PART 43

Scope of Cost Rules and Definitions

Contents

43.0.1

Editorial introduction

43.0.2 The rules relating to costs in Pts 43 to 48 deal with the main provisions as to costs and the way in which the court will award and assess costs. These parts do not however provide a complete self contained code and other provisions relating to costs may be found under other rules and particularly Pt 36 Offers of settlement

Transitional Provisions

43.0.3 Paragraph 18 of the Practice Direction supplemental to Pt 51 (see para.51PD.1) deals with the extent to which the CPR apply to proceedings issued before April 26, 1999.

So far as costs are concerned all the provisions in the new costs rules apply from April 26, 1999, both as to the procedure to be adopted and also the way in which costs are to be assessed. It is recognised that litigation may well have been in progress for some considerable time before April 26, 1999 without the parties or their lawyers being aware that the new rules might alter the way in which the steps which they were undertaking would be viewed by the court at the time of assessment of costs. When the court is assessing costs of work done prior to April 26, 1999 the new rules will apply, but the judge dealing with the costs (whether by summary or detailed assessment) will not disallow anything in respect of that work which would not have been disallowed under the rules in force prior to April 26, 1999. The Costs Practice Direction deals with the detailed transitional provisions in respect of proceedings for taxation commenced prior to April 26, 1999 (see s.57 of the Costs Practice Direction para.48PD.8).

Costs judges have all the powers of the court under the CPR and accordingly the overriding objective set out in Pt 1 and the court's general powers of management set out in Pt 3 apply equally to all questions of costs. Authorised court officers have all the powers of the court when making a detailed assessment except certain penal powers (see r.47.3).

Under the transitional provisions the court cannot ignore that the parties have been acting under the old regime, but the court is not constrained to reach the same decision as would have been made previously. The position under the CPR is fundamentally different from under the old regime. Rule 1.1 makes it clear that the CPR is a new procedural code whose overriding objective is to enable courts to deal with cases justly; *Biguzzi v Rank Leisure Plc* [1999]1 W.L.R. 1926, CA.

Scope of this Part

43.1 **43.1 This Part contains definitions and interpretation of certain matters set out in the rules about costs contained in Parts 44 to 48.**

(Part 44 contains general rules about costs; Part 45 deals with fixed costs; Part 46 deals with fast track trial costs; Part 47 deals with the detailed assessment of costs and related appeals and Part 48 deals with costs payable in special cases.)

Definitions and application[1]

43.2—(1) In Parts 44 to 48, unless the context otherwise requires— **43.2**

(a) "costs" includes fees, charges, disbursements, expenses, remuneration, reimbursement allowed to a litigant in person under rule 48.6, any additional liability incurred under a funding arrangement 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;

(b) "costs judge" means a taxing master of the Senior Courts;

(ba) "Costs Office" means the Senior Courts Costs Office;

(c) "costs officer" means—

(i) a costs judge;

(ii) a district judge; and

(iii) an authorised court officer;

(d) "authorised court officer" means any officer of—

(i) a county court;

(ii) a district registry;

(iii) the Principal Registry of the Family Division; or

(iv) the Costs Office,

whom the Lord Chancellor has authorised to assess costs;

(e) "fund" includes any estate or property held for the benefit of any person or class of person and any fund to which a trustee or personal representative is entitled in that capacity;

(f) "receiving party" means a party entitled to be paid costs;

(g) "paying party" means a party liable to pay costs;

(h) "assisted person" means an assisted person within the statutory provisions relating to legal aid;

(i) "LSC funded client" means an individual who receives services funded by the Legal Services Commission as part of the Community Legal Service within the meaning of Part I of the Access to Justice Act 1999;

(j) "fixed costs" means the amounts which are to be allowed in respect of solicitors' charges in the circumstances set out in Section I of Part 45.

(k) "funding arrangement" means an arrangement where a person has—

(i) entered into a conditional fee agreement or a collective conditional fee agreement which provides for a success fee within the meaning of section 58(2) of the Courts and Legal Services Act 1990;

[1] Amended by the Civil Procedure (Amendment No.3) Rules 2000 (SI 2000/1317), the Civil Procedure (Amendment) Rules 2001 (SI 2001/256), the Civil Procedure (Amendment No.2) Rules 2003 (SI 2003/1242), the Civil Procedure (Amendment No.3) Rules 2003 (SI 2003/1329) and the Civil Procedure (Amendment) Rules 2008 (SI 2008/2178).

(ii) taken out an insurance policy to which section 29 of the Access to Justice Act 1999 (recovery of insurance premiums by way of costs) applies; or

(iii) made an agreement with a membership organisation to meet that person's legal costs;

(l) "percentage increase" means the percentage by which the amount of a legal representative's fee can be increased in accordance with a conditional fee agreement which provides for a success fee;

(m) "insurance premium" means a sum a money paid or payable for insurance against the risk of incurring a costs liability in the proceedings, taken out after the event that is the subject matter of the claim;

(n) "membership organisation" means a body prescribed for the purposes of section 30 of the Access to Justice Act 1999 (recovery where the body undertakes to meet costs liabilities);

(o) "additional liability" means the percentage increase, the insurance premium, or the additional amount in respect of provision made by a membership organisation, as the case may be; and

(p) "free of charge" has the same meaning as in section 194(10) of the Legal Services Act 2007;

(q) "pro bono representation" means legal representation provided free of charge; and

(r) "the prescribed charity" has the same meaning as in section 194(8) of the Legal Services Act 2007.

(2) The costs to which the rules in Parts 44 to 48 apply include—

(a) the following costs where those costs may be assessed by the court;

(i) costs of proceedings before an arbitrator or umpire;

(ii) costs of proceedings before a tribunal or other statutory body; and

(iii) costs payable by a client to his solicitor; and

(b) costs which are payable by one party to another party under the terms of a contract, where the court makes an order for an assessment of those costs.

(3) Where advocacy or litigation services are provided to a client under a conditional fee agreement, costs are recoverable under Parts 44 to 48 notwithstanding that the client is liable to pay his legal representative's fees and expenses only to the extent that sums are recovered in respect of the proceedings, whether by way of costs or otherwise.

(4) In paragraph (3), the reference to a conditional fee agreement is to an agreement which satisfies all the conditions applicable to it by virtue of section 58 of the Courts and Legal Services Act 1990[1].

[1] 1990 c.41, as substituted by s.27(1) of the Access to Justice Act 1999 (c.22).

Editorial note

43.2.1 Assessment is the process by which the court decides the amount of any costs payable.

As to summary assessment see r.43.3 and as to detailed assessment r.43.4. For the purpose of these rules a Taxing Master of the Senior Courts is referred to as a "costs judge".

The Indemnity Principle and CFAs

43.2.1.1 The indemnity principle is fully discussed in Vol.1 at para.47.14.4. Put simply the indemnity principle ensures that an unsuccessful party cannot be held liable to pay costs to a successful party who is not legally liable to pay them. Costs payable by a client to the solicitor belong to the solicitor: Costs recovered between the parties belong to the client. It follows that the latter cannot exceed the former. This principle worked satisfactorily pre-CPR and in the days of widely available legal aid. However, conditional fee agreements have become the normal way of funding much litigation, especially personal injury litigation. The indemnity principle and the CFA do not logically sit together. The rule and regulation changes recognise this and take the sensible and simple approach of abrogating the indemnity principle in appropriate cases. Thus solicitors can lawfully agree with clients not to seek to recover by way of costs anything in excess of costs agreed with, or ordered to be paid by the other party. Rules 43.2 (3) and (4) as amended provide that costs whose recovery is limited in this way are recoverable costs for the purposes of CPR Pts 44 to 48.

Costs estimates

43.2.2 Section 6 of the Costs Practice Direction (43PD.6) deals with costs estimates and when they are to be provided. The Court of Appeal has expressed the hope that judges conducting cases will make full use of their powers under the Practice Direction both to obtain estimates of costs and to exercise their powers in respect of costs and case management to keep costs within the bounds of the proportionate in accordance with the overriding objective: *Solutia (UK) Ltd v Griffiths* [2001] EWCA Civ 736.

The Court of Appeal has held that the Costs Practice Direction s.6, relating to costs estimates, is expressed in clear mandatory terms: costs estimates must be provided. The court set out a non exhaustive guide as to the circumstances in which a costs estimate might be taken into account in determining the reasonableness of costs claimed, intended to assist judges in the application of the direction. First, estimates made by solicitors of the overall likely costs of litigation should usually provide a useful yardstick by which the reasonableness of the costs finally claimed may be measured. If there is a substantial difference between the estimated costs and the costs claimed that difference calls for an explanation. In the absence of a satisfactory explanation the court may conclude that the difference itself is evidence from which it can conclude that the costs claimed are unreasonable. Secondly, the court may take the estimated costs into account if the other party shows that it relied on the estimate in a certain way. Thirdly, the court may take the estimate into account in cases where it decides that it would probably have given different case management directions if a realistic estimate had been given. The court did not consider that it would be a correct use of the power conferred by the Costs Practice Direction to hold a party to their estimates simply in order to penalise him for providing an inadequate estimate. Thus if the estimate had not been relied on by the paying party; the court concluded that even if the estimate had been close to the figure ultimately claimed its case management directions would not have been affected; and, the costs claimed were otherwise reasonable and proportionate, then it would be wrong to reduce the costs claimed simply because they exceed the amount of the estimate. The court considered that the costs judge should determine how, if at all, to reflect the costs estimates in the assessment before going on to decide whether, for reasons unrelated to the estimate, there are elements of the costs claimed which were unreasonably incurred or unreasonable in amount. This will avoid the danger of "double jeopardy" referred to by Lord Woolf C.J. in *Lownds* (see *Lownds v Home Office* [2002] EWCA Civ 365 at para.30; [2002] 1 W.L.R. 2450, CA; *Leigh v Michelin Tyre Plc* [2003] EWCA Civ 1766).

The Court of Appeal has subsequently considered whether a paying party may claim that their liability to the receiving party under an order for the payment of costs is discharged or that it should be reduced, if the solicitor for the receiving party has failed to give their client an estimate of costs in accordance with the Solicitors Costs Information and Client Care Code. The court considered the indemnity principle and

the special status of the solicitor's certificate of accuracy attached to a bill of costs (see *Bailey v IBC Vehicles Ltd* [1998] 3 All E.R. 570, CA and *Hollins v Russell* [2003] EWCA Civ 718; [2003] 1 W.L.R. 2487). The Law Society submitted that the effect of Practice Rule 15 properly construed was that a breach would not render the solicitor's fees irrecoverable, but that the failure to provide an estimate was likely to be relevant in determining what costs clients could reasonably be expected to pay. The court inferred that the Client Care Code is to protect the legitimate interests of the client and the administration of justice rather than to relieve paying parties of their obligations to pay costs which have been reasonably incurred. Arden L.J., with whom the other members of the court agreed, found that the contract of retainer is not rendered unenforceable by the failure to give an estimate. The Code, like the Solicitors Practice Rules, constitutes subordinate legislation for the purposes of the Solicitors Act 1974. That means that it is binding and has statutory effect, it does not mean however that any contract made or performed in breach of a requirement imposed by the Code is unenforceable. In those circumstances that is a question for the discretion of the judge assessing costs whether to take into account any failure by the receiving party to provide an estimate in the circumstances and of the kind required by the Code. It is open to the paying party to submit that if the receiving party's work had been estimated in accordance with the requirements of the Code a lower amount of costs would have been incurred. In those circumstances they may ask the costs judge to require the receiving party to prove that such an estimate was given. The procedure established in *Pamplin v Express Newspapers Ltd* [1985] 1 W.L.R. 689, Hobhouse J. would then apply. The costs judge must however give weight to the certificate as to accuracy. The costs judge must be satisfied that there is some real basis for the paying party's contention that the receiving party should be required to prove that there was an estimate or an adequate estimate that is not (to quote the words of Hobhouse J. in *Pamplin*) a sham or fanciful dispute. In addition the costs judge must be satisfied that the absence of an estimate as to costs could have had both a calculable effect and a not immaterial effect on the costs claimed.

The court gave some guidance as to how the costs judge should take the fact that there is no estimate into account. The judge should consider whether, and if so to what extent, the costs claimed would have been significantly lower if there had been an estimate. If the situation is that an estimate was given but not updated the first part of the guidance given by the court in *Leigh v Michelin* [2003] EWCA Civ 1766; [2004] 1 W.L.R. 846 may be applied. Arden L.J. stressed that the guidance given was not exhaustive since it was impossible to foresee all the differing circumstances that might arise in any individual assessment: *Garbutt v Edwards* [2005] EWCA Civ 1206; [2006] 1 W.L.R. 2907; [2006] 1 All E.R. 553, CA.

Where a solicitor's bill to the client far exceeded an estimate which had been given, the court held that the estimate of costs was not a fixed quotation nor did it put an upper limit on costs. The retainer was subject to the Supply of Goods and Services Act 1982 s.15 and it was therefore an implied term that the solicitors would be paid reasonable remuneration for their services. Although the solicitors had informed the client that they would update the cost estimate, this was not a condition precedent to the solicitors recovering any sum in addition to the sum set out in the estimate. In deciding what sum should be payable the court could have regard to the estimate and it was a factor in assessing reasonableness. For this purpose it was relevant, as a matter of law, to ask what, in all the circumstances, it was reasonable for the client to be expected to pay. The cases cited (*Wong v Vizards* [1997] 2 Costs L.R. 46; *Leigh v Michelin Tyre Plc* [2003] EWCA Civ 1766; [2004] 1 W.L.R. 846 and *Garbutt v Edwards* [2005] EWCA Civ 1206; [2006] 1 W.L.R. 2907) were not authority for the proposition that the solicitors had any automatic entitlement to add a margin to the estimate or that the client could cap its liability at the estimate plus a margin (*MasterCigars Direct Ltd v Withers LLP* [2007] EWHC 2733 (Ch); [2009] 1 W.L.R. 881, Morgan J.).

Following the decision in *MasterCigars* Tugenhat J. dealt with another appeal (*Reynolds v Stone Rowe Brewer* [2008] EWHC 497 (QB)) in which the costs judge at first instance held that the solicitor should be bound by an estimate of £18,000 to which he added a 15 per cent margin in accordance with *Wong v Vizards* [1997] 2 Costs L.R. 46. The costs judge also limited the claimant's liability for counsel's and expert's fees to the estimates which had been given. The judge held (para.63) that it could not be shown that there was any error of law on the part of the costs judge about which the solicitors could complain. The costs judge was entitled to have regard to the estimates. He did so by giving them an interpretation which, in effect, meant that he treated the

estimates as being for a much higher sum than that which the solicitors themselves attributed to the estimates. The court held that the judge did not treat the estimate of £18,000 as a fixed quotation but merely treated it as a yard stick; the figure that the costs judge certified was a figure that it was reasonable to expect the claimant to pay in the case.

Rule 43.2(2) Application of CPR

Arbitration

43.2.3 As to costs in regard to arbitrations, see Arbitration Act 1996 ss.59–65 (Vol.2, Section 2E, paras 2E–224 to 2E–234). The costs judge is merely the delegate of the arbitrator or other tribunal assessing the amount (*Perkins (H.G.) Ltd v Best-Shaw* [1973] 1 W.L.R. 975; [1973] 2 All E.R. 924).

Family proceedings

43.2.4 The Family Proceedings Rules 1991 have been amended to provide that Pts 43, 44 (except rr.44.9 to 44.12), 47 and and 48 of the CPR shall apply. Rule 44.3(2) (costs follow the event) does not apply. Family Proceedings (Miscellaneous Amendments) Rules 1999 (SI 1999/1012).

The Family Proceedings Rules 1991 have been further amended to make provision about the costs of ancillary relief proceedings. The existing rules about costs in such proceedings are omitted and a new rule (2.71) inserted which sets out a general rule that the court will not make a costs order in ancillary relief proceedings unless it is appropriate to do so because of the conduct of one of the parties in relation to those proceedings. The new rules require the completion of a costs estimate at interim hearings and the completion of a detailed statement of costs at any final ancillary relief hearing. The new provisions apply to proceedings commenced after April 3, 2006.

The Family Proceedings (Costs) Rules 1991 are revoked. See President's Practice Directions 48BPD.1 et seq.

The general rule under r.2.71(4)(a) of the Family Proceedings Rules 1991 that there should be no order for costs in ancillary relief proceedings does not apply to the issue of costs between two parties who intervene in ancillary relief proceedings in order to establish a beneficial interest in the matrimonial home, since those proceedings between the interveners are not ancillary relief proceedings for the purposes of the rule. They were proceedings for rival declarations regarding the beneficial interest in a property: *Baker v Rowe* [2009] EWCA Civ 1162.

Insolvency proceedings

43.2.5 Rule 7.33 of the Insolvency Rules 1986 provides that, subject to any inconsistency with Ch.6 of Pt 7 of the third group of the Rules (i.e. rr.7.3–r.7.42, CPR Pts 43, 44, 45, 47 and 48 apply to insolvency proceedings with any necessary modifications.

Mediation

43.2.6 Following mediation the parties compromised the claim and counterclaim on the basis that the claimant should pay the defendant's costs of the counterclaim and various subsidiary provisions. The Tomlin Order concluding the proceedings did not deal explicitly with the costs of the mediation itself. The defendant sought the costs of the mediation. Prior to the mediation the parties had entered into an agreement that the mediated fee would be borne equally by each party and that each would bear its own costs. It was held at first instance as a matter of general principle that costs incurred in a mediation could form part of the costs of the action, in the same way as the reasonable costs of negotiation (see Costs Practice Direction para.4.6(8)). On appeal the defendant argued that the Tomlin Order took precedence over the mediation agreement and that therefore the costs were recoverable. The judge held that the mediation agreement was binding on the parties and to argue that it was effectively discharged by the Tomlin Order was reading too much into the Tomlin Order. The defendant was therefore unable to recover its share of the mediator's fee or any of its costs of attending on the mediation: *NatWest Bank v Feeney* (QB), May 14, 2007, Eady J.

Meaning of summary assessment

43.3 "Summary assessment" means the procedure by which the **43.3**

court, when making an order about costs, orders payment of a sum of money instead of fixed costs or "detailed assessment".

Editorial note

43.3.1 Judges are required to assess the costs of a case if practicable. In cases lasting not more than one day, the parties are under an obligation to provide the court and their opponents with details of the costs which may be sought in the event of success (see Section of the Costs Practice Direction). See Guide to Summary Assessment of Costs, para.48.16.

The court has a discretion as to whether or not to carry out a summary assessment and there is no implied general rule requiring detailed assessment of costs in hearings lasting longer than one day. Paragraph 13.1 of the Costs Practice Direction requires the court to consider making a summary assessment in every case: *Q v Q (Costs: Summary Assessment)* [2002] 2 F.L.R. 668, Wilson J.

It is the duty of the parties and their legal representatives to assist the judge in making summary assessments by providing a statement of costs; see paras 3.2 and 13.5 of the Costs Practice Direction. The statement should follow as closely as possible Form N260 (Statement of Costs (summary assessment)); see Guide to the Summary Assessment of Costs, Appendix 3 (para.48.52.1 below).

Two pharmaceutical companies applied for the revocation of a patent owned by a third company. The two applications were independent, but the case managing judge ordered that they should be heard simultaneously using the same evidence. The two actions then proceeded together. The first company discontinued its application, and the second company lost its application. The judge ordered that the two applicant companies should bear equally the costs of the successful company. The company which had discontinued appealed, arguing that the order was perverse, and that it should only be liable for the extra costs incurred as a result of its own involvement. The appeal was dismissed, the court stating that as soon as the first company had joined the action it put itself at risk of paying the successful party's costs if the action failed: *Actavis UK Ltd v Eli Lilly Co Ltd* [2010] EWCA Civ 13.

The court's power to carry out a summary assessment of costs is not restricted to hearings at which it is exercising its discretion under r.44.3 to determine where costs are to fall (*ENE Kos v Petroleo Brasileiro SA (The "Kos")* [2009] EWHC 1843 (Comm); [2010] 1 Lloyd's Rep. 87 (Andrew Smith J.) (accordingly, power could be exercised at the conclusion of the trial of a question as to whether expenses incurred were "incidental to" proceedings within SCA 1981 s.51)).

Contentious probate

43.3.1.1 In contentious probate proceedings the court held that there was a public interest in wills being proved in solemn form where there were grounds for reasonable suspicions on the particular facts of the case. Reasonable suspicions had been raised which justified an investigation of the will. The public interest requirement did not however justify a potential exhaustion of the estate in legal costs, nor could it defeat the public interest in encouraging sensible settlements. The question for the court was whether the cost should be paid by the claimant, the defendant or out of the estate. On the basis that the claimant ought to have accepted the defendant's offer to settle, which was entirely reasonable, the claimant was ordered to pay the costs: *Perrins v Holland* [2009] EWHC 2558 (Ch) Lewison J.

Appeal

43.3.2 Appeals from summary assessment are dealt with under the ordinary rules relating to appeals (see CPR Pt 52 and Practice Direction supplementing that Part).

Meaning of detailed assessment

43.4 **43.4 "Detailed assessment" means the procedure by which the amount of costs is decided by a cost officer in accordance with Part 47.**

Editorial note

43.4.1 "Detailed assessment" is the name given to the procedure formerly known as taxation. (See Section 3 of the Costs Practice Direction and Part 47.)

THE COSTS PRACTICE DIRECTION (CPR PT 43)

This Practice Direction supplements CPR Parts 43 to 48

Section 1 Introduction

43PD.1

1.1 This Practice Direction supplements Parts 43 to 48 of the Civil Procedure Rules. It applies to all proceedings to which those Parts apply.

1.2 Paragraphs 57.1 to 57.9 of this Practice Direction deal with various transitional provisions affecting proceedings about costs.

1.3 Attention is drawn to the powers to make orders about costs conferred on the Senior Courts and any county court by Section 51 of the Senior Courts Act 1981.

1.4 In these Directions:

"counsel" means a barrister or other person with a right of audience in relation to proceedings in the High Court or in the County Courts in which he is instructed to act.

"LSC" means Legal Services Commission.

"solicitor" means a solicitor of the Senior Courts or other person with a right of audience in relation to proceedings, who is conducting the claim or defence (as the case may be) on behalf of a party to the proceedings and, where the context admits, includes a patent agent.

1.5 In respect of any document which is required by these Directions to be signed by a party or his legal representative Practice Direction 22 will apply as if the document in question was a statement of truth. (Practice Direction 22 makes provision for cases in which a party is a child, a protected party or a company or other corporation and cases in which a document is signed on behalf of a partnership.)

Section 2 Scope of Costs Rules and Definitions

Rule 43.2 Definitions and Application

43PD.2

2.1 Where the court makes an order for costs and the receiving party has entered into a funding arrangement as defined in rule 43.2, the costs payable by the paying party include any additional liability (also defined in rule 43.2) unless the court orders otherwise.

2.2 In the following paragraphs—

"funding arrangement", "percentage increase", "insurance premium", "membership organisation" and "additional liability" have the meanings given to them by rule 43.2.

A "conditional fee agreement" is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or part of them, to be payable only in specified circumstances, whether or not it provides for a success fee as mentioned in section 58(2)(b) of the Courts and Legal Services Act 1990.

"base costs" means costs other than the amount of any additional liability.

2.3 Rule 44.3A (1) provides that 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. (As to the

time when detailed assessment may be carried out see paragraph 27.1 below.)

2.4 For the purposes of the following paragraphs of this practice direction and rule 44.3A proceedings are concluded when the court has finally determined the matters in issue in the claim, whether or not there is an appeal. The making of an award of provisional damages under Part 41 will also be treated as a final determination of the matters in issue.

2.5 The court may order or the parties may agree in writing that, although the proceedings are continuing, they will nevertheless be treated as concluded.

Section 3 Model Forms for Claims for Costs

Rule 43.3 Meaning of Summary Assessment

43PD.3 **3.1** Rule 43.3 defines summary assessment. When carrying out a summary assessment of costs where there is an additional liability the court may assess the base costs alone, or the base costs and the additional liability.

3.2 Form **N260** is a model form of Statement of Costs to be used for summary assessments.

3.3 Further details about Statements of Costs are given in paragraph 13.5 below.

Rule 43.4 Meaning of Detailed Assessment

3.4 Rule 43.4 defines detailed assessment. When carrying out a detailed assessment of costs where there is an additional liability the court will assess both the base costs and the additional liability, or, if the base costs have already been assessed, the additional liability alone.

3.5 Precedents A, B, C and D in the Schedule of Costs Precedents annexed to this Practice Direction are model forms of bills of costs to be used for detailed assessments.

3.6 Further details about bills of costs are given in the next section of these Directions and in paragraphs 28.1 to 49.1, below.

3.7 Precedents A, B, C and D in the Schedule of Costs Precedents and the next section of this Practice Direction all refer to a model form of bill of costs. The use of a model form is not compulsory, but is encouraged. A party wishing to rely upon a bill which departs from the model forms should include in the background information of the bill an explanation for that departure.

3.8 In any order of the court (whether made before or after 26 April 1999) the word "taxation" will be taken to mean "detailed assessment" and the words "to be taxed" will be taken to mean "to be decided by detailed assessment" unless in either case the context otherwise requires.

Section 4 Form and Contents of Bills of Costs

43PD.4 **4.1** A bill of costs may consist of such of the following sections as may be appropriate:

(1) title page;

(2) background information;

(3) items of costs claimed under theheadings specified in paragraph 4.6;
(4) summary showing the total costs claimed on each page of the bill;
(5) schedules of time spent on non-routine attendances; and
(6) the certificates referred to in paragraph 4.15.

4.2 Where it is necessary or convenient to do so, a bill of costs may be divided into two or more parts, each part containing sections (2), (3) and (4) above. Circumstances in which it will be necessary or convenient to divide a bill into parts include:

(1) Where the receiving party acted in person during the course of the proceedings (whether or not that party also had a legal representative at that time) the bill must be divided into different parts so as to distinguish between;
  (a) the costs claimed for work done by the legal representative; and
  (b) the costs claimed for work done by the receiving party in person.

(1A) Where the receiving party had pro bono representation for part of the proceedings and an order under section 194(3) of the Legal Services Act 2007 has been made, the bill must be divided into different parts so as to distinguish between:
  (a) the sum equivalent to the costs claimed for work done by the legal representative acting free of charge; and
  (b) the costs claimed for work done by the legal representative not acting free of charge.

(2) Where the receiving party was represented by different solicitors during the course of the proceedings, the bill must be divided into different parts so as to distinguish between the costs payable in respect of each solicitor.

(3) Where the receiving party obtained legal aid or LSC funding in respect of all or part of the proceedings the bill must be divided into separate parts so as to distinguish between;
  (a) costs claimed before legal aid or LSC funding was granted;
  (b) costs claimed after legal aid or LSC funding was granted; and
  (c) any costs claimed after legal aid or LSC funding ceased.

(4) Where value added tax (VAT) is claimed and there was a change in the rate of VAT during the course of the proceedings, the bill must be divided into separate parts so as to distinguish between;
  (a) costs claimed at the old rate of VAT; and
  (b) costs claimed at the new rate of VAT.

(5) Where the bill covers costs payable under an order or orders under which there are different paying parties the bill must be divided into parts so as to deal separately with the costs payable by each paying party.

(6) Where the bill covers costs payable under an order or orders, in respect of which the receiving party wishes to

claim interest from different dates, the bill must be divided to enable such interest to be calculated.

4.3 Where a party claims costs against another party and also claims costs against the LSC only for work done in the same period, the costs claimed against the LSC only can be claimed either in a separate part of the bill or in additional columns in the same part of the bill. Precedents C and D in the Schedule of Costs Precedents annexed to this Practice Direction show how bills should be drafted when costs are claimed against the LSC only.

4.4 The title page of the bill of costs must set out:

(1) the full title of the proceedings;

(2) the name of the party whose bill it is and a description of the document showing the right to assessment (as to which see paragraph 40.4, below);

(3) if VAT is included as part of the claim for costs, the VAT number of the legal representative or other person in respect of whom VAT is claimed;

(4) details of all legal aid certificates, LSC certificates and relevant amendment certificates in respect of which claims for costs are included in the bill.

4.5 The background information included in the bill of costs should set out:

(1) a brief description of the proceedings up to the date of the notice of commencement;

(2) a statement of the status of the solicitor or solicitor's employee in respect of whom costs are claimed and (if those costs are calculated on the basis of hourly rates) the hourly rates claimed for each such person.

It should be noted that "legal executive" means a Fellow of the Institute of Legal Executives.

Other clerks, who are fee earners of equivalent experience, may be entitled to similar rates. It should be borne in mind that Fellows of the Institute of Legal Executives will have spent approximately 6 years in practice, and taken both general and specialist examinations. The Fellows have therefore acquired considerable practical and academic experience. Clerks without the equivalent experience of legal executives will normally be treated as being the equivalent of trainee solicitors and para-legals.

(3) a brief explanation of any agreement or arrangement between the receiving party and his solicitors, which affects the costs claimed in the bill.

4.6 The bill of costs may consist of items under such of the following heads as may be appropriate:

(1) attendances on the court and counsel up to the date of the notice of commencement;

(2) attendances on and communications with the receiving party;

(3) attendances on and communications with witnesses including any expert witness;

(4) attendances to inspect any property or place for the purposes of the proceedings;
(5) attendances on and communications with other persons, including offices of public records;
(6) communications with the court and with counsel;
(7) work done on documents: preparing and considering documentation, including documentation necessary to comply with Practice Direction (Pre-Action Conduct) or any relevant pre-action protocols where appropriate, work done in connection with arithmetical calculations of compensation and/or interest and time spent collating documents;
(8) work done in connection with negotiations with a view to settlement if not already covered in the heads listed above;
(9) attendances on and communications with London and other agents and work done by them;
(10) other work done which was of or incidental to the proceedings and which is not already covered in the heads listed above.

4.7 In respect of each of the heads of costs:

(1) "communications" means letters out, e-mails out and telephone calls;
(2) communications, which are not routine communications, must be set out in chronological order;
(3) routine communications must be set out as a single item at the end of each head;

4.8 Routine communications are letters out, e-mails out and telephone calls which because of their simplicity should not be regarded as letters or e-mails of substance or telephone calls which properly amount to an attendance.

4.9 Each item claimed in the bill of costs must be consecutively numbered.

4.10 In each part of the bill of costs which claims items under head (1) (attendances on court and counsel) a note should be made of:

(1) all relevant events, including events which do not constitute chargeable items;
(2) any orders for costs which the court made (whether or not a claim is made in respect of those costs in this bill of costs).

4.11 The numbered items of costs may be set out on paper divided into columns. Precedents A, B, C and D in the Schedule of Costs Precedents annexed to this Practice Direction illustrate various model forms of bills of costs.

4.12 In respect of heads (2) to (10) in paragraph 4.6 above, if the number of attendances and communications other than routine communications is twenty or more, the claim for the costs of those items in that section of the bill of costs should be for the total only and should refer to a schedule in which the full record of dates and details is set out. If the bill of costs contains more than one schedule each schedule should be numbered consecutively.

4.13 The bill of costs must not contain any claims in respect of costs or court fees which relate solely to the detailed assessment

proceedings other than costs claimed for preparing and checking the bill.

4.14 The summary must show the total profit costs and disbursements claimed separately from the total VAT claimed. Where the bill of costs is divided into parts the summary must also give totals for each part. If each page of the bill gives a page total the summary must also set out the page totals for each page.

4.15 The bill of costs must contain such of the certificates, the texts of which are set out in Precedent F of the Schedule of Costs Precedents annexed to this Practice Direction, as are appropriate.

4.16 The following provisions relate to work done by solicitors:

(1) Routine letters out, routine e-mails out and routine telephone calls will in general be allowed on a unit basis of 6 minutes each, the charge being calculated by reference to the appropriate hourly rate. The unit charge for letters out and e-mails out will include perusing and considering the relevant letters in or e-mails in and accordingly no separate charge is to be made for in-coming letters or e-mails.

(2) The court may, in its discretion, allow an actual time charge for preparation of electronic communications other than e-mails sent by solicitors, which properly amount to attendances provided that the time taken has been recorded.

(3) Local travelling expenses incurred by solicitors will not be allowed. The definition of "local" is a matter for the discretion of the court. While no absolute rule can be laid down, as a matter of guidance, "local" will, in general, be taken to mean within a radius of 10 miles from the court dealing with the case at the relevant time. Where travelling and waiting time is claimed, this should be allowed at the rate agreed with the client unless this is more than the hourly rate on the assessment.

(4) The cost of postage, couriers, out-going telephone calls, fax and telex messages will in general not be allowed but the court may exceptionally in its discretion allow such expenses in unusual circumstances or where the cost is unusually heavy.

(5) The cost of making copies of documents will not in general be allowed but the court may exceptionally in its discretion make an allowance for copying in unusual circumstances or where the documents copied are unusually numerous in relation to the nature of the case. Where this discretion is invoked the number of copies made, their purpose and the costs claimed for them must be set out in the bill.

(6) Agency charges as between principal solicitors and their agents will be dealt with on the principle that such charges, where appropriate, form part of the principal solicitor's charges. Where these charges relate to head (1) in paragraph 4.6 (attendances at court and on counsel) they must be included in their chronological order in that head. In other cases they must be included in head (9) (attendances on London and other agents).

4.17(1) Where a claim is made for a percentage increase in addition to an hourly rate or base fee, the amount of the increase must be shown separately, either in the appropriate arithmetic column or in the narrative column. (For an example see Precedent A or Precedent B).

(2) Where a claim is made against the LSC only and includes enhancement and where a claim is made in family proceedings and includes a claim for uplift or general care and conduct, the amount of enhancement uplift and general care and conduct must be shown, in respect of each item upon which it is claimed, as a separate amount either in the appropriate arithmetic column or in the narrative column. (For an example, see Precedent C).

"Enhancement" means the increase in prescribed rates which may be allowed by a costs officer in accordance with the Legal Aid in Civil Proceedings (Remuneration) Regulations 1994 or the Legal Aid in Family Proceedings Regulations 1991.

Costs of preparing the bill

4.18 A claim may be made for the reasonable costs of preparing and checking the bill of costs.

Section 5 Special Provisions Relating to VAT

5.1 This section deals with claims for value added tax (VAT) which are made in respect of costs being dealt with by way of summary assessment or detailed assessment. **43PD.5**

VAT Registration Number

5.2 The number allocated by HM Revenue and Customs to every person registered under the Value Added Tax Act 1983(except a Government Department) must appear in a prominent place at the head of every statement, bill of costs, fee sheet, account or voucher on which VAT is being included as part of a claim for costs.

Entitlement to VAT on Costs

5.3 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 HM Revenue and Customs 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.

5.4 The receiving party has responsibility for ensuring that VAT is claimed only when the receiving party is unable to recover the VAT or a proportion thereof as input tax.

5.5 Where there is a dispute as to whether VAT is properly claimed the receiving party must provide a certificate signed by the solicitors or the auditors of the receiving party substantially in the form illustrated in Precedent F in the Schedule of Costs Precedents annexed to this Practice Direction. Where the receiving party is a litigant in person who is claiming VAT, reference should be made by him to HM Revenue and Customs and wherever possible a Statement to similar effect produced at the hearing at which the costs are assessed.

5.6 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, reference should be made to HM Revenue and Customs and wherever possible the view of HM Revenue and Customs obtained and made known at the hearing at which the costs are assessed. Such application should be made by the receiving party. In the case of a bill from a solicitor to his own client, such application should be made by the client.

Form of bill of costs where VAT rate changes

5.7 Where there is a change in the rate of VAT, suppliers of goods and services are entitled by ss.88 (1) and 88(2) of the VAT Act 1994 in most circumstances to elect whether the new or the old rate of VAT should apply to a supply where the basic and actual tax points span a period during which there has been a change in VAT rates.

5.8 It will be assumed, unless a contrary indication is given in writing, that an election to take advantage of the provisions mentioned in paragraph 5.7 above and to charge VAT at the lower rate has been made. In any case in which an election to charge at the lower rate is not made, such a decision must be justified to the court assessing the costs.

Apportionment

5.9 All bills of costs, fees and disbursements on which VAT is included must be divided into separate parts so as to show work done before, on and after the date or dates from which any change in the rate of VAT takes effect. Where, however, a lump sum charge is made for work which spans a period during which there has been a change in VAT rates, and paragraphs 5.7 and 5.8 above do not apply, reference should be made to paragraphs 8 and 9 of Appendix F of Customs' Notice 700 (or any revised edition of that notice), a copy of which should be in the possession of every registered trader. If necessary, the lump sum should be apportioned. The totals of profit costs and disbursements in each part must be carried separately to the summary.

5.10 Should there be a change in the rate between the conclusion of a detailed assessment and the issue of the final costs certificate, any interested party may apply for the detailed assessment to be varied so as to take account of any increase or reduction in the amount of tax payable. Once the final costs certificate has been issued, no variation under this paragraph will be permitted.

Disbursements not classified as such for VAT purposes

5.11(1) Legal representatives often make payments to third parties for the supply of goods or services where no VAT was chargeable on the supply by the third party: for example, the cost of meals taken and travel costs. The question whether legal representatives should include VAT in respect of these payments when invoicing their clients or in claims for costs between litigants should be decided in accordance with this Direction and with the criteria set out in the VAT Guide (Notice 700) published by HM Revenue and Customs.

(2) Payments to third parties which are normally treated as part of the legal representative's overheads (for example, postage costs and telephone costs) will not be treated as disbursements. The third party supply should be included as part of the costs of the legal representatives' legal services and VAT must be added to the total bill charged to the client.

(3) Disputes may arise in respect of payments made to a third party which the legal representative shows as disbursements in the invoice delivered to the receiving party. Some payments, although correctly described as disbursements for some purposes, are not classified as disbursements for VAT purposes. Items not classified as disbursements for VAT purposes must be shown as part of the services provided by the legal representative and, therefore, VAT must be added in respect of them whether or not VAT was chargeable on the supply by the third party.

(4) Guidance as to the circumstances in which disbursements may or may not be classified as disbursements for VAT purposes is given in the VAT Guide (Notice 700, paragraph 25.1). One of the key issues is whether the third party supply (i) was made to the legal representative (and therefore subsumed in the onward supply of legal services), or (ii) was made direct to the receiving party (the third party having no right to demand payment from the legal representative, who makes the payment only as agent for the receiving party).

(5) Examples of payments under (i) are: travelling expenses, such as airline ticket, and subsistence expenses, such as the cost of meals, where the person travelling and receiving the meals is the legal representative. The supplies by the airline and the restaurant are supplies to the legal representative, not to the client.

(6) Payments under (ii) are classified as disbursements for VAT purposes and, therefore, the legal representative need not add VAT in respect of them. Simple examples are payments by a legal representative of court fees and payment of fees to an expert witness.

Legal Aid/LSC Funding

5.13(1) VAT will be payable in respect of every supply made pursuant to a legal aid/LSC certificate where—

(a) the person making the supply is a taxable person; and

(b) the assisted person/LSC funded client—

(i) belongs in the United Kingdom or another member state of the European Union; and

(ii) is a private individual or receives the supply for non-business purposes.

(2) Where the assisted person/LSC funded client belongs outside the European Union, VAT is generally not pay-

able unless the supply relates to land in the United Kingdom.

(3) For the purpose of sub-paragraphs (1) and (2), the place where a person belongs is determined by section 9 of the Value Added Tax Act 1994.

(4) Where the assisted person/LSC funded client is registered for VAT and the legal services paid for by the LSC are in connection with that person's business, the VAT on those services will be payable by the LSC only.

5.14 Any summary of costs payable by the LSC must be drawn so as to show the total VAT on Counsel's fees as a separate item from the VAT on other disbursements and the VAT on profit costs.

Tax invoice

5.15 A bill of costs filed for detailed assessment is always retained by the Court. Accordingly if a solicitor waives his solicitor and client costs and accepts the costs certified by the court as payable by the unsuccessful party in settlement, it will be necessary for a short statement as to the amount of the certified costs and the VAT thereon to be prepared for use as the tax invoice.

Vouchers

5.16 Where receipted accounts for disbursements made by the solicitor or his client are retained as tax invoices a photostat copy of any such receipted account may be produced and will be accepted as sufficient evidence of payment when disbursements are vouched.

Certificates

5.17 In a costs certificate payable by the LSC, the VAT on solicitor's costs, Counsel's fees and disbursements will be shown separately.

Litigants acting in person

5.18 Where a litigant acts in litigation on his own behalf he is not treated for the purposes of VAT as having supplied services and therefore no VAT is chargeable in respect of work done by that litigant (even where, for example, that litigant is a solicitor or other legal representative).

5.19 Consequently in the circumstances described in the preceding paragraph, a bill of costs presented for agreement or assessment should not claim any VAT which will not be allowed on assessment.

Government Departments

5.20 On an assessment between parties, where costs are being paid to a Government Department in respect of services rendered by its legal staff, VAT should not be added.

Payment pursuant to an order under section 194(3) of the Legal Services Act 2007

5.21 Where an order is made under section 194(3) of the Legal Services Act 2007 any bill presented for agreement or assessment pursuant to that order must not include a claim for VAT.

Section 6 Estimates of Costs

43PD.6

6.1 This section sets out certain steps which parties and their legal representatives must take in order to keep the parties informed about their potential liability in respect of costs and in order to assist the court to decide what, if any, order to make about costs and about case management.

6.2(1) In this Section an "estimate of costs" means—

(a) an estimate of costs of—

(i) base costs (including disbursements) already incurred; and

(ii) base costs (including disbursements) to be incurred,

which a party, if successful in the proceedings, intends to seek to recover from any other party under an order for costs; or

(b) in proceedings where the party has pro bono representation and intends, if successful in the proceedings, to seek an order under section 194(3) of the Legal Services Act 2007, an estimate of the sum equivalent to—

(i) the base costs (including disbursements) that the party would have already incurred had the legal representation provided to that party not been free of charge; and

(ii) the base costs (including disbursements) that the party would incur if the legal representation to be provided to that party were not free of charge.

("Base costs" are defined in paragraph 2.2 of this Practice Direction.)

(2) A party who intends to recover an additional liability (defined in rule 43.2) need not reveal the amount of that liability in the estimate.

6.3 The court may at any stage in a case order any party to file an estimate of costs and to serve copies of the estimate on all other parties. The court may direct that the estimate be prepared in such a way as to demonstrate the likely effects of giving or not giving a particular case management direction which the court is considering, for example a direction for a split trial or for the trial of a preliminary issue. The court may specify a time limit for filing and serving the estimate. However, if no time limit is specified the estimate should be filed and served within 28 days of the date of the order.

6.4(1) When—

(a) a party to a claim which is outside the financial scope of either the small claims track or the fast track files an allocation questionnaire; or

(b) a party to a claim which is being dealt with on the fast track or the multi track files a pre-trial check list (listing questionnaire),

that party must also file an estimate of costs and serve a copy of it on every other party, unless the court otherwise directs. Where a party is represented, that party's legal representative must in addition serve a copy of the estimate on that party.

(2) Where a party who is required to file and serve a new estimate of costs in accordance with Rule 44.15(3) is represented, that party's legal representative must in addition serve the new estimate on that party.

(3) This paragraph does not apply to litigants in person.

6.5 An estimate of costs should be substantially in the form illustrated in Precedent H in the Schedule of Costs Precedents annexed to the Practice Direction.

6.5A(1) If there is a difference of 20% or more between the base costs claimed by a receiving party on detailed assessment and the costs shown in an estimate of costs filed by that party, the receiving party must provide a statement of the reasons for the difference with his bill of costs.

(2) If a paying party—

(a) claims that he reasonably relied on an estimate of costs filed by a receiving party; or

(b) wishes to rely upon the costs shown in the estimate in order to dispute the reasonableness or proportionality of the costs claimed,

the paying party must serve a statement setting out his case in this regard in his points of dispute.

("Relevant person" is defined in paragraph 32.10(1) of the Costs Practice Direction.)

6.6(1) On an assessment of the costs of a party, the court may have regard to any estimate previously filed by that party, or by any other party in the same proceedings. Such an estimate may be taken into account as a factor among others, when assessing the reasonableness and proportionality of any costs claimed.

(2) In particular, where—

(a) there is a difference of 20% or more between the base costs claimed by a receiving party and the costs shown in an estimate of costs filed by that party; and

(b) it appears to the court that—

(i) the receiving party has not provided a satisfactory explanation for that difference; or

(ii) the paying party reasonably relied on the estimate of costs;

the court may regard the difference between the costs claimed and the costs shown in the estimate as evidence that the costs claimed are unreasonable or disproportionate.

Costs budgets in defamation proceedings

43PD.6.1 During the operation of the Defamation Proceedings Costs Management Scheme, introduced by Practice Direction 51D (Defamation Proceedings Costs Management Scheme), Section 6 of the Costs Practice Direction is modified. In particular, para.6.4(1)(a) does not apply to proceedings within the scope of that Scheme, and para.6.5 is substituted for the purposes of the Scheme; see Practice Direction 51D para 2 (para 51DPD.3 below). A related modification is made to Practice Direction 29 (The Multi-Track) (ibid.).

Editorial note

43PD.7 See paragraph 51DPD.1 for Practice Direction 51D Defamation Proceedings Costs Management Scheme.