

## COSTS – SPECIAL CASES

### SECTION 50 AMOUNT OF COSTS WHERE COSTS ARE PAYABLE PURSUANT TO CONTRACT: RULE 48.3

- 50.1** Where the court is assessing costs payable under a contract, it may make an order that all or part of the costs payable under the contract shall be disallowed if it is satisfied by the paying party that costs have been unreasonably incurred or are unreasonable in amount.
- 50.2** Rule 48.3 only applies if the court is assessing costs payable under a contract. It does not –
- (1) require the court to make an assessment of such costs; or
  - (2) require a mortgagee to apply for an order for those costs that he has a contractual right to recover out of the mortgage funds.
- 50.3** The following principles apply to costs relating to a mortgage –
- (1) An order for the payment of costs of proceedings by one party to another is always a discretionary order: section 51 of the Senior Courts Act 1981.
  - (2) Where there is a contractual right to the costs the discretion should ordinarily be exercised so as to reflect that contractual right.
  - (3) The power of the court to disallow a mortgagee's costs sought to be added to the mortgage security is a power that does not derive from section 51, but from the power of the courts of equity to fix the terms on which redemption will be allowed.
  - (4) A decision by a court to refuse costs in whole or in part to a mortgagee litigant may be –
    - (a) a decision in the exercise of the section 51 discretion;
    - (b) a decision in the exercise of the power to fix the terms on which redemption will be allowed;
    - (c) a decision as to the extent of a mortgagee's contractual right to add his costs to the security; or
    - (d) a combination of two or more of these things.
 The statements of case in the proceedings or the submissions made to the court may indicate which of the decisions has been made.
  - (5) A mortgagee is not to be deprived of a contractual or equitable right to add costs to the security merely by reason of an order for payment of costs made without reference to the mortgagee's contractual or equitable rights, and without any adjudication as to whether or not the mortgagee should be deprived of those costs.
- 50.4**
- (1) Where the contract entitles a mortgagee to –
    - (a) add the costs of litigation relating to the mortgage to the sum secured by it;
    - (b) require a mortgagor to pay those costs, or
    - (c) both,
 the mortgagor may make an application for the court to direct that an account of the mortgagee's costs be taken.  
  
 (Rule 25.1(1)(n) provides that the court may direct that a party file an account)
  - (2) The mortgagor may then dispute an amount in the mortgagee's account on the basis that it has been unreasonably incurred or is unreasonable in amount.

- (3) Where a mortgagor disputes an amount, the court may make an order that the disputed costs are assessed under rule 48.3.

## **SECTION 50A – LIMITATION ON COURT’S POWER TO AWARD COSTS IN FAVOUR OF TRUSTEE OR PERSONAL REPRESENTATIVE: RULE 48.4**

- 50A.1** A trustee or personal representative is entitled to an indemnity out of the relevant trust fund or estate for costs properly incurred, which may include costs awarded against the trustee or personal representative in favour of another party.
- 50A.2** Whether costs were properly incurred depends on all the circumstances of the case, and may, for example, depend on –
- (1) whether the trustee or personal representative obtained directions from the court before bringing or defending the proceedings;
  - (2) whether the trustee or personal representative acted in the interests of the fund or estate or in substance for a benefit other than that of the estate, including his own; and
  - (3) whether the trustee or personal representative acted in some way unreasonably in bringing or defending, or in the conduct of, the proceedings.
- 50A.3** The trustee or personal representative is not to be taken to have acted in substance for a benefit other than that of the fund by reason only that he has defended a claim in which relief is sought against him personally.

## **SECTION 51 COSTS WHERE MONEY IS PAYABLE BY OR TO A CHILD OR PROTECTED PARTY: RULE 48.5**

- 51.1** The circumstances in which the court need not order the assessment of costs under rule 48.5(3) are as follows:
- (a) where there is no need to do so to protect the interests of the child or protected party or his estate;
  - (b) where another party has agreed to pay a specified sum in respect of the costs of the child or protected party and the solicitor acting for the child or protected party has waived the right to claim further costs;
  - (c) where the court has decided the costs payable to the child or protected party by way of summary assessment and the solicitor acting for the child or protected party has waived the right to claim further costs;
  - (d) where an insurer or other person is liable to discharge the costs which the child or protected party would otherwise be liable to pay to his solicitor and the court is satisfied that the insurer or other person is financially able to discharge those costs.

## **SECTION 52 LITIGANTS IN PERSON: RULE 48.6**

- 52.1** In order to qualify as an expert for the purpose of rule 48.6(3)(c) (expert assistance in connection with assessing the claim for costs), the person in question must be a
- (1) barrister,
  - (2) solicitor,

- (3) Fellow of the Institute of Legal Executives,
  - (4) Fellow of the Association of Law Costs Draftsmen,
  - (5) law costs draftsman who is a member of the Academy of Experts,
  - (6) law costs draftsman who is a member of the Expert Witness Institute.
- 52.2** Where a litigant in person wishes to prove that he has suffered financial loss he should produce to the court any written evidence he relies on to support that claim, and serve a copy of that evidence on any party against whom he seeks costs at least 24 hours before the hearing at which the question may be decided.
- 52.3** Where a litigant in person commences detailed assessment proceedings under rule 47.6 he should serve copies of that written evidence with the notice of commencement.
- 52.4** The amount, which may be allowed to a litigant in person under rule 46.3(5)(b) and rule 48.6(4), is £18 per hour.
- 52.5** Attention is drawn to rule 48.6(6)(b). A solicitor who, instead of acting for himself, is represented in the proceedings by his firm or by himself in his firm name, is not, for the purpose of the Civil Procedure Rules, a litigant in person.

## **SECTION 53 PERSONAL LIABILITY OF LEGAL**

### **REPRESENTATIVE FOR COSTS – WASTED COSTS ORDERS:**

#### **RULE 48.7**

- 53.1** Rule 48.7 deals with wasted costs orders against legal representatives. Such orders can be made at any stage in the proceedings up to and including the proceedings relating to the detailed assessment of costs. In general, applications for wasted costs are best left until after the end of the trial.
- 53.2** The court may make a wasted costs order against a legal representative on its own initiative.
- 53.3** A party may apply for a wasted costs order –
- (1) by filing an application notice in accordance with Part 23; or
  - (2) by making an application orally in the course of any hearing.
- 53.4** It is appropriate for the court to make a wasted costs order against a legal representative, only if –
- (1) the legal representative has acted improperly, unreasonably or negligently;
  - (2) his conduct has caused a party to incur unnecessary costs, and
  - (3) it is just in all the circumstances to order him to compensate that party for the whole or part of those costs.
- 53.5** The court will give directions about the procedure that will be followed in each case in order to ensure that the issues are dealt with in a way which is fair and as simple and summary as the circumstances permit.
- 53.6** As a general rule the court will consider whether to make a wasted costs order in two stages –
- (1) in the first stage, the court must be satisfied –
    - (a) that it has before it evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made; and
    - (b) the wasted costs proceedings are justified notwithstanding the likely costs involved.

- (2) at the second stage (even if the court is satisfied under paragraph (1)) the court will consider, after giving the legal representative an opportunity to give reasons why the court should not make a wasted costs order, whether it is appropriate to make a wasted costs order in accordance with paragraph 53.4 above.
- 53.7** On an application for a wasted costs order under Part 23 the court may proceed to the second stage described in paragraph 53.6 without first adjourning the hearing if it is satisfied that the legal representative has already had a reasonable opportunity to give reasons why the court should not make a wasted costs order. In other cases the court will adjourn the hearing before proceeding to the second stage.
- 53.8** On an application for a wasted costs order under Part 23 the application notice and any evidence in support must identify –
- (1) what the legal representative is alleged to have done or failed to do; and
  - (2) the costs that he may be ordered to pay or which are sought against him.
- 53.9** A wasted costs order is an order –
- (1) that the legal representative pay a specified sum in respect of costs to a party; or
  - (2) for costs relating to a specified sum or items of work to be disallowed.
- 53.10** Attention is drawn to rule 44.3A(1) and (2) which respectively prevent the court from assessing any additional liability until the conclusion of the proceedings (or the part of the proceedings) to which the funding arrangement relates, and set out the orders the court may make at the conclusion of the proceedings.

## **SECTION 54 BASIS OF DETAILED ASSESSMENT OF SOLICITOR AND CLIENT COSTS: RULE 48.8**

- 54.1** A client and his solicitor may agree whatever terms they consider appropriate about the payment of the solicitor's charges for his services. If however, the costs are of an unusual nature (either in amount or in the type of costs incurred) those costs will be presumed to have been unreasonably incurred unless the solicitor satisfies the court that he informed the client that they were unusual and, where the costs relate to litigation, that he informed the client they might not be allowed on an assessment of costs between the parties. That information must have been given to the client before the costs were incurred.
- 54.2**
- (1) Costs as between a solicitor and client are assessed on the indemnity basis as defined by rule 44.4.
  - (2) Attention is drawn to the presumptions set out in rule 48.8(2). These presumptions may be rebutted by evidence to the contrary.
- 54.3** Rule 48.10 and Section 56 of this Practice Direction deal with the procedure to be followed for obtaining the assessment of a solicitor's bill pursuant to an order under Part III of the Solicitors Act 1974.
- 54.4** If a party fails to comply with the requirements of rule 48.10 concerning the service of a breakdown of costs or points of dispute, any other party may apply to the court in which the detailed assessment hearing should take place for an order requiring compliance with rule 48.10. If the court makes such an order, it may –
- (a) make it subject to conditions including a condition to pay a sum of money into court; and
  - (b) specify the consequence of failure to comply with the order or a condition.

**54.5**

- (1) A client who has entered into a conditional fee agreement with a solicitor may apply for assessment of the base costs (which is carried out in accordance with rule 48.8(2) as if there were no conditional fee agreement) or for assessment of the percentage increase (success fee) or both.
- (2) Where the court is to assess the percentage increase the court will have regard to all the relevant factors as they appeared to the solicitor or counsel when the conditional fee agreement was entered into.

**54.6** Where the client applies to the court to reduce the percentage increase which the solicitor has charged the client under the conditional fee agreement, the client must set out in his application notice:

- (a) the reasons why the percentage increase should be reduced; and
- (b) what the percentage increase should be.

**54.7** The factors relevant to assessing the percentage increase include –

- (a) the risk that the circumstances in which the fees or expenses would be payable might not occur;
- (b) the disadvantages relating to the absence of payment on account;
- (c) whether there is a conditional fee agreement between the solicitor and counsel;
- (d) the solicitor's liability for any disbursements.

**54.8** When the court is considering the factors to be taken into account, it will have regard to the circumstances as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was entered into.

## **SECTION 56 PROCEDURE ON ASSESSMENT OF SOLICITOR AND CLIENT COSTS: RULE 48.10**

**56.1** The paragraphs in this section apply to orders made under Part III of the Solicitors Act 1974 for the assessment of costs. In these paragraphs 'client' includes any person entitled to make an application under Part III of that Act.

**56.2** The procedure for obtaining an order under Part III of the Solicitors Act 1974 is by the alternative procedure for claims under Part 8, as modified by rule 67.3 and Practice Direction 67. Precedent J of the Schedule of Costs Precedents annexed to this Practice Direction is a model form of claim form. The application must be accompanied by the bill or bills in respect of which assessment is sought, and, if the claim concerns a conditional fee agreement, a copy of that agreement. If the original bill is not available a copy will suffice.

**56.3** Model forms of order, which the court may make, are set out in Precedents K, L and M of the Schedule of Costs Precedents annexed to this Practice Direction.

**56.4** Attention is drawn to the time limits within which the required steps must be taken: i.e. 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 him of the breakdown, and any reply must be served within 14 days of service of the points of dispute.

**56.5** The breakdown of costs referred to in rule 48.10 is a document which contains the following information:

- (a) details of the work done under each of the bills sent for assessment; and

- (b) in applications under Section 70 of the Solicitors Act 1974, an account showing money received by the solicitor to the credit of the client and sums paid out of that money on behalf of the client but not payments out which were made in satisfaction of the bill or of any items which are claimed in the bill.
- 56.6** Precedent P of the Schedule of Costs Precedents annexed to this Practice Direction is a model form of breakdown of costs. A party who is required to serve a breakdown of costs must also serve –
- (1) copies of the fee notes of counsel and of any expert in respect of fees claimed in the breakdown, and
  - (2) written evidence as to any other disbursement which is claimed in the breakdown and which exceeds £250.
- 56.7** The provisions relating to default costs certificates (rule 47.11) do not apply to cases to which rule 48.10 applies.
- 56.8** Points of dispute should, as far as practicable, be in the form complying with paragraphs 35.1 to 35.7.
- 56.9** The time for requesting a detailed assessment hearing is within 3 months after the date of the order for the costs to be assessed.
- 56.10** The form of request for a hearing date must be in Form N258C. The request must be accompanied by copies of –
- (a) the order sending the bill or bills for assessment;
  - (b) the bill or bills sent for assessment;
  - (c) the solicitor's breakdown of costs and any invoices or accounts served with that breakdown;
  - (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;
  - (e) as many copies of the points of dispute so annotated as there are other parties to the proceedings to whom the court should give details of the assessment hearing requested;
  - (f) a copy of any replies served;
  - (g) a statement signed by the party filing the request or his legal representative giving the names and addresses for service of all parties to the proceedings.
- 56.11** The request must include an estimate of the length of time the detailed assessment hearing will take.
- 56.12** On receipt of the request for a detailed assessment hearing the court will fix a date for the hearing or if the costs judge or district judge so decides, will give directions or fix a date for a preliminary appointment.
- 56.13**
- (1) The court will give at least 14 days notice of the time and place of the detailed assessment hearing to every person named in the statement referred to in paragraph 56.10(g) above.
  - (2) The court will when giving notice, give all parties other than the party who requested the hearing a copy of the points of dispute annotated by the party requesting the hearing in compliance with paragraph 56.10(e) above.
  - (3) Attention is drawn to rule 47.14(6) and (7): apart from the solicitor whose bill it is, only those parties who have served points of dispute may be heard on the detailed assessment unless the court gives permission, and only items specified in the points of dispute may be raised unless the court gives permission.

**56.14**

- (1) If a party wishes to vary his breakdown of costs, points of dispute or reply, an amended or supplementary document must be filed with the court and copies of it must be served on all other relevant parties.
- (2) Permission is not required to vary a breakdown of costs, points of dispute or a reply but the court may disallow the variation or permit it only upon conditions, including conditions as to the payment of any costs caused or wasted by the variation.

**56.15** Unless the court directs otherwise the solicitor must file with the court the papers in support of the bill not less than 7 days before the date for the detailed assessment hearing and not more than 14 days before that date.

**56.16** Once the detailed assessment hearing has ended it is the responsibility of the legal representative appearing for the solicitor or, as the case may be, the solicitor in person to remove the papers filed in support of the bill.

**56.17**

- (1) Attention is drawn to rule 47.15 (power to issue an interim certificate).
- (2) If, in the course of a detailed assessment hearing of a solicitor's bill to his client, it appears to the costs judge or district judge that in any event the solicitor will be liable in connection with that bill to pay money to the client, he may issue an interim certificate specifying an amount which in his opinion is payable by the solicitor to his client. Such a certificate will include an order to pay the sum it certifies unless the court orders otherwise.

**56.18**

- (1) Attention is drawn to rule 47.16 which requires the solicitor to file a completed bill within 14 days after the end of the detailed assessment hearing. The court may dispense with the requirement to file a completed bill.
- (2) 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;
  - (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 showing the amount due following the detailed assessment hearing.

**56.19** A final costs certificate will include an order to pay the sum it certifies unless the court orders otherwise.

## **SECTION 57 TRANSITIONAL ARRANGEMENTS**

**57.1** In this section 'the previous rules' means the Rules of the Supreme Court 1965 ('RSC') or County Court Rules 1981 ('CCR'), as appropriate.

### **General Scheme of Transitional Arrangements concerning Costs Proceedings**

**57.2**

- (1) Paragraph 18 of Practice Direction 51A provides that the CPR govern any assessments of costs which take place on or after 26th April 1999 and states a presumption to be applied in respect of costs for work undertaken before 26th April 1999.
- (2) The following paragraphs provide five further transitional arrangements:
  - (a) to provide an additional presumption to be applied when assessing costs which were awarded by an order made in a county court before 26th April 1999 which allowed costs 'on Scale 1' to

be determined in accordance with CCR Appendix A, or 'on the lower scale' to be determined in accordance with CCR Appendix C.

- (b) to preserve the effect of CCR Appendix B Part III, paragraph 2;
- (c) to clarify the approach to be taken where a bill of costs was provisionally taxed before 26th April 1999 and the receiving party is unwilling to accept the result of the provisional taxation.
- (d) to preserve the right to carry in objections or apply for a reconsideration in all taxation proceedings commenced before 26th April 1999.
- (e) to deal with funding arrangements made before 3 July 2000.

### **Scale 1 or lower scale costs**

**57.3** Where an order was made in county court proceedings before 26th April 1999 under which the costs were allowed on Scale 1 or the lower scale, the general presumption is that no costs will be allowed under that order which would not have been allowed in a taxation before 26th April 1999.

### **Fixed costs on the lower scale**

**57.4** The amount to be allowed as fixed costs for making or opposing an application for a rehearing to set aside a judgment given before 26th April 1999 where the costs are on lower scale is £11.25.

### **Bills provisionally taxed before 26th April 1999**

**57.5** In respect of bills of costs provisionally taxed before 26th April 1999:

- (1) The previous rules apply on the question who can request a hearing and the time limits for doing so; and
- (2) The CPR govern any subsequent hearing in that case.

### **Bills taxed before 26th April 1999**

**57.6** Where a bill of costs was taxed before 26th April 1999, the previous rules govern the steps which can be taken to challenge that taxation.

### **Other taxation proceedings**

**57.7**

- (1) This paragraph applies to taxation proceedings which were commenced before 26th April 1999, were assigned for taxation to a Taxing Master or District Judge, and which were still pending on 26th April 1999.
- (2) Any assessment of costs that takes place in cases to which this paragraph applies which is conducted on or after 26th April 1999, will be conducted in accordance with the CPR.
- (3) In addition to the possibility of appeal under rules 47.20 to 47.23 and Part 52 any party to a detailed assessment who is dissatisfied with any decision on a detailed assessment made by a costs judge or district judge may apply to that costs judge or district judge for a review of the decision. The review shall, for procedural purposes, be treated as if it were an appeal from an authorised court officer.
- (4) The right of review provided by paragraph (3) above, will not apply in cases in which, at least 28 days before the date of the assessment hearing, all parties were served with notice that the rights of appeal in respect of that hearing would be governed by Part 47 Section VIII (Appeals from Authorised Court Officers in Detailed Assessment Proceedings) and Part 52 (Appeals).

- (5) An order for the service of notice under sub-paragraph (4) above may be made on the application of any party to the detailed assessment proceedings or may be made by the court of its own initiative.

### **Transitional provisions concerning the Access to Justice Act 1999 sections 28 to 31**

#### **57.8**

- (1) Sections 28 to 31 of the Access to Justice Act 1999, the Conditional Fee Agreements Regulations 2000, the Access to Justice (Membership Organisations) Regulations 2000, and the Access to Justice Act 1999 (Transitional Provisions) Order 2000 came into force on 1 April 2000. The Civil Procedure (Amendment No.3) Rules came into force on 3 July 2000. [The Conditional Fee Agreements Regulations 2000 were revoked by the Conditional Fee Agreements (Revocation) Regulations 2005 but continue to have effect in relation to conditional fee agreements entered into before 1 November 2005. The Access to Justice (Membership Organisation) Regulations 2000 were revoked by the Access to Justice (Membership Organisation) Regulations 2005 but continue to have effect in relation to arrangements entered into before 1<sup>st</sup> November 2005.]
- (2) The Access to Justice Act 1999 (Transitional Provisions) Order 2000 provides that no conditional fee agreement or other arrangement about costs entered into before 1 April 2000 can be a funding arrangement, as defined in rule 43.2 The order also has the effect that where an conditional fee agreement or other funding arrangement has been entered into before 1 April 2000 and a second or subsequent funding arrangement of the same type is entered into on or after 1 April 2000, the second or subsequent funding arrangement does not give rise to a liability which is recoverable from a paying party.
- (3) The Collective Conditional Fee Agreements Regulations 2000 came into force on 30 November 2000. The Regulations apply to agreements entered into between 30 November 2000 and 31 October 2005. Agreements entered into before 30 November 2000 are treated as if the Regulations had not come into force. The Regulations do not apply to collective conditional fee agreements entered into on or after 1 November 2005.

#### **57.9**

- (1) Rule 39 of the Civil Procedure (Amendment No 3) Rules 2000 applies where between 1 April and 2 July 2000 (including both dates) – a funding arrangement is entered into, and proceedings are started in respect of a claim which is the subject of that agreement.
- (2) Attention is drawn to the need to act promptly so as to comply with the requirements of the Rules and the Practice Directions by 31 July 2000 (i.e. within the 28 days from 3 July 2000 permitted by Rule 39) if that compliance is to be treated as compliance with the relevant provision. Attention is drawn in particular to Rule 44.15 (Providing Information about Funding Arrangements) and Section 19 of this Practice Direction.
- (3) Nothing in the legislation referred to above makes provision for a party who has entered into a funding arrangement to recover from another party any amount of an additional liability which relates to anything done or any costs incurred before the arrangement was entered into.

