PART 44

General Rules about Costs

Contents

Scope of this Part[1]

44.1 This Part contains general rules about costs, entitlement to costs and orders in respect of pro bono representation. 44.1

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

Solicitor's duty to notify client

44.2 Where— 44.2

(a) the court makes a costs order against a legally represented party; and

[1] Amended by the Civil Procedure (Amendment) Rules 2008 (SI 2008/2178).

(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.

Editorial note

44.2.1 This rule is the result of Lord Woolf's view that one of the reasons for the expense of litigation was that the client was not aware of the costs being incurred in their name by their legal representatives. The original requirement that the client should attend every case management conference has been dropped, but the solicitor is under a duty to inform the client whenever an adverse costs order is made. Although the court is not given specific penal powers in relation to failure to notify the client, such failure, if deliberate, might amount to professional misconduct. See also the similar provision in relation to costs orders for misconduct, r.44.14. The court may require the solicitor to produce evidence showing that took reasonable steps to comply with the rule. (See s.7 of the costs practice direction.)

Court's discretion and circumstances to be taken into account when exercising its discretion as to costs[1]

44.3 **44.3—(1) The court has discretion as to—**

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) If the court decides to make an order about costs—

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

(3) The general rule does not apply to the following proceedings—

(a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or

(b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including—

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention, 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;

[1] Amended by the Civil Procedure (Amendment No.3) Rules 2006 (SI 2006/3435).

(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;

(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.

Editorial note

44.3.1 Although this rule preserves the general rule that the unsuccessful party will be ordered to pay the costs of the successful party, Lord Woolf M.R. was anxious to move away from the position that any success is sufficient to obtain an order for costs. He therefore envisaged far more partial orders for costs which more accurately reflect the level of success achieved by the receiving party; see *A.E.I. Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 W.L.R. 1507, CA.

Jackson J., at the end of a long running dispute concerning the construction of Wembley Stadium, gave a supplementary judgment on costs in which he reviewed the relevant current cases. From this review he derived the following eight principles:

"(i) In commercial litigation where each party has claims and asserts that a balance is owing in its own favour, the party which ends up receiving payment should generally be characterised as the overall winner of the entire action.

(ii) In considering how to exercise its discretion the court should take as its starting point the general rule that the successful party is entitled to an order for costs.

(iii) The judge must then consider what departures are required from that starting point, having regard to all the circumstances of the case.

(iv) Where the circumstances of the case require an issue-based costs order, that is what the judge should make. However, the judge should hesitate before doing so, because of the practical difficulties which this causes and because of the steer given by rule 44.3(7).

(v) In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order.

(vi) In considering the circumstances of the case the judge will have regard not only to any part 36 offers made but also to each party's approach to negotiations (insofar as admissible) and general conduct of the litigation.

(vii) If (a) one party makes an offer under part 36 or an admissible offer within rule 44.3(4)(c) which is nearly but not quite sufficient, and (b) the other party rejects that offer outright without any attempt to negotiate, then it might be appropriate to penalise the second party in costs.

(viii) In assessing a proportionate costs order the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the costs specific to the issues which he has won but also the common costs."

Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd and Cleveland Bridge Dorman Long Engineering Ltd [2008] EWHC 2280 (TCC) Jackson J.

As a result of the authorities since the decision in *Elgindata (No.2), Re* [1992] 1 W.L.R. 1207, CA it is no longer necessary to establish that a successful party has acted unreasonably or improperly in raising an issue in order for it to be deprived of its costs and ordered to pay the unsuccessful party's costs of that particular issue. The issue based approach requires the court to consider issue by issue where the costs in each discrete issue fall: *Summit Property Ltd v Pitmans* [2001] EWCA Civ 2020. In a case where the trial judge had made a global order which deprived the claimant of any costs, because the claimant had obtained very much less by way of damages than had originally been claimed, the Court of Appeal held that the judge had failed to explain why he had not chosen to adopt a conventional issue based approach and his approach was accordingly flawed, since it was not in accordance with the principles laid out in CPR r.44.3. On the facts the Court of Appeal substituted an order that the claimant should have 50 per cent of his costs up to the conclusion of the trial on liability and all his costs thereafter: *Aspin v Metric Group Ltd* [2007] EWCA Civ 922. For a case in which the court awarded costs including costs under CPR r.36.20 and in circumstances that reflected the fact that each party had won and lost on a substantial issue, see *Fulham Leisure Holdings Ltd v Nicholson Graham and Jones* [2006] EWHC 2428, Ch, Mann J.

Although the normal rule is that the unsuccessful party should be ordered to pay the successful party's costs, the court has a discretion to make a different order where it would be unjust to follow the normal rule. Where the successful party had fought a case on a number of distinct bases on which had lost, including an improper allegation of fraud, it was appropriate to make an issue based split costs order requiring each party to pay 50 per cent of the other party's costs. The Court of Appeal would have been surprised if the judge had not found it appropriate to make an issue based order: *National Westminster Bank Plc v Kotonou* [2007] EWCA Civ 223.

The trial judge has a wide discretion to further the overriding objective. In exercising that discretion the judge should have regard to the factors set out in CPR r.44.3(4). Where a judge awarded the claimant an amount which reflected the defendant's contention of what was proper, the defendant was, on the facts, in reality the winner. The judgment sum awarded was of relative insignificance to the sum claimed by the claimant. The Court of Appeal held that the judge had failed to have regard to the fact that the defendant had won in principle and set aside the order that the defendant should pay the claimant's costs substituting no order as to costs: *Islam v Ali* [2003] EWCA Civ 612. Claimants, who had won on the central issue but lost on eight other issues, were awarded their full costs of the proceedings relating to liability. In respect of an estoppel issue, and also on the quantum issue which the claimant had lost, the court ordered that the claimants should bear their own costs and pay those of the defendant, where they related to the attendance of counsel and solicitors in court on the days on which the quantum evidence was given. The court recognised that awarding one party the costs of particular issues would make the assessment process impossibly difficult for the costs judge. *Travellers Casualty and Sureties Company of Canada v Sun Life Assurance Company of Canada UK Ltd* [2006] EWHC 2885 (Comm) Christopher Clarke J.

The Court of Appeal allowed an appeal by defendants but ordered them to pay the costs in any event because of the way in which the matter had been conducted in the court below (*Daniels v Walker* [2000] 1 W.L.R. 1382). Parties had eventually agreed to settle a Pt 8 claim but they could not agree the issues relating to costs. The claimant,

who was partially successful, had entered into a CFA with its lawyers. The court held that it would be wholly inappropriate and unreasonable for any success fee to be allowed. The claimant had made no effort to comply with the TCC pre-action protocol. Had the procedure been followed there was a good chance that agreement would have been reached much earlier, before the need for any CFA arose. The claimant had adopted a very confrontational approach when a more conciliatory one would have been more effective: *Buildability Ltd v O'Donnell Developments Ltd* [2009] EWHC 3196 (TCC); [2010] B.L.R. 122, Akenhead J.

An award of costs that simply looks at the number of issues won and lost does not fairly reflect the realities of the case. Where successful claimants had lost a good many issues it was not unreasonable, in particular in the light of the misleading conduct of three of the defendants, for the claimants to have raised the issues that they did. The claimants were awarded a percentage of their costs: *Douglas v Hello Ltd* [2004] EWHC 63, Ch, Lindsay J.

Where a claimant succeeded on one issue at trial, but in reality the defendant was the winner, an order that the claimant should pay the defendants' costs reflected the overall justice of the case. The court accepted that there was no automatic rule requiring reduction of a successful party's costs if they lost on one or more issues. In any litigation, particularly complex litigation, a winning party was likely to fail on one or more issues in the case. The claimant was ordered to make an interim payment representing less than 60 per cent of the defendants' total costs and less than a third of its own costs. One defendant was also entitled to recover its costs against two other defendants who had supported the claimant, limited to the amount by which that defendant's costs had been increased by the participation of the other two defendants in the trial: *Kidsons v Lloyd's Underwriters* [2007] EWHC 2699 (Comm), Gloster J.

Where a partnership dispute was settled on the day of the trial, because the claimant abandoned their claims at the door of the court and the Order which was made reflected what the defendant had sought throughout, the judge at first instance made no order as to costs. On appeal the court held that costs should have followed the event and the making of no order for costs was not a reasonable exercise of the judge's discretion: *Hannan v Maxton* [2009] EWCA Civ 8.

Where a claimant fundamentally amended the particulars of claim shortly before trial, as a result of which the costs in the case amounted to substantially more than the original amount claimed in the action, the unsuccessful party would still usually have to pay the costs of the successful party, taking into account the conduct of the parties, whether a realistic offer to settle was made and whether the circumstances dictated that a party should pay a proportion of the other party's costs or up to a specific point in the proceedings. On the facts of the particular case an order that the defendant should pay two thirds of the claimant's costs was upheld: *Professional Information Technology Consultants Ltd v Jones* [2001] EWCA Civ 2103.

On an appeal where the respondent, with permission, amended its notice the appellant decided not to pursue the appeal further, which was dismissed. The court held there should be an order for costs in accordance with the general rule (r.44.3(2)(a)), the respondent ought to have taken the amended points at a much earlier stage, and the costs payable by the appellant to the respondent should be limited to the respondent's costs up to and including service of the respondent's notice and the costs of preparing and serving the first skeleton (prior to the amended notice) (*Phillips v Phillips* [2009] EWCA Civ 185).

It is not open to a defendant who has paid money into court to argue that if a claimant had been more reasonable they would have offered more money. The remedy is in the defendant's own hands. It was open to the defendant to pay into court the maximum sum they were prepared to pay. At first instance the judge had reduced the award of costs to nil on the basis of the claimant's failure to engage in negotiations, which was a failure to comply with the pre-action protocol. The Court of Appeal found that the judge had failed to take into account the extent to which that factor had already been dealt with in their reasoning, thus no further reduction should have been made. On the facts the claimant was awarded 60 per cent of their costs from the date of the Pt 36 offer (*Straker v Tudor Rose (A Firm)* [2007] EWCA Civ 368; [2007] C.P. Rep 32).

Where a claimant applies to discover a third party's identity (a *Norwich Pharmacal* application: *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] A.C. 133). Rule 44.3 cannot apply to such applications since they are not really inter partes disputes. The defendant in the case had not resisted the court making the order but

had remained neutral on the application. Such applications are akin to applications for pre-action disclosure under r.48.3. In general the costs incurred should be recovered from the wrong doer and not from the party from whom disclosure is sought. In a normal case the applicant should be ordered to pay the costs of the party making disclosure including the costs of disclosure: *Totalise Plc v Motley Fool Ltd* [2001] EWCA Civ 1897; [2002] 1 W.L.R. 1233, CA.

In contentious probate proceedings two long-standing exceptions to the general rule that costs follow the event have survived the introduction of the CPR: i.e. if the person who made the will, or persons interested in the residue, had been the cause of the action or responsible for the litigation, a case could be made out for costs to come out of the estate. Secondly, if the circumstances led reasonably to an investigation of the matter, then the costs might be left to be borne by those who had incurred them (see *Spiers v English* [1907] P. 122 and *Re Cutcliffe's Estate* [1959] P. 6; *Kostic v Chaplin* [2007] EWHC 2909 (Ch) Henderson J.).

Orders for costs

44.3.2 The court has the powers contained in s.51 of the Senior Courts Act 1981 in relation to costs. See Section 8 of the Costs Practice Direction for the effect of some common orders for costs; in respect of the fees of counsel; and the fees of conveyancing counsel.

The scope of a judge's discretion under r.44.3 entitles them to make a variety of orders where there was a split trial. A judge is not required by the rules to make an immediate decision on costs after a trial on liability and has a discretion to postpone it until quantum has been finally determined: *Shepherds Investments Ltd v Andrew Walters* [2007] EWCA Civ 292.

In an appeal where the point of law arising was of some importance but the cost of the repair works in issue was small and much less than the legal costs involved, and bearing in mind the proportionality element of the overriding objective, the Court of Appeal granted permission to appeal on condition that the appellant should pay all the costs in the Court of Appeal irrespective of the outcome of the proceedings: *Morris v Wrexham CBC* [2001] EWHC Admin 697. As to protective costs orders see 48.15.7.

Although r.44.3 gives the court a discretion when considering costs, the court cannot act as an appellate court in respect of its own order except where fraud has been shown in the original application for the order. The court has no discretion under r.44.3 to amend its own costs order: *Commissioners of Customs & Excise v Anchor Foods*, *The Times*, September 28, 1999, Neuberger J.

In an action for malicious prosecution where a jury fails to agree, the standard order should be costs in the case: *Camiller v Commissioner of Police for the Metropolis*, *The Times*, June 8, 1999, CA.

Where a party effectively controlled the actions of other co-parties (in the particular case the co-defendant companies were described as the second defendant's "children"), and operated them to maximise the benefit to him, the court found him jointly liable for costs and did not limit the order to those issues which they had lost: *Quadrant Holdings (Cambridge) Ltd v Quadrant Research Foundation (Costs)* [1999] F.S.R. 918, Pumfrey J.

Where a claimant brought a money claim and the defendant was successful on a single determinative issue but lost on three other principal issues, the award of costs to the defendants was reduced by one quarter. The court applied the following criteria:

(a) the reasonableness of taking the point;

(b) the extra time taken up prior to trial in preparing to argue the point;

(c) the extra time taken in court to argue the point;

(d) the extent to which it was just in all the circumstances to deprive the successful party of its costs; and

(e) the extent to which the unsuccessful point was related to any successful point. (*Antonelli v Allen* [2001] Lloyd's Rep. P.N. 487, Neuberger J.).

Counsels' fees

44.3.3 Unless a rule specifically requires the court to give a certificate for Counsel, there is no longer any need for such a certificate. (See para.8.7 of the Costs Practice Direction.)

[THE NEXT PARAGRAPH IS 44.3.5.]

Discretion as to costs

44.3.5 In *Aiden Shipping Ltd v Interbulk Ltd* [1986] A.C. 965; [1986] 2 All E.R. 409; the House of Lords (overruling the Court of Appeal) held that the discretionary power to award costs contained in SCA 1981 s.51(1) was expressed in wide terms leaving the rule-making authority to control its exercise by rules of court, if it saw fit to do so, and the appellate courts to establish principles for its exercise; and there was no justification for implying a limitation to the effect that costs could only be ordered to be paid by parties to the proceedings.

Lord Goff of Chieveley (at 981), said that he did not foresee any injustice flowing from the abandonment of the implied limitation and expressed the view that "Courts of first instance are … well capable of exercising their discretion under the statute in accordance with reason and justice."

In *Re Gibson's Settlement Trusts* [1981] Ch. 179; [1981] 1 All E.R. 233, Sir Robert Megarry V.-C. considered the circumstances in which costs incurred prior to the commencement of proceedings could be allowed. Disputes antecedent to the proceedings which bear no real relation to the subject of the litigation, could not be regarded as part of the costs of the proceedings, but disputes which are in some degree relevant to the proceedings, as ultimately constituted and the other parties' attitude made it reasonable to apprehend that the litigation would include them, could be allowed.

There is no logical basis for saying that the claimant must have identified the precise claim that is in the event made, before costs can be potentially recoverable. Lord Harnworthin speaking of costs "ultimately proving of use and service in the action" and Megarry V.-C. talking of "a kind of legitimation by subsequent litigation" make clear that the matter is one of hindsight rather than foresight, per Kay J. in *Rentall Ltd v D. S. Willcock Ltd*, *Review of Taxation*, July 30, 1997, unrep..

Because of the terms of a consent order the costs judge was required, on a true construction of the order, to separate into distinct categories costs of the Pt 8 proceedings and costs incidental to them. The court had to consider whether the preparation for proceedings of one type could properly be regarded as giving rise to costs of and incidental to subsequent proceedings of a narrower scope. The court followed the guidance laid down in *Re Gibsons Settlement Trust* [1981] 1 Ch 179, Sir Robert McGarry V.-C. Applying those guidelines the court found that the work product created by the breach of trust expenditure was ultimately of some use and service in the Pt 8 proceedings, albeit less than originally anticipated. The breach of trust dispute was in some degree relevant to the subject matter of the Pt 8 proceedings and above all the attitude both of the Trustees and the other branches of the family at the time of the relevant expenditure made it reasonable for the claimants to apprehend that the litigation would in due course include that dispute. *Newall v Lewis* [2008] EWHC 910 (Ch), Briggs J.

The court held that the costs of obtaining and servicing a bank guarantee were not recoverable as damages for breach of an implied term in a charter party, but because the purpose of the guarantee was to provide security for a claim, brought by the defendant in their counterclaim, the expenses were "incidental to" the proceedings and were recoverable as costs: *Ene Kos v Petroleo Brasileiro SA (the "Kos")* [2009] EWHC 1843 (Comm); [2010] 1 Lloyd's Rep. 87 Andrew Smith J.

In proceedings relating to a guarantee and other proceedings relating to a mortgage, it was common ground that there was a general principle that the costs of a claim did not include the costs incurred by a party in seeking funding for either the prosecution or defence of that claim. On the particular facts of the case, the mortgage action (the Pt 8 claim) arose out of a dispute which emerged at the beginning of the funding negotiations. The Pt 8 claim was launched with a view to improving the defendant's prospects of funding his defence to the guarantee claim. The negotiations which thereafter continued in relation to funding were designed as an interim solution to the impasse between the parties about the meaning of the mortgage, which, in view of the bank's attempt to rely upon the background matrix of fact, was unlikely to be capable of being determined ahead of or separately from the guarantee claim. The Pt 8 claim and funding negotiations were pursued to a satisfactory conclusion as an interim solution to that impasse, which realistically preserved both parties competing claims in relation to the meaning of the mortgage. The defendant's success in the Pt 8 claim demonstrated that those negotiations were largely necessitated by the bank's wrongful assertion that the mortgage was security for more than the principle sum guaranteed which formed the basis of its rejection of the defendant's funding proposal. Thus the costs incurred in pursuit of negotiations designed to provide an interim solu-

tion to issues forming the subject matter of pending or contemplated litigation, while leaving the issues to be finally determined at a later date could, subject to the usual questions of proportionality and reasonableness, form part of the costs of those proceedings. Consequently, the funding related costs were part of the costs of the Pt 8 claim. Due to the nexus between those negotiations and that claim, they were not part of the costs of the guarantee claim: *National Westminster Bank v Kotonou* [2009] EWHC 3309 (Ch) Briggs J.

Neither a costs judge nor the court on appeal can properly refuse to carry out an order for detailed assessment because it is considered to be wrong or ultra vires; the only remedy if the order be wrong, is an appeal from the order, per Megaw J. in *Cope v United Dairies (London) Ltd* [1963] 2 Q.B. 33. A defendant who consented to judgment with costs could not appeal on grounds of mistake as to the terms of the claimants solicitor's retainer. A separate action was necessary (*Skinner v Thames Valley & Aldershot Co Ltd*, July 7, 1995, unrep., CA).

In the absence of fraud, misrepresentation or mistake, the court does not have jurisdiction to revisit a consent order, which can only be set aside or amended in the most exceptional circumstances since it represents the contract between the parties: *Centrehigh Ltd v Amen*, July 18, 2001, unrep., Neuberger J.

Costs between parties are awarded as an indemnity to the party incurring them and a successful party cannot therefore recover a sum in excess of their liability to their own solicitor (*Gundry v Sainsbury* [1910] 1 K.B. 645). For the circumstances when costs can still be recovered even though it was never realistically expected that the successful party would pay their own solicitor, see *R. v Miller & Glennie* [1983] 1 W.L.R. 1056; [1983] 3 All E.R. 186, following *Adams v London Improved Motor Coach Builders Ltd* [1921] 1 K.B. 495; and *Commissioners of Customs and Excise v Valerian Raz and Portcullis (VAT Consultancy) Ltd*, 1995 S.T.C. 14, Macpherson of Cluny J. See also *Hazlett v Sefton Metropolitan BC*, [2000] 4 All E.R. 887, DC.

The Court of Appeal has repeatedly stated that, when making an order for costs, the judge should clearly state their reasons, particularly where the costs incurred are disproportionate to the amount in issue: see *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605; *Verrechia v Commissioner of Police for the Metropolis* [2002] EWCA Civ 605; [2002] 3 All ER 385 CA; *Lavelle v Lavelle* [2004] EWCA Civ 223, CA.

Rule 44.3(1)

44.3.6 It is open to a judge, where a split trial has been ordered, to reserve the question of costs of the trial on liability until after the determination of the remaining issues. The Court of Appeal stated that there was much to be said for the view that the incidence of costs should be the same whether or not there has been an order for a split trial. Where there is a split trial and it remains uncertain whether the claimant will recover more than nominal damages it may be proper for the trial judge to defer making any order for the costs of the liability trial until the final outcome is known (*Weill v Mean Fidler* [2003] EWCA Civ 1058).

A public body (the CPS) is not insulated from the normal costs rules simply because it is a public body. In confiscation proceedings, where the CPS was held to have acted unreasonably in ignoring documentary evidence, the intervener was awarded her costs. The Court of Appeal stated that there was no need for a judge to refer to CPR r.44.3 provided that they followed the philosophy of it which required them to start with the proposition that the general rule was that the unsuccessful party should pay the costs of the successful party and then to consider whether any of the specific matters in r.44.3(4) took the case out of the ordinary rule and then to consider all the circumstances (*CPS v Grimes* [2003] EWCA Civ 1814).

Unless manifest injustice can be shown, the Court of Appeal will not disturb a costs order made by the judge at the invitation of the parties after they have settled their action save for costs. In all but straightforward cases a judge is entitled to say to the parties that if they have not reached an agreement on costs, they have not settled the dispute. Where the substantive issues have been compromised, the judge should be slow to embark on a determination of disputed facts solely in order to put themselves in a position to make a decision about costs: *BCT Software Solutions Ltd v C Brewer & Sons Ltd* [2003] EWCA Civ 9399.

If, after a judge has given judgment one party submits that the judge has failed to deal with a point, the judge may make it clear that the submission is unsustainable but may decide to give a supplementary judgment in the interests of clarification. If the judge concludes that there is some substance in the party's point they should consider

the materiality of the point and whether it undermines the decision reached. If necessary, the judge will have to give judgment again and may reach a different, or even the opposite conclusion. Judges are entitled to vary or reserve their order until the order is drawn. Accordingly they are entitled to give judgment again if the circumstances require that course: *Venture Finance Plc v Mead* [2005] EWCA Civ 325.

The Court of Appeal (Chadwick L.J.) offered further guidance for the future:

> "25. It does not, of course, follow that there will be no cases in which (absent a judgment after trial) the Judge will be in a position to make an order about costs. There will be cases (perhaps many cases) in which it will be clear that there was only one issue, that one party has been successful on that issue, and that conduct is not a factor which could displace the general rule. But, in such cases, the answer to the question which party should bear the costs of the litigation is likely to be so obvious that … the Judge will not be asked to decide that question. It will be agreed as one of the terms of compromise."
>
> "26. The cases in which the Judge will be asked to decide questions of costs—following a compromise of the substantive issues—are likely to be those in which the answer is not obvious. And it may well be that, in many such cases, the answer is not obvious because it turns on facts which are not agreed between the parties and which have not been determined. The Judge should be slow to embark on the determination of disputed facts solely in order to put himself in a position to make a decision about costs … the better course may be to require the parties to confront the realities of their litigation situation; to point out to them that, if they have not reached an agreement on costs, they have not settled their dispute and the action must proceed to judgment"

BCT Software above, quoted with approval in *Venture Finance Plc v Mead* [2005] EWCA Civ 325.

Where the subject matter of proceedings becomes academic during the course of the proceedings, leaving costs as the only issue, it is within the court's discretion whether or not it should consider the substantive issue in deciding any order as to costs. Unusual circumstances would have to exist before the court would consider an academic issue (*Arcadia Ventures Ltd v Longhurst* December 6, 2000, unrep., Mr T. Etherton, Q.C.).

There is no tradition that when a dispute is not judicially resolved the correct order is "no order as to costs". Thus where a claim settled without trial and the parties agreed the amount of profits to be paid by the defendant to the claimant without the necessity of an inquiry, the judge was entitled to make an order that the defendant should pay the claimants' costs: *Brawley v Marczynski* [2002] EWCA Civ 756.

Insolvency practitioners appealed against an order requiring them to pay personally the costs of an application by one of the creditors to remove them as administrators of a company. The judge, having read the evidence and heard full argument from counsel, made an order for the company to be compulsorily wound up, and terminated the administrators' appointment on their own application. Nothing remained of the creditor's application, except the question of costs. The judge ordered the administrators, and the managing director of the company, to pay the creditor's costs. The insolvency practitioners argued that the judge should not have made the order that he did without first giving them the opportunity of explaining the position from the witness box. On appeal the court held that the insolvency practitioners had no right to insist that before deciding the costs question the judge should hear oral evidence from and cross-examination of the witnesses. The judge was in principle entitled to embark on an assessment of the incidence of costs in a summary way: *Coyne v DRC Distribution Ltd* [2008] EWCA Civ 488; [2008] BCC 612 (CA).

Where a claimant obtained a without notice freezing order in an excessive amount which was the subject both of an application to discharge by the defendant and an application to vary by the claimant which failed, the claimant being ultimately successful in a smaller sum at trial, the court ordered that there should be no order as to costs in respect of the initial application for the freezing order, that the claimant should pay the defendant's costs of the application to discharge the order, that there be no order as to costs in respect of the claimant's unsuccessful application to vary and that the defendant should pay the claimant two thirds of its costs of trial: *Mr Biss v XOV Ltd* May 3, 2001, QB, Holland J.

Judicial review

The Administrative Court considered the powers of the court in relation to costs in **44.3.7**

judicial review proceedings concluded without a full hearing (see also para.54.12.5 below). The following principles were identified:

(i) the court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs;
(ii) it will normally be irrelevant that the claimant is LSC funded;
(iii) the overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost;
(iv) at each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case not least the amount of costs at that stage and the conduct of the parties;
(v) in the absence of a good reason to make any other order, the fallback is to make no order as to costs;
(vi) the court should take care to ensure that it does not discourage parties from settling judicial review proceedings, for example by a local authority making a concession at an early stage.

R. (Boxall) v Waltham Forest LBC (2001) 4 C.C.L. Rep. 258, Scott Baker J. This decision was approved in *R. (on the application of Kuzeva) v London Borough of Southwark* [2002] EWCA Civ 781; [2002] All E.R.(D) 488. (After *R. (Boxall) v Waltham Forest LBC* see also *Seray-Wurie v Attorney General*, March 22, 2007, unrep., P Girolami Q.C.)

The court has the power to make a costs order when the substantive proceedings have been resolved without a trial and the parties have not agreed about costs: *Bernard v Dudley MBC* [2003] EWHC 147 (Admin), Henriques J.

The Court of Appeal has given guidance on the proper approach to the award of costs against an unsuccessful claimant on an oral application for permission to apply for judicial review. The effect of CPR PD 54 (Judicial Review) para.8.6 is that a defendant who attends and successfully resists the grant of permission at a renewal hearing should not generally recover from the claimant their costs of and occasioned by doing so. The court, in considering an award against an unsuccessful claimant of the defendants' and/or any other interested party's costs at a permission hearing, should only depart from the general guidance in the Practice Direction if it considers there are exceptional circumstances for doing so. Exceptional circumstances may include:

(a) the hopelessness of the claim;
(b) the persistence in it by the claimant after its hopelessness has been demonstrated;
(c) the extent to which the court considers that the claimant has sought to abuse the process of judicial review;
(d) whether the unsuccessful claimant has had in effect the advantage of an early substantive hearing of the claim. A relevant factor for the court may be the extent to which the unsuccessful claimant has substantial resources which it has used to pursue the unfounded claim and which are available to meet an order for costs.

See *R. (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346; [2003] All E.R. (D) 222 and *R. (on the application of Payne) v Caerphilly CBC (Costs)* [2004] EWCA Civ 433.

The Court of Appeal has dealt with the question: whether as a matter of law or practice an order for costs made in favour of a successful respondent to judicial review proceedings includes costs incurred prior to the grant of the permission unless these are expressly excluded. The court gave the following guidelines:

1. On the conclusion of full judicial review proceedings in a defendant's favour, the nature and purpose of the particular claim is relevant to the exercise of the judges' discretion as to costs. In contrast to a judicial review claim brought wholly or mainly for commercial or proprietary reasons, a claim brought partly or wholly in the public interest, albeit unsuccessful, may properly result in a restricted or no order for costs.
2. If awarding costs against the claimant, the judge should consider whether they are to include preparation costs in addition to acknowledgment costs. It will be for the defendant to justify these. There may be no sufficient reason why such costs, if incurred, should be recoverable.
3. It is highly desirable that these questions should be dealt with by the trial

judge and left to the costs judge only in relation to the reasonableness of individual items.

4. If at the conclusion of such proceedings the judge makes an undifferentiated order for costs in a defendant's favour:
   (a) the order has to be regarded as including any reasonably incurred preparation costs; but
   (b) the *Practice Statement (Judicial Review: Costs)* 2004 1 W.L.R. 1760 should be read so as to exclude any costs of opposing the grant of permission in open court, which should be dealt with on the Mount Cook principles (*R. (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346), per Sedley L.J. in *R. (Davey) v Aylesbury Vale DC* [2007] EWCA Civ 1166; [2008] 1 W.L.R. 878, CA; [2008] 2 All E.R. 178, CA.

Sir Anthony Clarke M.R. held that an order for "the costs of the claim" means the "costs of and incidental to" the claim. Those costs can include costs incurred before issue of the proceedings.

The M.R. whilst agreeing with the guideline set out by Sedley L.J. added a note of caution, stating:

> "29. It does seem to me that costs should ordinarily follow the event and that it is for the claimant who has lost to show that some different approach should be adopted on the facts of a particular case. That principle is supported by the decision and reasoning of Dyson J. in *R v Lord Chancellor ex p. Child Poverty Action Group* [1999] 1 WLR 347 at 355H–356E … The basic rule he refers to is … that costs follow the event in public law cases, as in others, because where an unsuccessful claim is brought against a public body, it imposes costs on that body which have to be met out of money diverted from the funds available to fulfil its primary public functions.
>
> …
>
> 33. It seems to me that any defendant who incurs more cost at the permission stage than is contemplated by Carnwath L.J. will not be awarded such additional costs at the permission stage if the application is unsuccessful. Moreover, as I see it, the court should at that stage decline to look at anything which goes beyond the "summary of grounds" described in [*Ewing v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583]. In these circumstances, I am not persuaded that the approach we have adopted in this case will give rise to a risk of defendants recovering more expense than is reasonable at the permission stage."

In a case where the claimant won on the single most important issue but failed on the facts, justice required that the second defendant should pay 35 per cent of her costs. The court held that the claimant had undoubtedly won a very real victory the fruits of which she would not have herself enjoyed but which would benefit those who came after her (*R. (Watts) v Bedford Primary Care Trust* [2003] EWHC 2401 (Admin) Mumby J.). Similarly in a test case on a point of construction of the Principal Civil Service Pension Scheme, the court held that it was wrong to leave the defendant, a man of insubstantial means, to bear their own costs and the Minister for the Civil Service was ordered to pay the defendant's costs of and incidental to the appeal (*Minister for the Civil Service v Oakes* [2003] EWHC 3314).

Where a claimant sued a number of defendants for personal injuries and failed, a dispute arose as to the extent to which the claimant should be ordered to pay the costs. On the facts of the particular case the costs of the contribution proceedings should be seen as costs contingent on the claimant's success in the main action, and in the circumstances fell to be borne by the claimant. An unsuccessful Pt 20 claimant would normally pay all the Pt 20 costs of the successful Pt 20 defendant unless it would be unjust where the claimant had chosen to join the successful Pt 20 defendant, and had also failed against it, even if no additional costs resulted from that joinder. In the particular case the claimant had a proper basis for the joinder, had acted reasonably and it would not be fair to make him pay the costs of both parties: *Green v Sunset & Vine Productions Ltd* [2009] EWHC 1610 (QB), Ouseley J.

The Court of Appeal held that the principles to be applied under CPR r.44.3 where Judicial Review proceedings had been compromised were set out in *R. (Boxall) v Waltham Forest LBC* (above). The Court of Appeal could not change the law in order to fund litigation in a way that was preferable to a party, nor could there be one rule for Judicial Review proceedings and another for civil litigation. The judge, at first instance,

had made no order for costs save as to the detailed assessment on the applicant's publicly funded costs. The court stated (obiter) that judges should bear in mind the need to make reasonable and proportionate attempts to ascertain the position between the parties and should not be tempted too readily to use the fallback position of making no order for costs: *R (Scott) v London Borough of Hackney* [2009] EWCA Civ 217.

The Administrative Court has emphasised that practitioners should expect to observe the court operating a more robust approach to judicial review claims used inappropriately as a means of monitoring and regulating the performance by a public authority of its public duties and responsibilities. Practitioners could no longer expect the lenience shown in the instant case. Defaulting parties could expect to find their cases being summarily dismissed and lawyers to find themselves exposed to an application for wasted costs: *R. (on the application of B) v Lambeth LBC* [2006] EWHC 639, Admin, Munby J.

The Court of Appeal has considered the question of costs of a respondent to an application for permission. Having referred to *Davey v Aylesbury Vale DC* (above) the court stated that when "preparation" costs are sought in addition to "acknowledgement" costs, it is for the defendant to justify those costs, which may well not be recoverable. It was undoubtedly the case that even a short form of acknowledgement did not settle itself, and study may be needed to decide what should go into it:

In future and in accordance with principle (3) of the Sedley-Clarke principles, it will be important that the permission judge, who is far better placed than anyone else to decide what needed reasonably to be said, in response to a claim, should themselves apply the *R (Roudham and Larling Parish Council) v Breckland Council* [2008] EWCA Civ 714.

Rule 44.3(2)

44.3.8 The general rule is that the unsuccessful party will be ordered to pay the successful party's costs but different orders may be made. Relevant factors include: offers to settle, the conduct of the parties and whether a party has lost an issue: *Firle Investments Ltd v Data Point International Ltd* [2001] EWCA Civ 1106, CA. The question of who was the successful party, or the unsuccessful party to an action could be determined by who ultimately wrote the cheque at the end: *Day v Day (Costs)* [2006] EWCA Civ 415.

A judge making an award of costs has essentially to determine whether to apply the general rule that costs follow the event, or award costs on an issue by issue basis. It is not appropriate to consider in that determination, a claimant's ability to recover damages in an action overall. In a case where the claimant had succeeded in two thirds of their pleaded causes of action and the trial had not been prolonged by the unsuccessful cause of action, it was appropriate that the costs should follow the event: *Fleming v Chief Constable of Sussex* [2004] EWCA Civ 643.

In a claim for professional negligence, in which the defendants were found to have been negligent and in breach of statutory duty but the claim had been dismissed since it was statute barred, the court held that the mere fact that the claimant had succeeded on some points did not of itself justify departing from the general rule. In the particular case the claimant's conduct was criticised, the various issues were intertwined and the court held that the case was not suitable for a split or issues based costs order. Nonetheless, using a broad brush approach, the court decided that it was appropriate to order the claimant to pay 75 per cent of the defendant's costs (*Shore v Sedgwick Financial Services Ltd* [2007] EWHC 3054 (QB) Beatson J.).

Where there is no clear overall successful or unsuccessful party the general rule that costs follow the event may not apply. Where there has been no unreasonable conduct by either party in the litigation, and both sides have made attempts at different times and stages to resolve the matter, it may be appropriate to make no order for costs: *Cantor Gaming Ltd v GameAccount Global Ltd* [2007] EWHC 1914 (Ch), Daniel Alexander Q.C. Where a claimant sues two defendants in the alternative and succeeds against only one, the court has a discretion to order the unsuccessful defendant to pay the successful defendant's costs. This may be done by an order that the unsuccessful defendant pay the successful defendant's costs directly to them (a *Sanderson* Order: *Sanderson v Blyth Theatre Company* [1903] 2 K.B. 533, CA) or by an order that the claimant pay the successful defendant's costs to them and recover them from the unsuccessful defendant as part of the claimant's costs of the action (a *Bullock* Order: *Bullock v London General Omnibus Co* [1907] 1 K.B. 264, CA). There are no hard and fast rules as to when it is appropriate to make a *Sanderson* Order. The court will consider the extent to which the claimant has behaved reasonably in suing two defendants since it

would be hard if the claimant ended up paying the costs of the defendant against whom they had not succeeded. Equally it is not reasonable to join one defendant because the action is practically unsustainable. It would be unjust to make a co-defendant pay that defendant's costs which should be borne by the claimant. Ultimately it is a question for the discretion of the trial judge. *Moon v Garrett* [2006] EWCA Civ 1121. A *Bullock* or *Sanderson* Order is appropriate only in those cases where the claimant did not know which party was at fault and it was inappropriate to make either order when both defendants had succeeded in defending a large part of the claim. It would also be contrary to the objective of CPR r.44.3 to make a qualified *Bullock* or *Sanderson*Order: *Whitehead v Searle & Hibbert Pownall & Newton* [2007] EWHC 2046 (QB), Griffith Williams J. A claimant in a libel action sued three defendants but failed to establish malice against two of them. The unsuccessful defendant was ordered to pay two thirds of the claimant's costs on the standard basis but the claimant was ordered to pay one quarter of the successful defendants' costs (the proportion was reduced because of the conduct of one of the defendants). There had never been any question of any of the three defendants blaming the others: *Rackham v Sandy (Costs)* [2005] EWHC 1354. Where a claimant sued three defendants for personal injuries arising out of breach of statutory duty, the judge was entitled to conclude that the claimant should pay the costs of the two defendants against whom the claims had failed. The Court of Appeal held that the jurisdiction to make a Sanderson order had survived the introduction of the CPR. The judge had to be guided by the overriding objective and by CPR Pt 44 and it had to be recognised that it was capable of working injustice against a successful defendant. In deciding whether to order an unsuccessful defendant to pay the costs of a successful defendant the relevant factors included: whether the claim against the successful defendant had been made "in the alternative"; whether the causes of action had been connected with those on which the claimant had been successful; and whether it had been reasonable for the claimant to join and pursue a claim against the successful defendant. The fact that one defendant blamed another could be a significant factor, but whether it was reasonable to join that defendant and pursue the claim depended on the facts of the case and whether the claimant could in fact sustain such a claim: *Irvine v Commissioner of Police for the Metropolis* [2005] EWCA Civ 129. A defendant who was sued by an impecunious claimant joined another party as a Pt 20 defendant in order to protect its position. The claim against the defendant was dismissed and the Pt 20 claim also had to be dismissed. The defendant complained that if it were ordered to pay the Pt 20 defendants' costs it would be doubly out of pocket since there was no prospect of recovery from the claimant. The Court of Appeal referred to the decision in *Johnson v Ribbins* [1977] 1 W.L.R. 1458 where the Court of Appeal had found that it could not be right to deprive a third party of an order for costs, to which he was otherwise entitled against the defendant, because the defendant, when looking to the claimant for reimbursement, found a person "not worth powder and shot". In the ordinary run of cases under the CPR the same principle will be applied. A successful Pt 20 defendant should not be deprived of their prima facie right to an order for costs against a Pt 20 claimant merely on the ground of the claimant's impecuniosity. On the facts of the case the court ordered that on the assessment of the defendants' and Pt 20 defendants' costs, an enquiry should be made into the costs incurred by certain parties in and about instructing experts, whether such experts were to act in an evidentiary or an advisory role, such costs to include the legal costs associated with giving such instructions. Once the total of those costs have been ascertained they should be borne equally as to one sixth share each, subject to that the six parties should bear their own costs both in the main proceedings and in the Pt 20 proceedings: *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655.

The court, when refusing to make a *Bullock Order*, pointed out that the CPR encouraged the court to make issue based costs orders that reflected a more detailed analysis of success and failure and in particular to make costs orders in respect of certain periods or by reference to certain issues or by way of percentages: *McGlinn v Waltham Contractors Ltd* [2007] EWHC 698 (TCC), Coulson J.

In judicial review proceedings the court stated that there were judicial review cases where public interest or analogous considerations made it inappropriate to require an unsuccessful claimant to pay a defendant's costs. There was however no bright line distinction between judicial review cases which did or did not involve a public interest challenge, nor was the presence or absence of any private interest a determining factor with regard to costs. A more flexible and nuanced approach was indicated by the statutory duty to have regard to all the circumstances. There could be different degrees

under a wide spectrum of public interest mixed with what might be a greater or lesser amount of private interest: *Smeaton v Secretary of State for Health* [2002] EWHC 866 (Admin), Munby J.

The general rule may be set aside, for example at the conclusion of lengthy complex proceedings involving a mother and son with some moderation in favour of the claimant in the light of the particular circumstances: *Neave v Neave* [2002] EWHC 966, QB, Holland J. Where a disorganised testator had unintentionally lost or destroyed their will, giving rise to litigation on their death, the court held it appropriate to order that the costs of both sides should be paid out of the estate: *Rowe v Clarke* [2006] EWHC 1292 (Ch), May 10, 2006, Mark Herbert Q.C.

A Pt 36 offer should be regarded as the best to which a party is prepared to go, and if a claimant recovers more than the offer, they are entitled to their costs and should not be deprived of them by reason of a comparison with their Pt 36 offer: *Quorum A/S v Schramm*, November 21, 2001, unrep., Thomas J.

In a case where a defendant was successful on its counterclaim but was held by the judge to have unreasonably pursued two discrete issues as part of its case and was therefore penalised in costs, the Court of Appeal held that although the defendant had not succeeded on the two issues identified by the judge it had not acted unreasonably in pursuing them. There was therefore nothing in the facts of the case which justified departure from the general rule that the successful party should be awarded the whole of its costs: *Spice Girls Ltd v Aprilla World Service BV* [2002] EWCA Civ 15.

Where the ordinary costs order is departed from it is incumbent on the judge to give reasons, albeit short, for that departure. *Brent LBC v Anienobe* November 24, 1999, unrep., CA.

The task for the judge is to take an overview of the case as a whole and reach a conclusion based on two questions: (i) who succeeded in the action and (ii) what order for costs does justice require? (*B.C.C.I. SA v Ali (No.3)* (1999) 149 N.L.J. 1734.)

In an action over music copyright the claimant failed to obtain the relief sought, but the judge made no order for costs in favour of the defendant, on the basis that although it was the successful party, it had raised and lost a number of issues thereby prolonging the hearing and in some cases without the necessary standing to do so. The defendant had also made allegations of fraud which had been rejected. The Court of Appeal held that although it was unusual to deny a successful party the recovery of the whole of its costs of trial, the judge had not misdirected themselves as a matter of law, nor failed adequately to express their reasoning in their costs judgment: *Peer International Corporation v Editora Musical de Cuba* [2008] EWCA Civ 1260.

Where a defendant company successfully defended a claim against it but the trial judge rejected all the oral evidence except for that of three witnesses including the defendant's major shareholder and effective director, it was appropriate to make an order for costs in the defendant's favour since a restriction on the recovery of the defendant's costs would be to the detriment of the shareholders and the person whose conduct had been exonerated. A conventional order was therefore made under rule 44.3(2)(a): *International Commercial Finance (UK) Ltd v Knitwear Ltd*, Ch, June 18, 2001, Hedley J.

Where the court imposed an order for costs on setting aside a judgment in default of appearance, it was held on appeal that the decision to impose such a sanction on a party was a matter for the discretion of the judge hearing the application and would only be varied on appeal if the order was wrong in law or unjust by reason of a serious procedural or other irregularity in the proceedings before the judge: *Gore v Jones*, *The Times*, February 21, 2001, Pumfrey J.

Costs against a regulatory body

44.3.8.1 A regulator brings proceedings in the public interest in the exercise of a public function which it is required to perform. In those circumstances the principles applicable to an award of costs differ from those in relation to private civil litigation. Absent dishonesty or a lack of good faith a costs order should not be made against such a regulator unless there is good reason to do so. That reason must be more than that the other party has succeeded. In considering making such an order the court must consider, on the one hand, the financial prejudice to the particular complainant, weighed against the need to encourage public bodies to exercise their public function of making reasonable and sound decisions, without fear of exposure to undue financial prejudice, if the decision is successfully challenged (see *Gorlov v Institute of Chartered Accountants* [2001] EWHC 220 (Admin), Jackson J., and *City of Bradford MDC v Booth*

[2000] COD 338, Lord Bingham C.J.). On the facts the appellant was ordered to pay 60 per cent of The Law Society's costs before the tribunal. He had brought the proceedings upon himself, was unsuccessful and had been suspended. The Law Society had successfully vindicated the integrity of the profession: *Baxendale-Walker v The Law Society* [2006] EWHC 643 (Admin); [2006] 3 All E.R. 675, Moses L.J. and Stanley Burnton J. On appeal the Court of Appeal considered whether there was a conflict between the above decision and that in *Law Society v Adcock* [2006] EWHC 3212 (Admin). Having analysed the authorities the Court of Appeal agreed with Moses L.J. The order of the court below was not disturbed: *Baxendale-Walker v The Law Society* [2007] EWCA Civ 233; [2007] 3 All E.R. 330.

The Privy Council has held that the principles to be derived from the authorities (*Bradford MDC v Booth* [2000] 164 J.P. 485 DC; *R (on the application of Gorlov) v Institute of Chartered Accountants of England and Wales* [2001] EWHC Admin 220; [2001] A.C.D. 73; and *Baxendale-Walker v Law Society* [2007] EWCA Civ 233; [2008] 1 W.L.R. 426) concerned the different position of costs before disciplinary tribunals or before a court upon a first appeal against an administrative decision by, e.g. a regulatory authority. In a case in which the Disciplinary Committee of the Royal College of Veterinary Surgeons made no order for costs in respect of the proceedings before it which had not been challenged, the Board, in practice, made costs orders against the authority when an appeal succeeded and in favour of the authority in the case of unsuccessful appeals. Where appeals failed on liability, but succeeded on penalty, no orders for costs were made. There was no reason to depart from the Board's previous practice. The Board rejected an argument that a split order should be made because certain submissions had not been accepted and the fact that the appeal had been supported by an appeal fund raised by other members of the profession did not constitute a reason why the costs order should be less than complete (*Walker v Royal College of Veterinary Surgeons (Costs)* [2008] UKPC 20).

Official Solicitor

44.3.8.2 Where the Official Solicitor acted as a litigation friend to someone who was incapacitated it was in the court's discretion to order costs against the claimant even where the claimant had not been unsuccessful as such. The Official Solicitor brought his skill and experience to bear in such cases in the public interest. Although the costs burden to be borne by the paying party might be severe it was likely that it would only be involved in very few such cases. On the other hand the Official Solicitor was necessarily involved in every such case, and if he could not recover any costs from NHS Trusts the burden would be beyond his budget. The Official Solicitor had no enhanced right to seek his costs, but was entitled to apply for them in the usual way. In medical treatment cases it was usual for the claimant NHS Trust to pay a proportion of its costs and this would normally be one half: *X NHS Trust v J* [2005] EWHC 1273; [2006] Lloyds Rep Med 180, Munby J. (Fam).

Admiralty Court

44.3.8.3 There is no rule or principle in Admiralty Court cases, where there is no counterclaim, that a claimant who is found at fault under ss.187(1) and (2) of the Merchant Shipping Act 1995 should recover its costs in proportion to the percentage of liability of the defendant. The fact that the claimant had recovered only 70 per cent of the claim, having been found 30 per cent to blame, was not sufficient reason within rule 44.3(4)(b) or otherwise to reduce the costs awarded to the claimant. There was no basis on which the court could legitimately make an issues based order and the defendant's conduct, including their failure to make an offer at any stage, their late change of case and the unsatisfactory evidence of their two main witnesses reinforced the award of costs in favour of the claimant: *"Krysia" Maritime Inc v Intership Ltd* [2008] EWHC 1880 (Admlty) Aikens J.

In proceedings arising out of a collision of ships at sea, the fact that the successful party had been found one-third to blame for the collision was not of itself a sufficient reason to reduce the level of recoverable costs, although it did not follow that the apportionment of liability was not a relevant factor. Taking into account the offer which had been made and the parties' conduct, a fair outcome was that the successful party should recover 65 per cent of its costs: *Owners Demise Charterers and Time Charterers of "Western Neptune" v Owners and Demise Charterers of "Philadelphia Express"* [2009] EWHC 1522 (Admlty), David Steel J.

Costs of inquest

44.3.8.4 Following the death in custody of a young man who was a drug addict, a dispute

arose as to the adequacy of the care given to him by the prison authorities. At the inquest, solicitors and counsel attended with exceptional funding from the Legal Services Commission for representation. The civil claim was subsequently settled for £10,000.

90 per cent of the claimant's bill of costs related to the attendance at the inquest. On detailed assessment the Home Office argued that there should be no liability upon them to pay the costs of attending the inquest. The court held that it was common ground that the courts were entitled, at their discretion, to award costs that were of and incidental to civil proceedings pursuant to s.51 of the Senior Courts Act 1981. There was no doubt that the costs incurred prior to proceedings were capable, in principle, of being recoverable as costs in the proceedings (see *Gibson's Settlement Trusts*, 1981 Ch. 179 and the cases therein cited). Although the costs were in principle recoverable, it was not appropriate to divide the costs of an inquest by the dual role or purpose of the legal representative at the hearing, i.e. the inquest itself and the subsequent civil claim. All costs that were of and incidental to civil proceedings could be recovered: *Roach v The Home Office* [2009] EWHC 312 (QB); [2010] 2 W.L.R. 746; [2009] 3 All E.R. 510, Davis J.

Rule 44.3(4)(a)—conduct

44.3.9 The rule sets out the factors to which the court must have regard to when considering what order to make about costs. These factors include the conduct of all the parties which is further analysed at r.44.3(5). See the Directions relating to Pt 36 (see para.36APD.1) in respect of offers under that Part.

Litigants need to be encouraged to be selective as to the points they take and the extent of costs recovery is an incentive for responsible behaviour: *Base Metal Trading Ltd v Shamurin* [2003] EWHC 2419 (Comm) (Tomlinson J.) and see *Kastor Navigation Co Ltd v AGF MAT (The Kastor Too) (Costs)* [2003] EWHC 472 (Comm) (Tomlinson J.). and *Kastor Navigation Co Ltd v Axa Global Risks (UK) Ltd (The Kastor Too)* [2004] EWCA Civ 277.

Where the court found there were reasonable grounds for suspecting undue influence in proceedings to prove a will the unsuccessful defendant was required to pay only half the claimant's costs: in *Good (Deceased) (Costs), Re* [2002] EWHC 640, Rimer J.

The judge should consider whether or not the parties have conducted the litigation in accordance with a system of civil litigation which is designed to enable the parties to know where they stand at the earliest possible stage and at the lowest practicable cost, so that they may make informed decisions about their prospects and the sensible conduct of their cases. *Ford v GKR Construction Ltd*, [2000] 1 W.L.R. 1397, CA; see also note at 36.20.2; and *Amec Process & Energy Ltd v Stork Engineers and Contractors BV (Costs Order)* [2000] B.L.R. 70.

Following the Buncefield Oil Storage Depot explosion the court decided that the first and second defendants were vicariously liable for the negligence which led to the incident. Summary judgment was given for the claimants in the light of admissions by two defendants that one or the other was vicariously liable. At the preliminary issue it was decided that the first defendant was liable for the negligence of the relevant employee. The claimants sought costs on the indemnity basis because the defendant had unreasonably contested the issues of negligence and foreseeability. The court awarded costs on the indemnity basis, since the defendant had denied any fault for two years after the service of the defence. This was held to be unreasonable to a marked extent sufficient to justify the award of indemnity costs. The defendant had abandoned the issue of foreseeability of damage on the third day of the trial, although this did not mean that the point was necessarily hopeless. In considering the impact of the abandonment on costs, a broad brush approach should be adopted rather than a detailed assessment of the merits (see *Brawley v Marczynski (No.1)* [2002] EWCA Civ 756; [2003] 1 W.L.R. 813). Claims for costs on the indemnity basis in respect of other issues were rejected, save in the case of one claimant who became entitled to costs on the indemnity basis, having beaten a Pt 36 offer: *Colour Quest Ltd v Total Downsteam UK Plc* [2009] EWHC 823 (Comm) David Steel J.

In proceedings arising out of a road accident the claimant made an offer, before the proceedings were commenced, to settle on the basis of 95 per cent to 5 per cent split on liability. The defendant rejected this offer and the defendant was found to be 100 per cent liable at trial. At first instance the judge refused to award the claimant costs on the indemnity basis because the offer was unrealistic. The Court of Appeal found that this was irrelevant to the exercise of discretion under CPR r.36.21 and there was

nothing unjust in allowing that rule to have its ordinary effect. The claimant was therefore awarded costs on the indemnity basis: *Huck v Robson* [2002] EWCA Civ 398; [2002] 3 All E.R. 263, CA.

In a successful claim brought by the client against the solicitors who had acted for them in litigation, the solicitors joined counsel instructed by them in the original action as a third party. On appeal the solicitors were found to be liable as to 80 per cent and counsel as to 20 per cent of the damages awarded. The solicitors argued that costs should be apportioned in the same percentages. The court held that the costs order should reflect the fact that the matter should not have been defended by the solicitors and that both the solicitors and counsel had entered into an unnecessary and costly mud slinging contest. The solicitors were ordered to pay the full costs of the trial. Counsel was ordered to pay 20 per cent of the Pt 20 proceedings. The solicitors were required to pay one third of their own costs of the appeal, the balance to be paid by counsel: *Moy v Pettman Smith (A Firm) (Costs)* [2003] EWCA Civ 467; [2003] P.N.L.R. 31, CA.

Where tax appeals and referrals which were originally before the Special Commissioners and had been the subject of proceedings in the High Court and a reference to the European Court of Justice, the court held that the correct approach in principle was to consider the appropriate costs order by reference to success on the appeals which were originally before the Special Commissioners and which formed the subject matter of the appeal to the High Court, the reference to the ECJ, the resumed High Court hearing and the subsequent appeal to the Court of Appeal. The court referred to r.44.3(2)(a) and r.44.3(2)(b) and took into account all the circumstances, including whether a party had succeeded on part of the case even if it had not been wholly successful (r.44.3(4)(b)). Both parties had taken positions which were not fully vindicated, but HMRC was successful in the context of the actual appeals and referrals under consideration. The respondent company was ordered to pay HMRC's costs in the High Court and of the reference to the ECJ. HMRC was entitled to recover such of its costs of the appeal to the Court of Appeal as were attributable exclusively to the costs of appeals in respect of certain (French) losses: *Revenue & Customs Commissioners v Marks & Spencer Plc* [2010] EWHC 2215 (Ch).

Exaggeration and false claims

44.3.10 The Court of Appeal has examined the position as to what costs, if any, are reasonably incurred by a claimant in pursuing a claim for damages for personal injuries which they know (or must be taken to know) have not been suffered and also the practice as to how the paying party is to go about challenging the reasonableness of incurring costs, when this may depend upon disputed facts, but the case has quite properly been settled. Although the decision related to the proper approach under RSC Order 62 r.12 it is suggested that similar principles will apply under the CPR. The court stated that the costs judge should start by going through the bill of costs and ruling out all those items considered to be unjustified (for example almost all other medical fees, costs of retaining Leading Counsel, etc). This would leave some items which were plainly reasonable as items even if questionable in amount and other items where it would be difficult if not impossible to disentangle what was reasonable from what was unreasonable even having regard to the way in which the rule required that doubt to be resolved. The court stated that at that stage, but not at any earlier stage, it would be appropriate for the costs judge to consider awarding a percentage of the sum claimed. The percentage awarded would have to be such that, at the end of the exercise, the total sum awarded by way of costs could be regarded as reasonable having regard to the amount of damages obtained. The court quoted with approval Judge L.J. in *Ford v GKR Construction Ltd* [2000] 1 W.L.R. 1397:

> "If the judge had concluded that the claimant had been demonstrated by the video evidence to be a malinger, dishonestly exaggerating her symptoms, I have little doubt that he would have taken the view that, even if the video evidence had arrived late, the claimant should not be permitted to escape the consequences of the revelation, even late, of her attempted fraud …
>
> Every case and every consequential costs order depends upon the individual facts of the case."

A claimant who pursues an exaggerated and inflated claim for damages must expect to bear the consequences when their costs come to be assessed. In the absence of special circumstances a claimant who knows, or must be taken to know, that their claim for damages is unsustainable, in whole or in part, cannot be heard to assert that

a defendant who has disclosed evidence which establishes the unsustainability of the claim ought to have disclosed that evidence at an earlier stage in the proceedings: *Booth v Britannia Hotels Ltd* [2002] EWCA Civ 579.

Where a claimant with a back injury had sought damages of £150,000 and accepted a Pt 36 payment of £4,000, the defendants argued that the district judge should allow the claimant no more than 25 per cent of the costs claimed. The district judge correctly held that he had no power to do what was suggested but made significant reductions during the course of the assessment. On appeal the Court of Appeal upheld the decision at first instance and stated:

> "20. There is a real distinction between (a) carrying out an assessment and deciding *as part of the assessment* to reduce the bill by a percentage, and (b) deciding *in advance of the assessment* that the receiving party will only receive a percentage of the assessed costs. The figure that results from (a) represents 100% of the assessed costs. In deciding as part of the assessment to reduce the bill by a percentage the costs judge is giving effect to an order that the successful party is entitled to his costs to be assessed if not agreed. The figure that results from (b) represents less than 100% of the assessed costs. In deciding in advance of the assessment that the receiving party will only receive a percentage of the assessed costs the costs judge is not giving effect to an order that the successful party is entitled to his costs to be assessed if not agreed."
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> *Lahey v Pirelli* [2007] EWCA Civ 91.

A claimant who sought £3.75 million damages accepted an open offer of £38,000 with no interest, with the question of costs to be left to the court. The court, considering the claimant's conduct, stated that the correct order was no order as to costs. The claimant could not be said to have achieved a significant win. The claim had been exaggerated throughout and the particulars of claim were not properly based on expert evidence. The offer had been made as a nuisance payment to get rid of the action. *Hooper v Biddle & Co* [2006] EWHC 2995, October 1, 2006, Ch, Susan Prevezer Q.C.

The Court of Appeal upheld an order that an insolvency practitioner should pay half the costs of a creditor in an application to set aside an individual voluntary arrangement since the insolvency practitioner's conduct had fallen far below that of a reasonable practitioner. *Smurthwaite v Simpson-Smith* [2006] EWCA Civ 1183.

Where a claimant had been found intentionally to have exaggerated her claim, the fact that she was awarded more than the Pt 36 payment made by the defendant was not the guiding factor in awarding costs. The defendant could be viewed as the overall winning party since the court was bound to take into account the conduct of the parties and the absence by the claimant of any intention to settle the matter. A claimant who had made no attempt to negotiate should expect the court to take that failure into account when determining costs. To commence and lose a matter on the ground that the claim was exaggerated, without making any attempt to settle was a deciding factor. The defendant was ordered to pay the claimant's costs down to the date of payment into court and the claimant was ordered to pay all the defendant's costs thereafter: *Painting v University of Oxford* [2005] EWCA Civ 161; *The Times*, February 15, 2005 CA. The Court of Appeal distinguished from *Painting* (above) a case in which the client had exaggerated his claim but, following video evidence, reduced his claim both openly and in the course of without prejudice negotiations. The Recorder, having taken into account the circumstances, nonetheless awarded the claimant his costs. On appeal the Court of Appeal found that the Recorder was acting within his broad discretion: *Morgan v UPS* [2008] EWCA Civ 1476. In *Morgan* (above), the Court of Appeal referred to the judgment of Waller L.J. in *Straker v Tudor Rose* [2007] EWCA Civ 368:

> "The key issue is whether the judge misdirected himself. It is well known that this court will be loath to interfere with the discretion exercised by a judge in any area, but so far as costs are concerned, that principle has a special significance. The judge has the feel of a case after a trial which the Court of Appeal cannot hope to replicate and the judge must have gone seriously wrong if this court is to interfere".

A claimant who sought more than £1 million damages was found at trial to have exaggerated his disability. The defendant had made a Pt 36 offer of £50,000. At trial the judge awarded damages of £55,000 and ordered the defendant to pay 75 per cent of the claimant's costs. The Court of Appeal declined to amend the order, finding that the judge had not exercised his discretion in a manner that was plainly wrong. The

court stated that it remained open for the defendant, at detailed assessment, to challenge any costs incurred by the claimant insofar as they were unreasonably incurred in pursuing the claim to the extent to which it was exaggerated: *Jackson v Ministry of Defence* [2006] EWCA Civ 46.

Where a claimant sought damages of £610,000 for breach of duty under a service agreement and accepted a payment into court of £5,000 and abandoned the remaining claim the claimant was ordered to pay the defendant's costs, save for that relating to the payment in, which the defendant was ordered to pay in accordance with CPR Pt 27: *E Ivor Hughes Education Foundation v Leach* [2005] EWHC 1317, Ch, Peter Smith J.

It is not open to a judge to cut down the costs of the successful party under CPR r.44.3(4) merely because that party had not done as well as they had hoped. In the particular case the initial exaggeration of the claim had had no real effect on the costs of the action. The defendant had not achieved any partial success which might entitle her to an abatement of the claimant's costs (*Hall v Stone* [2007] EWCA Civ 1354).

The Court of Appeal granted permission to appeal on costs where the judge at first instance had found that the parties who were the real "winners" had been guilty of serious dishonesty. He made an order for costs with a reduction to reflect the dishonesty which he had found. The Court of Appeal stated:

> "It is well worthy of consideration by the Court of Appeal whether, where an ultimately successful party has, on the way to success, lied and sought to maintain forgeries and in other ways been thoroughly dishonest and moreover has greatly lengthened the trial in having these matters exposed, the usual rules as to costs are displaced."

The court drew the attention of the parties to *Aaron v Shelton* [2004] EWHC 1162, Jack J., which seemed to indicate that if a paying party were going to rely on the conduct or misconduct of the receiving party in order to seek a reduction in the costs to be paid, the time to raise that factor was at the end of the trial and not before the costs judge at the time of the assessment. Although as a result of a concession the principle in *Aaron v Shelton* was no longer material in the appeal, the court went on to comment that the decision of Jack J. on the facts was correct in principle, but that the statement of principle could be said to go further than the decision in the case required and was too broadly stated. As to the correct approach the court stated:

> "33. Clearly there is no problem if the judge's order makes 'no order as to costs', but if the judge orders a reduction by say 20% without more, what would be the natural construction of that order? My view is that the natural construction of such an order, unless the contrary is expressly stated, is that the party guilty of dishonesty should not be entitled to say on the assessment, my costs incurred in seeking to make a dishonest case can be taken as reasonably incurred because the judge has made a reduction. If the dishonest party was entitled to succeed on such an argument, he will hardly suffer any penalty at all.
>
> 34. It seems to me that consideration of a party's conduct should normally take place both at the stage when the judge is considering what order for costs he should make, and then during assessment. But the court will want to ensure that dishonesty is penalised but that the party is not placed in double jeopardy. Ultimately, the question is one of the proper construction of the order made by the judge. Thus it will be important for the judge who is asked to take dishonesty into account at the end of a trial when considering the order for costs, to consider what is likely to occur on assessment. Where dishonest conduct is being reflected in an order made by the trial judge, it must be wise for the future for judges to make clear whether they are making the order on the basis that, on the assessment, the paying party will still be entitled to raise the dishonesty in arguing that costs incurred in supporting the particular dishonesty were unreasonably incurred. Judges may also want to consider whether to make an order under rule 44.14 and it would be wise to do that before considering precisely what order to make in relation to the costs of a trial generally." *Northstar Systems Ltd v Fielding* [2006] EWCA Civ 1660

The Court of Appeal commented further on the decision in *Aaron v Shelton* (above), stating that the decision was too prescriptive in so far as it sought to lay down some principle that if a point was not raised before the trial judge, a party would be precluded from raising it before the costs judge. It would not be consistent with the express provisions of CPR r.44.3 and 44.5, and with the court's duty to see that costs were proportionate and reasonable, to preclude a party raising a point highly material to that question because it had not been raised before the trial judge under r.44.3. If a

special order as to costs was sought, that should obviously be sought from the trial judge. If the costs judge would be assisted by some indication from the trial judge about the way in which a trial had been conducted, such an indication could be sought. There was, however, no rule that a failure to raise a point before the trial judge would preclude the raising of the point before the costs judge.

In the same case the claimant had sought damages exceeding £15,000, and the claim proceeded on the multi track. In the event the damages awarded were £9,291. On assessment the district judge assessed the costs as if the case had proceeded on the fast track. The Court of Appeal held that this was impermissible, since it effectively rescinded the trial judge's order. The permissible approach was to assess costs on the standard basis taking into account that the case should have been allocated to the fast track: *Drew v Whitbread* [2010] EWCA Civ 53; [2010] 1 W.L.R. 1725, CA.

The court has held that it is an abuse of process, to seek to raise before the costs judge on an assessment, matters that could and should have been litigated before the court. The paying party was not permitted to raise, by way of points of dispute, precisely the same allegations that it had made in the pre-action protocol procedure but had not pursued in the action after the protocol had run its course: *Drukker & Co v Pridie Brewster & Co* [2005] EWHC 2788, QB, Openshaw J. (see also 44.3.13).

There is no general principle that, where an otherwise successful party has put forward a dishonest case, the general rule that costs follow the event is thereby wholly displaced. The court's powers include disallowance of the successful party's costs in advancing the dishonest case; an order that they pay the other party's costs attributable to proving that dishonesty; the imposition of an additional penalty which might extend to disallowance of the whole of the successful party's costs; or an order that they pay all or part of the unsuccessful party's costs. There was no general rule that a losing party who could establish dishonesty had to receive all their costs of establishing that dishonesty, however disproportionate they might be. There was no strict rule that pre-action conduct was relevant to costs only if causative of the bringing of an unsuccessful claim, or of increased expense in the subsequent litigation, although that would plainly be of primary relevance in the court's decision to what extent to penalise a party for inappropriate pre-action conduct when making or refusing an order for costs (*Bank of Tokyo-Mitsubishi Ufj Ltd v Baskn Gida Sanayi Ve Pazarlama AS* [2009] EWHC 1696 (Ch) Briggs J.).

A party who successfully defended a Pt 20 claim brought by an insurance company alleging fraud had her costs reduced by two thirds, notwithstanding that she had made a Pt 36 offer which the insurance company had failed to beat. The judge at first instance found that the successful party had lied to him in two respects in her evidence at trial. The Court of Appeal held that in the light of the lies which the party had told the judge had been entitled to make an order depriving her of some part of the costs she would otherwise have recovered. It was argued that the judge had made insufficient calculation of the time and expense taken up by the lies. That submission was rejected. Lies maintained and repeated in a complex case were insidious. It was incontrovertible that litigation was made more difficult, and the judge's task more intractable as a result of the party's lies: *Sulaman v Axa Insurance Plc and Direct Line Insurance Plc* [2009] EWCA Civ 1331.

A collision at sea resulted in damage to a barge and a dredger which was moored alongside. The owner of the damaged vessels claimed US$1.3 million. There were split hearings as to liability and quantum, and the owner of the other vessel was found wholly responsible for the collision. The losing party agreed to pay the costs of the action. At the quantum hearing the damages were assessed at US$6,245. The owner of the damaged vessels was ordered to pay the other party's costs of the quantum hearing on the indemnity basis. The other party then sought to have the liability costs order set aside, as having been obtained by fraud. The court held that the large claims for damages put forward in respect of repairs and loss of use for both vessels were fraudulent. At the time of the making of the liability costs order the paying party did not know of, or know sufficient of, and/or waive the fraud. The court held it was appropriate and necessary to set aside the liability costs order and replace it with an order for indemnity costs in the other party's favour. The claim by the owner of the damaged vessels was fraudulent from the outset and was properly marked by indemnity costs: *Owners of the ship Ariela v Owners and/or demise charterers of the Dredger Kamal XX1 and the Barge Kamal XX1V* [2009] EWHC 3256 (Comm) Burton J.

The Court of Appeal held that in a case where both the claim and the counterclaim were at the small claims level, the fact that the defendant had brought and persisted in

an additional hopeless counterclaim which caused the action to be allocated to the multi track, the defendant's conduct had resulted in the claimant incurring substantially more costs than would otherwise have been the case and the judge at first instance was plainly wrong in not taking that into account as a relevant factor when he made no order as to costs. The defendant was ordered to pay 50 per cent of the claimant's costs from the date of allocation to the multi track: *Peakman v Linbrooke Services Ltd* [2008] EWCA Civ 1239.

It is established by *Cope v United Dairies (London) Ltd* [1963] 2 Q.B. 33, Megaw J. that neither a costs judge nor the court on appeal can properly refuse to carry out an order for detailed assessment because it is considered to be wrong or ultra vires; the only remedy if the order be wrong is an appeal from the order. Accordingly, where a claimant had succeeded on a preliminary issue in the Court of Appeal and was awarded his costs, both of the hearing below and in the Court of Appeal, the substantive action was subsequently settled for a fraction of what had been claimed. Because of the gross exaggeration the defendant was awarded its costs of the action, except those subject to the Court of Appeal's order. On assessment the costs judge assessed the claimant's bill in the Court of Appeal at nil. On appeal the court held that the costs judge should have assessed the costs of the preliminary issue by reference to their reasonableness and propriety within the issue, not by reference to the ultimate fate of the action. It was the duty of the assessing tribunal to carry out the assessment which the previous court had directed it to carry out (*Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2009] EWHC 2014 (Ch) Mann J.).

In an action for breach of repairing covenants in a lease the claimant claimed over £500,000 from the defendant landlord who raised preliminary issues. There was a meeting of experts, after which all that was left of the claim was an agreed figure of £1,073.50. The claimant offered to accept this sum, provided the defendant paid all his costs, which the defendant refused to do. The court formed the view that in the litigation the claimant was the clear loser. The court held that the claimant both before and after the institution of proceedings acted in a way which took the case out of the norm. Any proper investigation of the claim, both before the particulars of claim were served and afterwards, would have revealed that this was not a genuine claim for dilapidations. The claimant was ordered to pay the defendant's costs on the indemnity basis: *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2008] EWHC 2003 (TCC), H.H. Judge Toulmin Q.C.

Where a claimant had exaggerated her claim, but had nonetheless beaten the defendant's Pt 36 payment, the Court of Appeal had to consider which was the unsuccessful party. The claimant had been successful in that she had established a claim for damages and beaten the payment into court. Rule 44.3(4)(a) required the court to have particular regard to the conduct of the parties, including "whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue". Exaggeration could be treated as an allegation relevant to the issue of quantum of damages. Exaggeration of the claim was unreasonable conduct which the court could take into account. Had the claim not been exaggerated the litigation might not have been heavily contested, and might have settled. The defendant had been put to unnecessary expense. In the circumstances the appropriate order was no order as to costs—see *Widlake v BAA Ltd* [2009] EWCA Civ 1256. In that case the court stated (at [21]) that, because a court in making a cost order must take into account all the circumstances of the case in exercising its discretion, every case will depend on its own facts; consequently, although points of principle may be derived from decided cases in which it has been argued that a party behaved unreasonably, generally a close analysis of the facts of such cases will not be very enlightening.

In a claim for loss of earnings the defendant, which was paying damages in respect of personal injuries, submitted that the costs of the issue of past and future earnings should be paid by the claimant to the defendant, or that the claimant's costs of the issue should be disallowed or substantially reduced. The Judge carried out an extensive review of the authorities, and in particular *Widlake v BAA Ltd* [2009] EWCA Civ 1256, in which Ward L.J. pointed out that there is a considerable difference between "a concocted claim" and "an exaggerated claim" "and Judges must be astute to measure how reprehensible the conduct is". The claimant accepted that the past and future loss of earnings claim was worth very much less than had originally been contended. The court held that this did not of itself show that there had been exaggeration. Rule 44.3(2)(b) could not have been intended to be satisfied merely because a genuine claim was over-estimated. The court was unable to make any findings as to the claimant's

conduct such as would warrant a departure from the default position. In a case where the court had heard evidence and reached conclusions on relevant factual issues it might be desirable that the court should apply its detailed knowledge of the case so as to make a special costs order in the light of that knowledge. Where the court was asked to deal with the matter on a broad brush basis, without the advantage of oral evidence and detailed submissions, the size of the sums at stake made it all the more desirable that issues about appropriateness and proportionality should be dealt with as part of the detailed assessment by a Costs Judge: *Morton v Portal Ltd* [2010] EWHC 1804 (QB) Walker J.

Note

44.3.10.1 Prior to the coming into force of the CPR, generally, if a party pleaded fraud and lost, that party was likely to have all the costs awarded against it. The CPR set out a complete code as to costs. The court has to exercise its discretion, and must take into account all the circumstances of the case. There is no specific rule for fraud claims, and the rules must be applied. The judge in the court below had made no error of principle in deciding that the failure of the successful party on a number of issues alleging fraud should be reflected in the costs order (65 per cent of the costs awarded): *Cheltenham BC v Laird* [2010] EWCA Civ 4.

Rule 44.3(4)(b)—success

44.3.11 In deciding what order for costs to make following an action, the court is entitled to take into account whether a party has succeeded on part of the case even if not wholly successful; the other party's reasonableness in raising, pursuing or contesting a particular allegation or issue is not necessarily relevant or a pre-condition to taking that factor into account. The defendant having been successful on two out of three issues, the claimant was awarded a percentage its costs: *Stocznia Gdanska SA v Latvian Shipping Co*, *The Times*, May 8, 2001, Thomas J.

In deciding what order for costs to make, the court must take into account the extent to which a party has succeeded, both in respect of it counterclaim and the level of success in relation to the defence of the claimant's claim. The court must also take into account any open offer of settlement which has been made, as well as the conduct of the parties: *Dick Van Dijk v Wilkinson T/A HFF Construction* [2001] EWCA Civ 1780.

In a case where the claimant succeeded on some issues, failed on others and abandoned still others, the Court of Appeal held that it was open to the judge to award the claimant a proportion of the costs in respect of those issues in which it had succeeded, but in respect of the abandoned issues these should have been left to the costs judge. Those costs should be disallowed on detailed assessment as costs unreasonably incurred in the litigation. (*Shirley v Caswell* [2000] Lloyd's Rep. P.N. 955; [2001] 1 Costs L.R. 1.).

The Civil Procedure Rules permit an order to be made for payment of a proportion of a party's costs. The decision in *Shirley v Caswell* above did not limit the court's power to make such an order: *Dooley v Parker* [2002] EWCA Civ 1188. Dyson L.J. stated that he did not read *Shirley v Caswell* as laying down any broad statement of principle other than that an order should not penalise a party twice over. If an order is made disallowing part of a receiving party's costs then the costs judge must take account of that fact when making the assessment of costs, and take great care to make sure that a double penalty is not imposed. There should be no difficulty about this since the costs judge should know from the terms of the judgment ordering payment of a proportion of a party's costs that that is what the trial judge did and the reasons why it was done. In a case in which there was a claim (for the return of a motor vehicle) and a counterclaim (for the cost of repairs) and where the claimant abandoned various issues during the course of proceedings, resulting in judgment being entered for the defendant on the counterclaim, the Court of Appeal held that, given the nature of the abandoned allegations, there must have been a notional increase in the costs to both parties. The court ordered the claimant to pay one half of the defendant's costs after the date on which the defendant had returned the claimant's property to him: *Darougar v Belcher* [2002] EWCA Civ 1262.

In the majority of cases the court will make an order that the claimant should pay the defendant's costs of a case which is struck out, but where the order is for the claimants to have their costs of the action up to a certain date *Shirley v Caswell* (above) requires that, unless the judge has some specific reason for interfering or intervening, they can make an order leaving the question of assessment to the costs judge. On an

assessment the costs judge will in any event disallow the costs of any claims which were positively struck out as well as disallowing costs in respect of issues abandoned or not pursued: *Nugent v Michael Goss Aviation* [2002] EWHC 1281 (QB), Burton J.

The Court of Appeal has stated that the provisions of rule 44.3(4) are inconsistent with any inflexible rule governing the costs of claim and counterclaim such as that in *Medway Oil v Continental Contractors* [1929] A.C. 88. The court declined to comment as to what should be the general approach to such a situation or even whether there should be a general approach (rule 46.3(6) makes provision for the allowance of costs where at a fast track trial the claimant succeeds on the claim and the defendant succeeds on the counterclaim): *Gould v Armstrong* [2002] EWCA Civ 1159.

In a road traffic case where the claimant was found to be 35 per cent to blame, having apportioned liability, the defendant who had counterclaimed was required to pay £311. The judge at first instance rejected the claimant's application for costs. The effect of the order was to make the claimant pay all of the defendant's costs, which exceeded the claimant's costs by £8,000. The existence of a CFA was held not to be of relevance on appeal. Although the defendant's CFA did skew the costs, CFAs were permitted by the CPR and the 100 per cent uplift was simply a fact of litigation life. The fact that the judge did not reflect in costs the apportionment as to liability was a decision well within reasonable limits: *Horth v Thompson* [2010] EWHC 1674 (QB) Rafferty J.

The court (Patten J.) has had to consider how to divide the common costs of action in a case where the trial judge had ordered the defendant to pay the claimant's costs of the action, save for three specific items of costs. Patten J. stated:

> "3. The CPR make no special provision for dealing with costs of this type and some of the difficulties in the assessment of these costs arise directly from a common failure by judges to appreciate the complexities which can be created by orders which seek to split the responsibility for costs between the parties other than by an order for the payment of a simple percentage or proportion of the total costs bill."

The parties agreed that the costs order did not differ materially in its terms from the type of order considered by the Court of Appeal in *Cinema Press Ltd v Pictures & Pleasures Ltd* [1945] K.B. 356 which in turn applied the earlier decision of the House of Lords in *Medway Oil & Storage Co v Continental Contractors Ltd* [1929] A.C. 88. Patten J. decided:

> "50. The decision in *Medway* applied in *Cinema Press* establishes that on a taxation of common costs … it is appropriate to attribute part of a composite fee to the items of work which the fee was intended to cover … The same goes for the time spent on preparing parts of witness statements which deal separately and exclusively with [a particular] issue. But what the decision in *Medway* does not do is to authorise the [Costs Judge] in a case like the present, to apportion the costs of work all of which is relevant to both claims."

The judge concluded:

> "57. … Instead the Costs Judge must analyse all the work done and claimed for in accordance with the *Medway* principles set out."
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> *Dyson Technology Ltd v Strutt* [2007] EWHC 1756, Ch, Patten J.

The correct approach in principle in money claims is that it is important to identify the party who has to pay money to another when deciding what order for costs to make where both the claim and counterclaim are successful. Where the value of a defendant's counterclaim amounted to one quarter of the claimant's claim the Court of Appeal quashed an order that the claimant should pay the defendant's costs on the counterclaim and ordered the defendant to pay 75 per cent of the claimant's costs of the claim and counterclaim taken together: *ACT Construction v Mackie* [2005] EWCA Civ 1336.

In proceedings under the Fatal Accidents Act 1976 a widow entered into a CFA with her solicitors. She was neither executor nor a beneficiary under the will of the deceased. The executor entered into a separate CFA with the same solicitors at a later date in order to bring proceedings under the Law Reform (Miscellaneous Provisions) Act 1934. These latter proceedings were successful, and the Fatal Accidents Act claim was withdrawn with no order as to costs. It was common ground that the claimant could recover only those costs which were of or incidental to the claim under the 1934 Act. An argument arose as to overlapping work which was relevant to both claims, and undertaken under both CFAs. On appeal the court held that the first CFA had been

superseded by the second CFA, and that there had been one action embodying two claims. The costs would therefore need to be divided, i.e., looked at item by item, so that the costs relating solely to the 1976 claim could be separated out and disallowed. The judge pointed out that the guidance given by r.44.3(7) (not to make issue based costs orders) was of equal importance to the profession, and in particular to solicitors as it was to the court. It was plain that where an issue based costs order was made following a compromise, this could lead to extra costs and difficulties on detailed assessment. Such orders ought, therefore, to be avoided (*Pacey v Ministry of Defence* [2009] EWHC 28 (QB) Sharp J.)

In proceedings which were compromised a Tomlin Order was drawn up which provided, among other things, that the third defendant would pay the claimant's costs of the action against the third defendant only. The order made it clear that the costs to be paid related exclusively to the professional negligence claim against the third defendant, and did not encompass any costs incurred by the claimant in respect of any dispute with the first and second defendants. There was no order for costs as between the claimant and the other defendants. The third defendant subsequently argued that the claimant was only entitled to costs against it of work carried out only against it, and if the work was carried out in relation to the claims against all three defendants, then such costs were not recoverable. In respect of the common costs, the court held, by reference to the authorities including *Medway Oil and Storage Co Ltd v Continental Contractors Ltd* [1929] A.C. 88, that although common costs cannot be apportioned in such a case, there may be scope for them to be divided. The court held that in so far as common costs could be attributed to the claim against the third defendants, they represented costs which related exclusively to the professional negligence claim against the third defendant within the meaning of the consent order. In respect of common costs which were not susceptible to division, those costs would not relate exclusively to the claim against the third defendant. The court ordered that the third defendants were not liable for any common costs except to the extent that those costs fell to be attributed to the claim against them by division (rather than apportionment): *Hay v Szterbin* [2010] EWHC 1967 (Ch), Newey J.

Rule 44.3(4)(c)—offers to settle

44.3.12 The Civil Procedure (Amendment No.3) Rules 2006 make a significant amendment to r.44.3(4)(c) so that it applies only to an offer to which the costs consequences under Pt 36 do not apply. Accordingly the text below must be read as applying only to offers made before the date of the amendment (April 6, 2007). Note that a corresponding amendment has been made to para.8.4 of the Costs Practice Direction.

There are compelling reasons of principle and policy why those prepared to make genuine offers of monetary settlement should do so by way of Pt 36 payments rather than written offers. Pt 36 payments offer greater clarity and certainty about (1) genuineness; (2) ability to pay; (3) whether the offer was open or without prejudice; and (4) the terms on which the dispute could be settled.

Where the defendant permitted the claimant to accept the payment in but did not agree costs. The judge ruled that the claimant was entitled to recover part only of the costs. The Court of Appeal held that the presumption that a claimant who fails to better a Pt 36 payment should be treated as the unsuccessful party can be dislodged in special circumstances, as where the defendant has withheld material and not allowed the claimant to make a proper appraisal of the defendant's case, but there was no principle that a defendant, at fault for failure to amend their case in time, should provide the claimant with additional time for accepting the payment in: *Factortame Ltd v Secretary of State for Transport, Local Government and the Regions* [2002] EWCA Civ 22; [2002] 1 W.L.R. 2438, CA.

Where a defendant made a written offer to settle the claimant's claim and made two subsequent Pt 36 payments it was held to be an error of principle outside the wide discretion given by r.44.3 to treat the defendant's written offer as if it were a Pt 36 payment made in a case in which the defendant had succeeded on all issues of trial. The written offer was relevant to the exercise of the discretion and on the particular facts of the case the claimant was ordered to pay half of the defendant's costs for the period, and notwithstanding that no Pt 36 payment which exceeded the judgment had been made until a late date, in the light of the unreasonable manner in which the claimant had conducted the claim there was ample justification for depriving the claimant of their costs for the period: *Amber v Stacey* [2001] 1 W.L.R. 1225; [2001] 2 All E.R. 88; [2001] C.P. Rep. 26, CA.

In a claim for injunction and damages the claimant successfully obtained injunctive relief, the claim for damages being listed for hearing at a later date. The defendant company had made Calderbank offers, but the court was not aware of the contents of the offers, but proceeded on the basis that the claimant had done better than the offers put forward. The court held that where there had been a payment into court, the amount of the payment should not be disclosed following the success of the claimant on liability. Save in the most exceptional circumstances the determination of costs should await the determination of damages, only then would it be known if the claimant had beaten the payment in. Whilst the claimant was fully entitled to consider that it had been successful in the action to date, and would recover substantial costs for the period where the defendant could not rely on the Calderbank offer, it was not appropriate to award those costs at this stage, since there was still a possibility there could be a set-off of costs awarded to the defendant for the period after the last day for acceptance of the Calderbank offer. Accordingly there was no basis on which to decide what an appropriate order for costs up to the relevant date would be. All outstanding matters of costs were reserved: *Tullett Prebon Plc v BGC Brokers LP* [2010] EWHC 989 (QB) Jack J.

Rule 44.3(5)—more about conduct

44.3.13 In deciding how to apportion costs to reflect the conduct of the parties in proceedings the judge should structure the judgment on costs around the provisions of CPR r.44.3 which require the court to take into account "the conduct of the parties". The introduction of the CPR does not affect the pre-existing law which entitles a judge to consider any relevant aspect of the conduct of the parties including their conduct in relation to the matters which gave rise to the litigation (see *Donald Campbell & Co Ltd v Pollak* [1927] A.C. 732). Although the practice of the Commercial Court (see *Hall v Rover Financial Services (GB) Ltd* [2002] EWCA Civ 1514) is not to disallow a successful party its costs simply because of anterior dishonest conduct which "while it was part of the transaction which gave rise to the proceedings, could not be characterised as misconduct in relation to the proceedings themselves", that was no more than a matter of practice. On their proper construction CPR r.44.3(4)(a) and (5)(a) do not contain any limitation such as would shut out reliance, in an appropriate case, on misconduct in and about the matters which triggered the litigation (*Groupama Insurance Co Ltd v Overseas Partners Re Ltd (Costs)* [2003] EWCA Civ 1846).

ADR

44.3.13.1 It is a lawyer's duty to further the overriding objective under r.1.1. If parties turned down ADR out of hand they may suffer the consequences when costs come to be decided. Where a defendant had been confident of success and had therefore felt that there could be no benefit in resorting to ADR, it was not willing to do so. Although successful in the proceedings no order for costs was made: *Dunnett v Railtrack Plc* [2002] EWCA Civ 303; [2002] 1 W.L.R. 2434, CA.

Where a successful party had refused to agree to ADR, despite the court's encouragement, that was a fact that the court would take into account when deciding whether their refusal was unreasonable. The court went on to decide that there was no basis for the court to discriminate against successful public bodies when deciding whether a refusal to agree to ADR should result in a cost penalty. The "ADR" pledge announced in March 2001 by the Lord Chancellor was no more than an undertaking that ADR would be considered and used whenever the other party accepts it in all suitable cases by all Government departments and agencies. It was difficult to see in what circumstances it would be right to give great weight to the pledge. The court's role was to encourage not compel ADR. It was likely that compulsion of ADR would be regarded by the European Court of Human Rights as an unacceptable constraint on the right of access to court and therefore a violation of art.6 ECHR.

Although the fact that the court could not order disclosure of without prejudice negotiations against the wishes of one of the parties, could mean that the court would not be able to decide whether a party had been unreasonable in refusing mediation, it was always open to a party to make open or Calderbank offers of ADR, and the other party could respond to such offers either openly or in Calderbank form. If a party gave a good reason why it thought ADR would not serve a useful purpose, that was one thing, if it failed to do so, that was a matter which the court might consider relevant although not conclusive in exercising its discretion as to costs. The reasonableness or otherwise of going to ADR could be fairly and squarely debated between the par-

ties, and under the Calderbank procedure, made available to the court when the question of costs came to be considered (*Reed Executive Plc v Reed Business Information Ltd (No.2)* [2004] EWCA Civ 887; [2004] 4 All ER 942, CA).

In *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 4 All E.R. 920, CA, the Court of Appeal addressed the question of ADR in greater detail. The court indicated that the burden was on the unsuccessful party to show why there should be a departure from the general rule on costs, in the form of an order to deprive the successful party of some or all of their costs on the grounds that he refused to agree to ADR. A fundamental principle was that such a departure was not justified unless it had been shown that the successful party had acted unreasonably in refusing to agree to ADR. In deciding whether a party had acted unreasonably the court should bear in mind the advantages of ADR over the court process and have regard to all the circumstances of the particular case. The factors that could be relevant included:

(i) the nature of the dispute;
(ii) the merits of the case;
(iii) the extent to which other settlement methods had been attempted;
(iv) whether the costs of ADR were disproportionately high;
(v) whether any delay in setting up and attending the ADR would have been prejudicial;
(vi) whether the ADR had a reasonable prospect of success.

In a case in which the respondents put before the court an extensive bundle of correspondence showing that they had made real efforts to settle the dispute, by making offers which were reasonable and generous, and had sought a round the table meeting, all of which were refused by the appellant, the respondents did not act unreasonably by refusing to enter into mediation. The fact that mediation was refused did not detract from the usual order that the unsuccessful appellant should pay the successful respondent's costs in resisting the appeal: *Valentine v Allen* [2003] EWCA Civ 915.

A barrister was justified in refusing to proceed to mediation in a professional negligence action where the attitude and character of the claimant made it most unlikely that the mediation would succeed. The court stated that this was an exceptional decision reflecting how seriously disturbed the claimant's judgment was in relation to the case. The fact that heavy costs had already been incurred, that the allegation was one of professional negligence and that the defendant believed he had a good defence were not reasons justifying refusal to mediate. The court accepted however that the mediation had no realistic prospect of success. The defendant was accordingly not penalised in costs: *Hurst v Leeming* [2002] EWHC 1051 (Ch), Lightman J.

The Administrative Court found that a magistrates' court had been wrong to order a local authority to pay a sum towards the costs of a company which was the subject of an abatement notice under the Environmental Protection Act 1990 s.80, but whose appeal against the abatement notice failed. The reason given was that the authority had not offered the company the option of reasonable discussions. The Administrative Court held that since the local authority had successfully contested the company's appeal, and the abatement notice had been upheld, it was, prima facie, entitled to its costs. The only reasonable discussions which might have taken place were in respect of an extension of time, but the company had never requested an extension or accepted that the notice was valid. The local authority had reasonably pursued its statutory duty at the public expense and had succeeded. The order for the payment of the company's costs were set aside: *R. (on the application of Chiltern District Council) v Wren Davis Ltd* [2008] EWHC 2164 (Admin) Sir George Newman.

The court found it appropriate to make an order for costs which reflected the paying party's inappropriate unwillingness to negotiate and the fact that there had been a fabrication of documents. The paying party was ordered to pay the applicant's costs subject to detailed assessment if not agreed, less, after assessment, the sum of £20,000 (*Gil v Baygreen Properties Ltd (in liquidation)* [2004] EWHC 2029 (Ch), Nicholas Davidson Q.C).

Where failure to mediate was due to the attitudes taken on either side it was not open to one party to claim that the failure should be taken into account in the order as to costs. A party who agreed to mediation but then took an unreasonable position in the mediation was in the same position as a party who unreasonably refused to mediate. That was something which the court should take into account in its costs order (*Earl of Malmesbury v Strutt & Parker* [2008] EWHC 424 (QB) Jack J.).

A party should not be able to obtain a tactical or costs advantage where, in substance, the principles of a pre-action protocol had been complied with. In a case where the claimant had sent a letter of claim under the protocol containing a clear summary of the facts setting out the basis on which the claim was made and identifying the principal contractual terms and statutory provisions relied on and the nature of the relief sought, the defendant was held to be well aware, before the proceedings were commenced, what the nature of the claim was against it. The defendant had been given every opportunity to attend meetings, to discuss matters and to settle the dispute. When the claimant, who had been seeking a contribution from the defendant in respect of other proceedings, settled those proceedings, the defendant had sought an order for costs against the claimant on the basis that the pre-action protocol had not been fully complied with (*TJ Brent Ltd v Black & Veatch Consulting Ltd* [2008] EWHC 1497 (TCC) Akenhead J.).

Where a claimant sued a main contractor in respect of goods sold to a sub-contractor, subject to a retention of title clause, the claimant offered to submit to mediation which was rejected. The claim was for £70,000, the defendant made a Pt 36 payment of £6,000 and judgment was ultimately given for £387. The defendant sought an order for costs on the indemnity basis and the claimant argued there should be no order for costs for the period during which the defendant had failed to provide the claimant with information on its payments to the sub-contractor and because of the refusal to mediate. The court held that the defendant's rejection of mediation was unreasonable, as there would have been reasonable prospects of resolving the matter, at least until the Pt 36 payment. The court held that the defendant's conduct deprived the parties of the opportunity to resolve the case at minimal cost. The claimant was granted its costs up to a particular date and the defendant its costs thereafter: *P4 Ltd v Unite Integrated Solutions Plc* [2006] EWHC 2924, Ramsey J.

Where solicitors were defendants to a Pt 20 claim and declined to engage in mediation three weeks prior to trial, the solicitors, who were successful at the trial, were not deprived of any part of their costs. The court held that it was entirely reasonable for the solicitors not to participate in the mediation between the original claimant and defendant: *Société Internationale de Telecommunications Aeronautiques SC v Wyatt & Co (UK) Ltd* [2002] EWHC 2401, Park J.

In a case where a claimant successfully sued her solicitor and barrister for negligence, the solicitor was willing to settle the case before further costs were incurred, and urged the barrister to mediate. The claimant had made an offer of settlement but the barrister consistently refused to negotiate or enter into mediation and had valued the claim at a significantly lower figure than the settlement offer. By the time the matter reached trial considerable further costs had been incurred. The claimant recovered less than her offer of settlement and the solicitor submitted that the barrister should pay the whole of the claimant's costs after the date when the solicitor urged the barrister to mediate, because of the barrister's persistent refusal to negotiate or to enter into mediation. Although the court held that there was a strong possibility that a settlement could have been achieved close to the sum actually awarded had there been negotiation, the main issue was whether the barrister's view of his prospects was an unreasonable one, and whether the solicitor could demonstrate that this was so. Given the differing views of the claim, this was not demonstrated. It could not be right that, to avoid being vulnerable on costs, the defendant should always be prepared to pay more than the claim was worth, as that would enable claimants to put undue pressure on the defendant to settle at a higher figure than the claim merited: *Hickman v Blake Lapthorn and Fisher* [2006] EWHC 12 (QB), Jack J.

Other Conduct

44.3.13.2 Where a claimant was slightly injured in a road traffic accident in respect of which the court awarded £500 damages (£1,000 plus having been claimed) the court on appeal limited the claimant's costs recovery to the costs to which he would have been entitled had he not exaggerated the extent of his injuries. The defendant was accordingly ordered to pay the fixed costs permitted under CPR r.27.14. The judge then went on to award a further £1,000 under CPR r.27.14(1)(d) in respect of the unreasonable behaviour of the defendant including the manner in which he had driven his car prior to the collision and his wish that the case should proceed on the multi track: *Devine v Franklin* [2002] EWHC 1846 (QB), Gray J.

It behoves parties in litigation to be sensible about applications by the other side (e.g. an amendment application that ought to have been consented to) and not

unreasonably to refuse. The application to amend in the particular case had been made because the claimant had had to make it. It should not have been resisted, as demonstrated by the fact that the defendant ultimately consented. The defendant was ordered to pay the costs of the application: *La Chemise Lacoste SA v Sketchers USA Ltd* May 24, 2006, unrep., Ch D, Mann J. Where an application for interim injunctive relief was discontinued on undertakings given by the respondent, the first instance judge had erred, in principle, in awarding costs in favour of the respondent. The costs could have been avoided if the respondent had given a better response to the letter before action. Had the matter gone to a hearing, it was clear that the applicant would have been the winner: *Fox Gregory Ltd v Hamptons Group Ltd* [2006] EWCA Civ 1544.

The Court of Appeal has held that a judge was wrong to deprive a successful claimant of their costs, on the basis that the had not conceded any contributory negligence. The claimant had in fact succeeded to the extent of 80 per cent in a fully contested trial on liability. The issue of contributory negligence (which had been heard as a preliminary issue) was part of the trial of liability as a whole, and could not be regarded as a separate issue. The claimant's conduct did not fall within r.44.3(5), and it was not reasonable to condemn him for standing by his conviction that the defendant was wholly responsible (*Sonmez v Kebabery Wholesale Ltd* [2009] EWCA Civ 1386, October 22, 2009)

Where a party, who was ultimately successful, had persisted in pursuing an untenable position in the litigation the court found that the party ought reasonably to have negotiated a settlement, along the lines of the Tomlin order which was ultimately agreed, at a very much earlier stage. The successful party was awarded its costs up until an exchange of correspondence in which the defendants had accepted that the claimant would ultimately be successful. The claimant was ordered to pay the defendants' costs from the exchange of correspondence until the date of final settlement by Tomlin order (*Carlisle & Cumbria United Independent Supporters' Society Ltd v CUFC Holdings Ltd* [2008] EWHC 1783 (Ch) Peter Smith J.).

Where the trial judge awarded the successful defendant only 75 per cent of its costs on the grounds that the case was a test case, the Court of Appeal held that the grounds upon which the court could depart from the usual order was set out in r.44.3(4) and (5). The list is not exhaustive. It is wrong to deprive a successful defendant of part of its costs on the ground that the judgment might be of assistance to it in the future (*Pexton v The Wellcome Trust*, October 10, 2000, unrep., CA).

Where a defendant was granted permission to appeal, and the claimant subsequently made concessions and applied to amend its Particulars of Claim and invited the defendant to withdraw the appeal, the defendant still went ahead. The Court of Appeal held that taking into account the conduct of the parties, including the fact that the defendant incurred a great deal of costs not attributable to the point on which they succeeded, and that the claimant had made no offer as to costs when conceding, it was appropriate for the claimant to pay a modest amount of the defendant's costs. Arden L.J. stated that the parties ought to have informed the court at an early stage that there was no point in a full hearing, thereby enabling the court to direct that the matter of costs should be dealt with on paper by a single Lord Justice. Parties to appeal should note that the costs awarded by the court are likely to be reduced when they fail to keep one another and the court fully informed of pre-hearing developments rendering a hearing ineffective (*Red River UK Ltd v Sheikh* [2009] EWCA Civ 643).

Rule 44.3(6)—types of order

44.3.14 The rule sets out a list (which is not exhaustive) of orders which the court may make and r.44.3(7) provides that if the court is minded to make an order for costs relating to a distinct part of the proceedings the court should, if practicable, make an order for a proportion (i.e. a percentage) of another party's costs or costs from or until a certain date.

The Court of Appeal refused to alter a judge's rejection of a defendant's argument that an issue based order should be made reflecting the success of the defendant on a number of issues, because matters in the claim and counterclaim were inextricably intertwined and because of the defendant's conduct in contesting various items, in particular a claim for VAT in respect of which the judge found that one of the defendants had lied (*Boynton v Willers* [2003] EWCA Civ 904).

The Court of Appeal has held that a judge has a discretion to make an order for costs subject to a cap. In the particular case the judge was held to have exercised his discretion wrongly because the reason he gave for imposing a cap was proportionality

but proportionality was catered for by the costs orders he had made, all of which provided for the costs to be assessed on the standard basis. There were also additional matters in respect of which the judge was held to have acted incorrectly: *SCT Finance Ltd v Bolton* [2002] EWCA Civ 56; [2003] 3 All E.R. 434, CA.

Consideration of the relevant factors by a judge, when considering what form of order ought to be made in order properly to apply CPR r.44.3(7), will in most cases lead to the conclusion that an "issues based" order ought not to be made. Wherever practicable the judge should endeavour to form a view as to the percentage of costs to which the winning party should be entitled, or alternatively whether justice would be sufficiently done by awarding costs from or until a particular date only, as suggested by CPR r.44.3(6)(c). Whatever order for costs is made reasons should be given and may be given briefly in a judgment. It is the duty of the judge to produce a judgment which gives a clear explanation for the order: *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605; [2002] 1 W.L.R. 2409; *Verrechia v Commissioner of Police for the Metropolis* [2002] EWCA Civ 605; [2002] 3 All E.R. 385, CA.

In an unsuccessful claim for damages an order for costs was made on the indemnity basis in respect of allegations under the Human Rights Act 1998, whilst the remaining costs were ordered to be assessed on the standard basis. The court held that the Human Rights claim was a discrete issue in the proceedings, and there was sufficient clarity as to which costs were attributable to it, to treat it differently from the other costs: *Webster v Ridgeway Foundation School* [2010] EWHC 318 (QB), Nicol J. (Note that this decision appears to overlook r.44.3(7), which requires the court, if practicable, to make an order under (6)(a) a proportion of the other party's costs, or (6)(c) costs from or until a certain date only. The order under (6)(f) would be likely to cause great difficulty on detailed assessment.)

The court should be more ready than before CPR to make costs orders which reflect not merely the overall outcome of the proceedings but also the loss of particular issues. It was not necessary for the court to make an issues based order to achieve that result. Rule 44.3(7) makes this plain and the court will not be forced into making an issues based order rather than a percentage order by the failure of the parties to provide the court with sufficient information about costs to achieve the correct percentage: *Budgen v Andrew Gardner Partnership* [2002] EWCA Civ 1125; [2003] C.P. Rep. 8; *The Times*, September 9, 2002, CA. As to the correct approach to making an issue based costs order, the Court of Appeal accepted the principle that a claimant is entitled to put their case at its highest. There is however a distinction between putting the case at its highest and advancing a basis for relief on a basis that fails (especially if it is entirely unsupportable). There was no reason why the losing party should bear the costs in relation to an issue which simply could not succeed. With regard to ATE insurance the duty on those advising claimants which existed where public funding was the issue is no different in respect of proceedings brought under a CFA with ATE insurance. If a point is a bad one that should be the advice that those advising should give. There is an overriding duty to the court not to run unarguable points. It is certainly not an argument for an order that an opponent should bear all the costs of the successful party that some bad points needed to be run in order to obtain ATE insurance. The courts should not be slow to make a reduction in the costs that a successful party should recover if they form the view that bad points have been argued and lost: *Kew v Bettamix Ltd* [2006] EWCA Civ 1535.

Rule 44.3(6)(g) enables the court to order interest on costs to run from a date other than the date of judgment. The court has the power to reach a conclusion as to interest suiting the particular circumstances of the case: *Powell v Herefordshire Health Authority* [2002] EWCA Civ 1786; [2003] 3 All E.R. 253, CA. "In any event in principle there seems no reason why the court should not [award interest] where a party has had to put up money paying its solicitor and been out of the use of that money in the meanwhile" per Waller L.J. in *Bim Kemi AB v Blackburn Chemicals Ltd (Costs)* [2003] EWCA Civ 889. The court has expressed the view that the appropriate dates, when seeking to measure the extent to which a party has been out of pocket, would be the dates on which the invoices were actually paid. The appropriate time for interest to stop would be when interest on costs is replaced by judgment interest: *Douglas v Hello Ltd* [2004] EWHC 63 (Ch) Lindsay J.

Where proceedings were compromised, the receiving party applied, some three years after the Consent Order, for an order that the costs judge dealing with assessment should be directed that the party's entitlement to costs included preparation for trial as there was no prospect that the claim would be revived. The judge, at first

instance, directed that an order be drawn up whereby the costs judge was directed to carry out the assessment using the guidance set out in six specified paragraphs in the judgment. On appeal the Court of Appeal thought it highly debateable whether the judge had any jurisdiction to hear the application. Even if the judge had jurisdiction, he should not have exercised it as the matter would ordinarily go before a costs judge for detailed assessment. In addition, the judgment was extremely diffuse and it was unlikely that any costs judge would be able to follow the directions. As a matter of practice it was undesirable for judges to enter into this form of order. Any order made at the end of a judgment should stand on its own: *Richardson Roofing Company Ltd v Ballast plc; Comp Co Holdings plc; The Colman Partnership* [2009] EWCA Civ 839.

In 1998 the Judgments Act 1838 was amended so as to give the court a discretion with regard to interest (see *Powell v Herefordshire*, above and *Douglas v Hello*, above). The combined effect of the Act and the Rules is that, save where a rule or Practice Direction otherwise provides, interest will run from the date the judgment is given, unless the court orders otherwise. There is nothing in the Statute or in the Rules which indicates that a different order is only to be made in exceptional circumstances. The Rules expressly indicate that the court may order interest to begin from a date before judgment, and the circumstances in which it is likely to do so include cases where substantial sums have been paid in costs before the judgment is given.

> "The most important criterion is that any order should reflect what justice requires. The primary purpose of an award of interest on a debt, damages or costs is to compensate the recipient for the fact that he had been precluded from obtaining a return on the money which he has had to expend on costs and has thus been out of pocket—*London Chatham and Dover Railway Company v South Eastern Railways Company* (1893) A.C. 429 at 437; *Earl of Malmsbury v Strutt and Parker* [2008] EWCA 616 (QB) paras [5] and [6]" *Fattal v Walbrook Trustees (Jersey) Ltd* [2009] EWHC 1674 (Ch) Christopher Clarke J.

Binding authority confirms that interest at the judgment debt rates applies to damages from the date of assessment, and applies to costs from the date of the costs order. The court has no more power directly to adjust that rate as payable under a costs order than it does to vary the rate payable under any other judgment. Under r.44.3(6)(g) the court has power to order that a paying party must pay interest on costs from or until a certain date, but there is no power to alter the statutorily prescribed interest rate (*Schlumberger Holdings Ltd v Electromagnetic GO Services AS* [2009] EWHC 773 (Ch) Mann J.)

Family proceedings

44.3.14.1 In ancillary relief proceedings the wife applied for an order that the husband should transfer shares in a company run by him. The application was opposed by the husband and his business partner. Shortly before the trial the wife substituted a claim for periodical payments. The husband sought his costs for the time, effort and money devoted to the issues which should never have been raised. The court held that the application for transfer of shares was misconceived, and that the husband should not have to suffer the consequences of that application. An issue-based costs order was appropriate. The change of position by the wife required a complete change in focus for the husband, and led to a significant amount of additional work being carried out. Under the Family Proceedings Rules 1991 r.2.71(4) the starting point was that costs lay where they fell. The wife was ordered to pay 20 per cent of the husband's unassessed costs in order to avoid the expense and delay of detailed assessment. An order was made under CPR r.44.3(6)(b) and 3(7) that the wife should pay a stated amount: *M v M (Costs)* [2009] EWHC 1941 Fam; [2010] 1 F.L.R. 256, Elena King J.

Rule 44.3(8)—payment on account

44.3.15 The court has power to order an amount to be paid on account of costs even though the costs have not been assessed. Quite apart from the specific rule, the court has an inherent jurisdiction to control its own processes. Rule 3.1(1) expressly preserves the inherent powers of the court. Where the paying party had refused to comply with orders requiring them to make interim payments towards the receiving party's costs the costs judge had the power to make an unless order, stipulating that unless the order was complied with, the receiving party would be entitled to the full amount of the costs sought. In the particular case the paying party had served points of dispute. The court therefore ordered detailed assessment, but the paying party was not permitted to participate further, unless the payments already ordered were made

together with interest: *Days Healthcare UK Ltd v Pihsiang Machinery Manufacturing Co Ltd* [2006] EWHC 1444 (QB); [2006] 4 All E.R. 233, Langley J.

In a claim for professional negligence the defendant issued a Pt 20 claim against another company. The original claim was struck out because the claimant had failed to comply with an unless order, and the Pt 20 claim was discontinued, the defendant agreeing to pay the third party's costs. The court held that the claimant should pay the defendant's costs, and also the costs incurred by the defendant against the third party. The defendant was entitled to an interim payment of just under 50 per cent of its own costs incurred in both sets of proceedings. The general rule was that, absent exceptional circumstances, payment should be made at the end of a case, but before detailed assessment, particularly where there resources of the party paying the costs must be limited. The defendant was also entitled to an interim payment of the amount paid to the third party in settlement of its costs. Those costs had been the subject of detailed negotiations, and the costs paid by the defendant might well have proved irrecoverable in practice due to the claimant's financial difficulties, it was therefore in the defendants' interests to keep them to a minimum: *German Property 50 SARL v Summers-Inman Construction and Property Consultants LLP* [2009] EWHC 2968 (TCC); [2010] B.L.R. 179, Coulson J.

The Court of Appeal held that in determining whether or not to make an order on account under CPR r.44.3(8) (or an interim costs certificate and r.47.15) it was an important consideration that a party should not be kept out of the monies, which would almost certainly be demonstrated to be due, longer than was necessary. This is not a presumption but a factor which one would expect to carry significant weight with a judge. It must, however, be considered with all other material factors which will vary from case to case. There is a wide discretion afforded by both r.44.3(8) and r.47.15, which is to be exercised in the circumstances of the particular case and all material factors have to be weighed in the balance. Delay in making application for detailed assessment is a proper consideration for the judge to take into account. There is always some risk that even the judge's conservative assessment may turn out to be wrong, and the fact that the successful party has not been actively pursuing matters is a proper factor to which the judge can give weight. This is particularly so where the court is satisfied that the paying party will ultimately be good for any sums, together with interest, that are likely to be awarded. The receiving party is not then significantly prejudiced by the delay in payment: *Blackmore v Cummings* [2009] EWCA Civ 1276; [2010] 1 W.L.R. 983, CA.

In *Crystal Decisions (UK) Ltd v Vedatech Corp* [2006] EWHC 3500 (Ch), December 6, 2006, unrep. (Patten J.), where the defendant failed to pay the costs of an interim application (which had been summarily assessed), the judge, exercising powers derived from the court's inherent jurisdiction, granted the claimant's application for an order to the effect that, unless the amount due was paid, (1) the defendant be debarred from defending the proceedings, and (2) the claimant be entitled to enter judgment. The judge noted that, as the defendant was not resident within the jurisdiction, enforcement remedies available to the claimant were of limited value. The judge held that, unless there was some overwhelming consideration falling within art.6 of the ECHR, the normal consequences of a failure to comply with an interim costs order should be an order of the type applied for. In refusing the defendant permission to appeal the Court of Appeal expressed the opinion that this holding could be supported where there is no other way of ensuring that the order was satisfied; see *Crystal Decisions (UK) Ltd v Vedatech Corp* [2008] EWCA Civ 848, June 10, 2008, unrep., CA and *Oil & Minerals Development Corp v Sajjad* April 4, 2002, unrep. (and see para.3.4.4).

Where the resources of a party ordered to pay costs are limited, the court should not force the receiving party to engage in detailed assessment proceedings before receiving any money at all since this would merely require the expenditure of further money on a process which would produce no return. The judge awarded an interim payment in an amount which he regarded as the absolute bare minimum that the defendants could hope to recover on a detailed assessment: *Allason v Random House UK Ltd* [2002] EWHC 1030 (Ch), Laddie J.

The discretion to make *pre-emptive costs orders* (now called protective costs orders), even in cases involving public interest challenges, should be exercised only in the most exceptional circumstances. Necessary conditions were that the issues raised were truly ones of general public importance and that the court had sufficient appreciation of the merits of the claim that it could conclude that it was in the public interest to make the order. The court also had to have regard to the financial resources of the applicant

and the respondent and the amount of costs likely to be in issue: *R. v Lord Chancellor, Ex p. Child Poverty Action Group*; *R. v DPP, Ex p. Bull* [1999] 1 W.L.R. 347, Dyson J.

The criteria set out by Dyson J. in *R v Lord Chancellor, Ex p. Child Poverty Action Group* above, were held to be consistent with the overriding objective by Richards J. in *R. v Hammersmith & Fulham LBC Ex p. CPRE London Branch*, October 26, 1999, unrep. See the note at 48.15.7 for Court of Appeal re-statement of these criteria. The court granted such an order to a party representing all policy holders opposed to a scheme put forward by the claimant insurance company for the reorganisation of their insurance business. The application was granted on the basis that the opposing party was entitled to the order because their position was analogous with that of a shareholder bringing a derivative action and they were performing a service enabling the claimant's scheme to be fully tested in court. The court retained a discretion to disallow costs unreasonably incurred since the court retained a discretion to disallow costs unreasonably incurred in opposition: *AXA Equity & Law Life Assurance Society Plc (No.1), Re*, [2001] 2 B.C.L.C. 447, Evans-Lombe J.

In general an interim order for payment of costs prior to assessment should be made, but the court has to take into account all the circumstances in the particular case including the unsuccessful party's wish to appeal; the relative financial position of each party; the court's overriding objective to deal with cases justly. Where it was necessary to wait for a detailed assessment, making an order for a lesser amount which the successful party would almost certainly recover was a closer approximation to justice. Having considered the circumstances and the conduct of the parties the court came to the view that the successful claimant was likely to recover only 40 per cent of its costs, this figure was further reduced by the court in arriving at an interim payment figure: *Mars UK Ltd v Teknowledge Ltd (Costs)* [1999] 2 Costs LR 44; [1999] 2 Costs L.R. 44, Jacob J. The decision in *Mars* was accepted in *Beach v Smirnov* [2007] EWHC 3499 (QB) Ouseley J. The judge stated that the principle which must underlie the making of an interim payment is that set out in *Mars*. The principle is that the claimant is entitled to something by way of costs and they should be paid it without delay. The fact that there may be difficulties of assessment does not absolve the judge from the need to consider whether the justice that comes from not keeping somebody out of the money to which they are entitled, can only be achieved at too high a price to a defendant, putting them in a position where they have paid more than due. Justice requires that a sum of costs be paid provided there can be a reasonable assessment of the sum that is very likely to be awarded (*Dyson Ltd v Hoover Ltd* [2003] EWHC 624 (Ch) Laddie J. not followed).

Whilst the decision in *Mars UK v Teknowledge Ltd* might be the starting point after a full trial, where the court has not heard the trial, and has not had the opportunity to assess the issue of proportionality, and has no detailed knowledge of the nature and strength of the arguments, there should be no presumption that an order for an interim payment should be made (and no presumption against). The provisions concerning the making of an interim costs certificate under CPR r.47.15 meant that a costs judge's power to order an interim payment had to be preceded by steps that put them in a position to make an accurate assessment similar to that of the judge at the end of a trial. The court held that the sums involved in the case were too large to justify an attempt at assessment without full knowledge of the issues. It was preferable for a costs judge to consider the question of costs: *Dyson Appliances Ltd v Hoover Ltd* [2003] EWHC 624 (Ch); *The Times*, March 18, 2003, Laddie J.

In a case in which the successful claimant submitted that summary assessment was appropriate the defendant argued that in the absence of agreement between the parties it should be possible to have a detailed assessment of the costs in dispute provided that a substantial payment on account was ordered. On the facts the judge found that there appeared to be no grounds for reducing the claimant's costs and ordered the majority of the costs to be paid on account, the balance to be subject to detailed assessment: *Mabey & Johnson Ltd v Ecclesiastical Insurance Office Plc (Costs)* [2000] C.L.C. 1570, Morrison J. The court has held that it is right, in principle, for a payment on account to be ordered in judicial review proceedings before the Administrative Court: *R (London Oratory School) v The Schools Adjudicator* [2004] EWHC 3014 (Admin) Jackson J.

The court has power to order interest on an interim payment of costs. The power resides either in CPR r.52.10(2)(d) or in CPR r.44.3(6)(g) read in the context of r.44.3(8): *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWCA Civ 133; 118 Con. L.R., CA.

Rule 44.3(9)—set off

44.3.16 The Court of Appeal in *Lockley v National Blood Transfusion Service* [1992] 1 W.L.R. 492, CA stated the following propositions:

1. A direction for the set-off of costs against damages or costs to which a legally aided person has become or becomes entitled in the action may be permissible.
2. The set-off is no different from and no more extensive than the set-off available to or against parties who are not legally aided.
3. The broad criterion for the application of set-off is that the claimant's claim and the defendant's claim are so closely connected that it would be inequitable to allow the claimant's claim without taking into account the defendant's claim. As it has sometimes been put the defendant's claim must in equity impeach the claimant's claim.
4. Set-off of costs or damages to which one party is entitled against costs or damages to which another party is entitled depends upon the application of the equitable criterion set out in the judgment. It was treated by May J. in *Currie & Co v Law Society* [1977] Q.B. 990, 1000, as a "question for the courts discretion". The court did not think that a set-off of damages against damages could be properly be described as a discretionary matter, nor that a set-off of costs against damages could be so described.
5. If and to the extent that a set off of costs awarded against a legally aided party against costs or damages to which the legally aided party is entitled cannot be justified as a set off:
   (i) the liability of the legally aided party to pay the costs awarded against it will be subject to s.17(i) of the Legal Aid Act 1988 [now s.11 of the Access to Justice Act 1999] and reg.124(1) of the Civil Legal Aid (General) Regulations 1989 [now reg.9 of the Community Legal Service (Costs) Regulations 2000]; and
   (ii) the s.16(6) of the 1989 Act charge [now s.10(7) of the 1999 Act] will apply to the costs or damages to which the legally aided party is entitled.

The Court of Appeal subsequently examined the propositions set out in *Lockley* above in *R. (Burkett) v London Borough of Hammersmith & Fulham* [2004] EWCA Civ 1342. The court found that s.51 of the Senior Courts Act 1981 provides quite simply that: "subject to the provisions of this and any other enactment and to Rules of Court" the costs of and incidental to all proceedings in the High Court shall be in the discretion of the court. A set off as to costs is therefore essentially discretionary in nature, a discretion only to be withheld from a judge by specific rules of law (paras 41 and 42).

Arguments that the order for set off of costs lacked mutuality, or that one set of costs failed to impeach a claim to the other set of costs, were drawn from the jurisprudence of equitable set off as a defence to an action brought. The arguments were irrelevant (except possibly as a guide to the judge to the exercise of discretion) to the discretionary jurisdiction as to costs (para.47).

In relation to arguments concerning s.11 of the Access to Justice Act 1999 a set off does not place the person against whom it is asserted under any obligation to pay, but merely reduces the amount that they can recover. The court did not agree that the approach was artificial or contrary to the spirit of costs protection. Costs protection was not an absolute right but something carefully moderated by specific statutory provisions to which the judges in earlier cases (including *Lockley*) had made careful reference. If there was any artificiality it was for this principle to be introduced into a case where it was not the assisted party but their lawyers who were seeking to resist the set off (para.50).

In respect of an argument that the statutory provisions demonstrated that an order for costs was in favour of the LSC; that the LSC was the counterparty to it; that the defendant owed the costs only to the LSC; and thus that the order could not be set off against a liability of the applicant to the LSC the court found that this was not the case. On their very face the provisions emphasise that the costs are recovered by the client and that the costs order is made in favour of the client. This reflects the long standing principle that however litigation is funded, the party not the funder remains in control of the action and is to be treated by the court no differently from a non funded party (see s.22(4) Access to Justice Act 1999). Secondly, Parliament has provided that there should be special arrangements for the management of orders made in favour of assisted persons, not only payments of costs but also payments of damages. It had never been suggested that because of this provision damages also belonged to the LSC. If that were indeed the case there would be no need for the statutory charge. The fact that a funder has made a provision with their principal as to the disposition of that principal's recovery cannot affect the nature of the relationship between the principal

and the other party to the litigation in which the principal takes part, even where those arrangements are created by the statutory rules governing public funding rather than by private treaty (paras 53, 54 and 55).

The court has an inherent jurisdiction to order a set off of costs. Where it was not a case of normal common law equitable or statutory set off, any strict rules governing those forms of set off did not apply. There was no analogy with the traditional approach of the court to set off which might prejudice a solicitor's lien because in the particular case there was a crystallised debt and an outright assignment rather than a mere lien: *Izzo v Philip Ross & Co*, [2002] B.P.I.R. 310, Neuberger J.

The court has confirmed that the position with regard to set off remains the same as it was before the introduction of the CPR. Whilst an assisted person remains protected against the making of enforceable orders for payment of costs, that protection is not available in respect of orders for costs to be used as a shield or set off (*Hill v Bailey* [2003] EWHC 2835 (Ch), Lightman J.).

Where the court made costs orders in two actions concerning a partnership dispute and an unfair prejudice petition against a company, in deciding the correct costs order it was necessary to consider what orders would have been made if the two actions had been dealt with separately. The court made findings as to what would have been the outcome in each case had they been dealt with separately. The court had not seen any bills of costs, and decided that it was not at all safe, where the costs on each side were very large, to carry out an exercise of set-off by reference to percentages of one side's costs against the other. It was instead appropriate to ascertain a percentage of each side's costs which was payable to the other, and leave the parties to turn those percentages into money amounts: *Amin v Amin* [2010] EWHC 827 (Ch), Warren J.

The Court of Appeal made an order for costs in favour of the claimant against the defendants in respect of the costs of appeals, and against the claimant in favour of the defendants in respect of the costs of an application to strike out and to adduce fresh evidence. The order contained no provision for set-off. The defendants had already had to provide security for the appeal costs by bank guarantee which would be effective only if the final costs certificate were issued by December 31, 2009. The costs judge completed the detailed assessments, but adjourned the question of set-off. The claimant applied to the Court of Appeal for a declaration that there was no provision in the original order for set-off, and that the final certificate should be issued forthwith. That application was dismissed, the court having no jurisdiction to grant the declaration sought, i.e. as to the true meaning of its own orders. It was not necessary for set-off to be provided for in the court's order, as that was a matter which the costs judge could dealt with. The costs judge has power to grant a certificate for an outstanding balance, which can result from the process of set-off pursuant to r.44.3(9), similarly, under r.47.16. The court indicated that the costs judge could be invited to issue a final certificate on the claimant's undertaking to pay into court the sums paid by the bank, to await the final decision on set-off. (In the event the costs judge decided the issue of set-off in sufficient time for the claimant to obtain the amount due from the bank under the guarantee: *Dadourian Group International Inc v Simms* [2009] EWCA Civ 1327.)

Costs orders relating to funding arrangements[1]

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

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

(2) At the conclusion of the proceedings, or the part of the proceedings, to which the funding arrangement relates the court may—

(a) make a summary assessment of all the costs, including any additional liability;

[1] Introduced by the Civil Procedure (Amendment No.3) Rules 2000 (SI 2000/1317).

(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)

Editorial note

44.3A.1 Because it was felt that disclosure of full details of funding arrangements, particularly the percentage success fee in a conditional fee agreement, was prejudicial, the rules provide for limited information to be given to opposing parties until the final assessment (summary or detailed) is made. The rule provides that the court will not assess any additional liability until the conclusion of the relevant part of the proceedings. At that point the court may carry out a summary assessment of all the costs, make a summary assessment of the base costs only and order a detailed assessment of the additional liability, or make an order for detailed assessment of all the costs. For a case in which the judge assessed the additional liability (a success fee under a CFA) and ordered detailed assessment of the claimant's costs in relation to liability, see *Burton v Kingsley* [2005] EWHC 1034 (QB) Richards J.

See note on *Times Newspapers Ltd v Burstein* at 47.14.3.

Summary assessment

44.3A.2 When the court makes a summary assessment during the course of the proceedings the judge should state separately the amount allowed in respect of solicitors' charges, counsels' fees and other disbursements. This is so even though any additional liability is not at that stage assessed. The reason for this is that when the final assessment takes place it will be necessary to identify the total figures allowed to solicitors and counsel in order that any percentage increase (which may be different for solicitors and counsel) can be applied.

Recoverability of success fees and insurance premiums

44.3A.3 For notes on these and related topics see Vol.2, para.7A–62 et seq.

Limits on recovery under funding arrangements[1]

44.3B **44.3B—(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,

[1] Introduced by the Civil Procedure (Amendment No.3) Rules 2000 (SI 2000/1317) and amended by the Civil Procedure (Amendment No.2) Rules 2009 (SI 2009/3390).

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.)

Effect of rule

44.3B.1 The rule sets out the limits on recovery under the funding arrangements. Any proportion of the percentage increase in a conditional fee agreement which relates to the fact that payment of fees and expenses is delayed is not recoverable. In relation to provision made by a membership organisation, no more than the cost of a premium of an insurance policy covering the risk of having to pay the costs of other parties to the proceedings is recoverable. Recovery of additional liability is not possible for any period where the party has failed to provide information about a funding arrangement. For further discussion of these topics see Vol.2, para.7A–55 et seq.

Relief from sanction

44.3B.2 Where there has been a failure to disclose, the application for relief from sanctions should be made as soon as the failure is discovered. If the fees recoverable by counsel are likely to be affected by the failure, counsel must also be given notice of the application for relief. Counsel is entitled to be heard on the solicitor's application. CPR r.3.9 sets out the circumstances which court may consider on an application to grant relief from a sanction. Where the paying party had from the outset the information to which it was entitled, in relation to funding arrangements, the court found that there was no prejudice to that party from breaches of the Practice Direction (no formal notice had been given) and the receiving party was entitled to relief from the sanction provided for by r.44.3B(1(c) and was not to be deprived of the opportunity, in principle, to recover the agreed success fee: *Montlake v Lambert Smith Hampton Group Ltd* [2004] EWHC 1503 (Comm), Langley J.

Relief from sanctions should not be granted lightly and any party who fails to comply with the CPR runs a significant risk that they will be refused relief. Thus, if a party does not have a good explanation, or the other side is prejudiced by their failure, relief from sanctions will usually be refused. It is vitally important to the administration of justice that the rules of procedure are observed (*Supperstone v Hurst* [2008] EWHC 735 (Ch) Floyd J.).

Orders in respect of pro bono representation[1]

44.3C **44.3C—(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

[1] Introduced by the Civil Procedure (Amendment) Rules 2008 (SI 2008/2178).

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.

Editorial note

44.3C.1 Section 194 of the Legal Services Act 2007 makes provision for the recovery of costs in pro bono cases from October 1, 2008. The court is enabled to make an order for costs against an unsuccessful opponent of a litigant who has been represented pro bono. The costs awarded will not be payable to the litigant's legal representatives but to a charity, The Access to Justice Foundation, whose objectives are to receive and distribute financial resources to be utilised in helping to provide pro bono legal advice or assistance to those who need it most, e.g., through advice centres and law centres.

Section 194 sets out the criteria for making an order (see para.9B–550). Such an order may be made if one of the parties' legal representatives was not acting pro bono but an order may not be made against a party who has been wholly represented pro bono or with LSC funding. Rule 44.3C sets out the procedure in respect of orders in respect of pro bono representation. Consequential amendments have been made throughout Pts 43 to 47 to deal with the new situation. There have also been consequential amendments to the Costs Practice Direction Pts 4, 5 and 6 and a new s.10A has been inserted. The rules relating to the assessment of costs remain the same, although it is expected that summary assessment will be the norm in pro bono cases.

Mr Jeremy Morgan Q.C., writing in The Law Society Gazette of November 13, 2008, suggests that where there is a series of costs orders going either way, if the first order is made in favour of the Foundation, and the second in favour of the opponent, it will not be possible to direct a set-off of these orders as they lack the mutuality essential for ordering set-off as a later court has no general power to revoke an earlier order. Both will stand and be enforceable. He suggests that there is an obvious unfairness about such a result, and that the solution is to invite the court in pro bono cases to reserve costs until the trial or other final hearing, preferably with a note on the court file to indicate the order which would have been made but for this problem. The court conducting the final hearing can then make a single order one way or the other which reflects the justice of the case overall, including the interlocutory successes and failures.

The Pro Bono Costs regime

44.3C.2 For guidance on the operation of the Pro Bono Costs regime see para.48.15.

Basis of assessment[1]

44.4 **44.4—(1) Where the court is to assess the amounts 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, the amount of the costs to be allowed in respect of any such business which falls to be assessed by the

[1] Amended by the Civil Procedure (Amendment No.3) Rules 2000 (SI 2000/1317).

court will be decided in accordance with those general orders rather than this rule and rule 44.5.

Editorial note

44.4.1 The test to be applied under each basis is whether or not the costs have been reasonably incurred or are reasonable in amount. On the standard basis the additional test of proportionality is imposed and the court will only allow costs which are proportionate to the matters in issue. Rule 44.5 sets out the factors which the court must take into account in deciding the amount of costs.

Where the assessment is on the indemnity basis proportionality is not mentioned in the rule. The overriding objective imports proportionality into all proceedings.

Proportionality has always been a target which the courts should aim at. Case management powers will allow a judge to exercise the powers of limiting costs either indirectly or even directly so that they are proportionate to the amount involved: per Sir Christopher Staughton, *Griffiths v Solutia UK Ltd* [2001] EWCA Civ 736.

As to proportionality see para.44.4.3 and s.11 of the Costs Practice Direction.

Rule 44.4(2)—proportionality

44.4.2 The Court of Appeal has given guidance on proportionality. The court stated that the requirement of proportionality now applies to decisions as to whether an order for costs should be made and to the assessment of costs which should be paid when an order has been made. The court suggested that the considerations to be taken into account by the court when making an order for costs under r.44.3 are "redolent of proportionality".

Because of the central role that proportionality should have in the resolution of civil litigation it is essential that courts attach the appropriate significance to the requirement of proportionality when making orders for costs and when assessing the amount of costs.

> "…what is required is a two stage approach. There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which Part 44.5(3) states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the costs for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item was reasonable. If, because of lack of planning or due to other causes, the global costs are disproportionately high, then the requirement that the costs should be proportionate means that no more should be payable than would have been payable if the litigation had been conducted in a proportionate manner. This in turn means that reasonable costs will only be recovered for the items which were necessary if the litigation had been conducted in a proportionate manner."

The court expressed the view that costs judges are well equipped to assess which approach a particular case requires. In a case where proportionality is likely to be an issue a preliminary judgment as to the proportionality of the costs as a whole must be made at the outset. This will ensure that the costs judge applies the correct approach to the detailed assessment.

> "In considering that question the Costs Judge will have regard to whether the appropriate level of fee earner or counsel has been deployed, whether offers to settle have been made, whether unnecessary experts had been instructed and the other matters set out in Part 44.5(3). Once the decision is reached as to proportionality of costs as a whole, the judge will be able to proceed to consider the costs, item by item, applying the appropriate test to each item."

In considering what was necessary a sensible standard of necessity has to be adopted. This is a standard which takes fully into account the need to make allowances for the different judgments which those responsible for litigation can sensibly come to as to what is required. The danger of setting too high a standard with the benefit of hindsight has to be avoided. The threshold required to meet "necessity" is higher than that of "reasonable" but it is still a standard that a competent practitioner should be able to achieve without undue difficulty. When a practitioner incurs expenses which are reasonable but not necessary they may be able to recover the fees and disburse-

ments from their client but the extra expense which results from conducting litigation in a disproportionate matter cannot be recovered from the other party.

In deciding what is necessary the conduct of the other party is highly relevant. A party who is unco-operative may render necessary, costs which would otherwise be unnecessary and it is acceptable that they should pay the costs for the expense which they have made necessary.

Dealing with the situation where a claimant recovers significantly less than they have claimed the court stated that the following approach should be followed:

> "Whether the costs incurred were proportionate should be decided having regard to what it was reasonable for the party in question to believe might be recovered, thus:
>
> (i) the proportionality of the costs incurred by the claimant should be determined having regard to the sum that it was reasonable for him to believe that he might recover at the time he made his claim;
>
> (ii) the proportionality of the costs incurred by the defendant should be determined having regard to the sum it was reasonable for him to believe that the claimant might recover should his claim succeed.
>
> This is likely to be the amount that the claimant has claimed, for a defendant will normally be entitled to take a claim at its face value.
>
> The rationale for this approach is that a claimant should be allowed to incur the cost necessary to pursue a reasonable claim but not allowed to recover costs increased or incurred by putting forward an exaggerated claim and a defendant should not be prejudiced if he assumes the claim which was made was one which was reasonable and incurs costs in contesting the claim on this assumption."

Home Office v Lownds [2002] EWCA Civ 365; [2002] 1 W.L.R. 2450; [2002] 4 All E.R. 775, CA.

Lord Scott of Foscote, dealing with an appeal relating to a freezing injunction, stated:

> 39. "… I think it needs to be understood that the difference between costs at the standard rate and costs on an indemnity basis is, according to the language of the relevant rules, not very great.…It is difficult to see much difference between the two sets of criteria, save that where an indemnity basis has been ordered the onus must lie on the payer to show any unreasonableness. The criterion of proportionality, which applies only to standard basis costs, seems to me to add very little to the reasonableness criterion. The concept of costs that were unreasonably but proportionately incurred, or are unreasonable but proportionate in amount, or vice versa, is one that I find difficult to comprehend." *Fourie v Le Roux* [2007] UKHL 1.

It is not clear from the opinions whether the judgment of Lord Woolf in *Lownds v Home Office* [2002] EWCA Civ 365; [2002] 1 W.L.R. 2450; [2002] 4 All E.R. 775 was brought to the attention of their Lordships.

The application of the decision in *Home Office v Lownds* (above) has been considered by Morland J.:

> 28. "… I do not accept that if a Costs Judge has ruled at the outset of a detailed assessment that the bill as a whole is not disproportionate he is precluded from decided that an item or a number of items are or appear disproportionate having regard to the 'matters in issue'.
>
> …
>
> 30. … The effect of a preliminary finding of disproportionality is like unto traffic lights at red. The receiving party will then face a stringent test to justify with regard to each item that it has been 'proportionately and by a sensible standard necessarily incurred:' and 'proportionate and reasonable in amount'.
>
> …
>
> 32. A preliminary finding of disproportionality must not be regarded as penalising the receiving party in terms of the amount ultimately awarded because the overriding objective requires that a case is dealt with justly and fairly.
>
> 33. The preliminary judgment of proportionality determines the manner of the detailed assessment. It does not determine the final sum payable to the receiving party but a finding of disproportionality does entail the receiving party being put to a stringent test the duel test of sensible necessity and reasonableness of amount for each item … In the unlikely event that a Costs Judge at the initial stage is unable to say whether the bill viewed as a whole is proportionate or disproportionate he will be obliged to carry out a detailed assessment applying the dual test.

…

37. … The Court of Appeal never envisaged that a Costs Judge before giving a preliminary judgment on proportionality of the costs as a whole would plough through in detail this gargantuan mass of material.

38. In my judgment even in very complex group litigation an experienced Costs Judge if provided with succinct skeletons of the parties contentions beforehand should be able to determine overall proportionality within an hour or less …"

The court went on to state that in considering whether the costs claimed were proportionate it would be wrong to leave out of account pre-CPR costs since they must form part of the global view. The judge concluded:

"54. … If certain facets of the bill of costs strike the judge as being disproportionate he is entitled … to rule that the bills as a whole fail the proportionality test and carry out the detailed assessment on the basis of the dual test. Even if the Costs Judge has reached the preliminary view that the bill as a whole is proportionate, in my judgment that preliminary view does not disentitle the Costs Judge from concluding that certain items appear disproportionate and applying the dual test of sensible necessity and reasonableness to that item."

Giambrone v JMC Holidays Ltd (formerly t/a Sunworld Holidays Ltd) (Costs) [2002] EWHC 2932; [2003] 1 All E.R. 982.

The decision in Lownds (above) requires the costs judge to undertake a two stage process, firstly to assess whether the costs overall are proportionate and second to proceed to assess proportionality and reasonableness on an item by item basis. When giving a ruling it is not imperative for the costs judge to go through the items in r.44.5 as a check list: *Ortwein v Rugby Mansions Ltd* [2003] EWHC 2077 July 28, 2003 (Ch), Lloyd J.

In Patent proceedings the court was required to determine costs arising. The claimant had succeeded in revoking the Patent in issue but was also forced to revoke two of its own Patents which were the subject of an undefended attack by the defendant. The claimant's costs totalled £6 million and the defendants' £1.6 million. The defendants submitted that the claimant's costs should be kept at the same level as the defendants' costs. The court found that the claimant's expenditure was entirely disproportionate to what had been at stake. The claimant had repeatedly asserted that the issues had no real commercial significance and there was accordingly no justification for the costs rising above that which would commonly be expected for an action of this nature. The judgment of the court amounted to a finding of disproportionality and the costs judge was directed to assess the costs on an item by item basis and to allow the items claimed only if they were necessary and reasonable. *Research in Motion UK Ltd v Visto Corporation* [2008
EWHC 819 (Ch), Floyd J.

Rule 44.4(3)—costs on the indemnity basis

44.4.3 The Court of Appeal declined to give guidance to judges intending to make orders for costs on the indemnity basis. There was an infinite variety of situations that might gobefore a court justifying the making of such an order. The court could do no more than draw the judge's attention to the extensive width of the discretion provided in CPR Pt 44. Issues of costs ought to be left to a judge's discretion following the rules provided in the CPR. The words of the CPR should not be replaced or supplemented with guidance notes from the Court of Appeal. The making of a costs order on the indemnity basis would be appropriate in circumstances where the facts of the case and/or the conduct of the parties was such as to take the situation away from the norm: *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Ham Johnson* and *Betesh & Co v Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 879. Following *Excelsior Commercial and Industrial Holdings* it is appropriate to award costs on the indemnity basis where the conduct of a party has taken the situation away from the norm. It is not always necessary to show deliberate misconduct, in some cases unreasonable conduct to a high degree would suffice. The claimant's refusal of two reasonable offers to settle would have been enough in itself to warrant an order on the indemnity basis (*Franks v Sinclair (Costs)* [2006] EWHC 3656 (Ch) David Richards J.). A claimant who discontinued a defamation action was ordered to pay costs on the indemnity basis, the case having collapsed, and the claimant having refused all offers of settlement including any unreserved apology and payment of costs to date. The court held that the claimant's unreasonable pre-trial conduct was, on its own, sufficient to justify an order for costs on the indemnity basis. The claimant's conduct was both unreasonable, and,

to a high degree, out of the norm to justify the award of costs on the indemnity basis (*Noorani v Calver (No.2) (Costs)* [2009] EWHC 592 (QB) Coulson J.). The abandonment by defendants of their defence in proceedings was not of itself sufficient to take the consequent claim for costs out of the norm, so as to justify an award of costs on the indemnity basis. Placing too much weight on capitulation as a justification for costs on the indemnity basis was inconsistent with the overriding objective where issues between the parties would as a result be narrowed. The abandonment of issues was not something which the courts should discourage where parties could be adequately compensated for work done in anticipated preparation for defending or advancing issues by a standard costs order: *Catalyst Investment Group v Lewishon* [2009] EWHC 16 (Ch), Barling J. The judgment summarises earlier guidance in relation to when it is appropriate to grant costs to a successful party on the indemnity basis. Where the court is considering whether a losing party's conduct is such as to justify an order for costs on the indemnity basis, the minimum nature of the conduct required is, except in very rare cases, that there has been a significant level of unreasonableness or otherwise inappropriate conduct in its wider sense in relation to that party's pre-litigation dealings with the winning party, or in relation to the commencement or conduct of the litigation itself. In a case where a counterclaiming defendant alleged fraud which was shown to be deeply flawed from the very commencement of the counterclaim, and where the allegation rested on an assumption which was so improbable as to be far fetched, the court made an order for costs on the indemnity basis: *National Westminster Bank Plc v Rabobank Nederland* [2007] EWHC 1742 (Comm), Sir Anthony Colman. A losing claim where the claim had a solid basis and was not a frivolous one, and where the claimant's pre-action activity had not overstepped the mark, did not result in an award of costs on the indemnity basis. The claimant's expert evidence however, was deficient and led to unnecessary costs being incurred by the defendant. The court ordered that the costs incurred in respect of counsels' and solicitors' attendance on specific days, and the costs attributable to dealing with the expert evidence were to be assessed on the indemnity basis. *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 2531 (Comm) Christopher Clarke J. Following *Excelsior v Salisbury* the suggestion that an award of costs of an interlocutory application had to follow the event unless the matters specially set out in r.44.3(4) took the case outside the general rule was rejected: *Lifeline Gloves Ltd v Richardson* [2005] EWHC 1524, Ch, Pumfrey J.

In a case where the defendant's experts had not merely performed poorly as witnesses during the case, but had not addressed their responsibilities or conducted themselves properly as expert witnesses, the court held that the justice of the case was that the defendant should pay the claimant's costs, but that the costs attributable to dealing with the evidence of the defendant's experts should be assessed on the indemnity basis (*Williams v Jervis* [2009] EWHC 1837 (QB) Roderick Evans J. It is doubtful whether this order would make any practical difference on assessment, but if an argument did arise in relation to this item, it would require minute examination of the facts in order to establish exactly what costs were attributable to the defendant's evidence).

An order for indemnity costs does not enable a claimant to receive more costs than they have incurred; its practical effect is to avoid the costs being assessed at a lesser figure. Even on the indemnity basis the receiving party is restricted to recovering only the amount of costs which have been incurred (*Petrotrade Inc v Texaco Ltd* [2001] 4 All E.R. 86; [2002] 1 W.L.R. 947 (Note), CA). A party who has acted throughout on professional advice is not guilty of conduct such as to merit an award of indemnity costs. There is no sound reason why parties litigating on issues of costs should be more vulnerable to an order for costs on the indemnity basis: *Zissis v Lukomski* [2006] EWCA Civ 341.

When considering an application for the award of costs on the indemnity basis the court is concerned principally with the losing party's conduct of the case rather than the substantive merits of the position. The Guide to the Summary Assessment of Costs helps to clarify the distinction for the purposes of CPR Pt 44 between proportionality and reasonableness. Proportionality concerns the relationship of the costs claimed for such things as the amount of money at stake in the proceedings, the importance of the case, the complexity of the issues and the means of the parties. Whether the costs, proportionate or not, were reasonably incurred is therefore a different question. Although the two may overlap, the object of an indemnity costs order is to take proportionality out of the picture and to place on the paying party the burden of persuasion as to reasonableness: *Simms v Law Society* [2005] EWCA Civ 849; (2005) 155 N.L.J. 1124.

The fact that a substantial part of a claimant's case had failed at the stage of summary judgment did not warrant an award of indemnity costs. The giving of summary judgment against the party, who had a hopeless case, was itself the norm. The requirement of proportionality was a useful brake on the escalation of costs and should not be lightly removed from any assessment of costs. The claimant was ordered to pay 90 per cent of the defendant's costs on the standard basis: *Easy Air Ltd v Opal Telecom Ltd* [2009] EWHC 779 (Ch), Lewison J.

The Court of Appeal has held that it is incorrect for a judge to be guided by the many pre CPR cases. The award of costs on the indemnity basis is normally reserved to cases where the court wishes to indicate its disapproval of the conduct in the litigation of the party against whom the costs are awarded: *Reid Minty v Gordon Taylor* [2001] EWCA Civ 1723; [2002] 2 All E.R. 150, CA.

In group litigation where the defendants mounted a full frontal attack on medical evidence underpinning field research programmes which they themselves had helped to set up, the judge found that the defendants' experts, had lost intellectual and professional credibility. The court found that the decision to continue the challenge through the defendants' experts after the claimant's experts had completed their evidence amounted to unreasonable conduct of the litigation. Therefore on the generic medical issues it was directed that the defendants should pay the costs on the indemnity basis, whereas in respect of all other issues, in the cases where the claimants succeeded, costs should be on the standard basis: *The British Coal Respiratory Disease Litigation, Re*, January 23, 1998, unrep., Turner J. Where cross-examination of a claimant took the form of a totally uncalled for personal attack, the court made an order for costs on the indemnity basis in favour of the claimant for that portion of the trial, *Clark v Associated Newspapers Ltd* [1998] 1 W.L.R. 1558; *The Times*, January 28, 1998, Lightman J.

Where a party to litigation acted in a way that could be described as disgraceful or deserving of moral condemnation an order for costs on the indemnity basis could be made: *Wailes v Stapleton Construction & Commercial Services Ltd*; *Wailes v Unum Ltd* [1997] 2 Lloyds' Rep. 112, Newman J. Where claimants brought proceedings for an account of the defendant's dealings with the estate of the deceased and abandoned 9 out of 13 claims for damages during the course of the proceedings, the remainder of which were lost, it was held to be appropriate to order costs on the indemnity basis. *Mahmey Trust Reg v Lloyds TSB Bank Plc* [2006] EWHC 1782, Ch, Evans-Lombe J.

A judge was wrong to award costs on the indemnity basis against a claimant who had not acted improperly in availing themselves of the opportunity presented by statute to apply to the court. The claimant had made an application under the provisions of s.263 of the Insolvency Act 1986. The application had failed on the basis that the claimant had no sufficient interest to make the application. The Court of Appeal found the claimant had not acted improperly and that the costs should be on the standard basis; *Raja v Rubin* [2000] Ch. 274; [1999] 3 W.L.R. 606, CA.

If a judge considers that a party has acted unreasonably in connection with the litigation in breach of a direction of the court, it might be appropriate to make an order for costs on the indemnity basis against that party, or to exercise the power to award interest on damages at a much higher rate than usual. *Baron v Lovell* [2000] P.I.Q.R. P20; *The Times*, September 14, 1999, CA.

The decisions of the Court of Appeal in *Raja v Rubin* and *Baron v Lovell* (above) show that the court had been concerned with some part of the paying party's conduct of the litigation which merited the disapproval of the court. The usual order on the standard basis should be made unless there is some element of a party's conduct of the case which deserves some mark of disapproval. It is not just to penalise a party for running litigation which it has lost. Advancing a case which is unlikely to succeed or which fails in fact is not a sufficient reason for an award of costs on the indemnity basis: *Shania Investment Corp v Standard Bank London Ltd* November 2, 2001, unrep.

Failure by a claimant to send a letter before action to the defendant, or to give any other warning of the intention to commence proceedings resulted in an order for costs on the indemnity basis against the claimant. The court stated that the letter before action is at least as necessary under the CPR as under the former rules: *Phoenix Finance Ltd v Federation Internationale de L'Automobile* [2002] EWHC 1242 (Ch), Sir Andrew Morritt V.-C. A party who presented a petition to wind up a company without first presenting a statutory demand in circumstances, where the petitioner knew there was a serious dispute over the quality of the goods supplied, was ordered to pay the costs on the indemnity basis. The presentation of a petition in those circumstances was an

abuse of process (*Company (No.2507 of 2003), Re* [2003] EWHC 1484 (Ch)). A claimant who sought to "park" the proceedings, while attempting to negotiate a settlement, by pursuing the hopeless appeal was ordered to pay costs on the indemnity basis as the claimant's conduct was an abuse of process: *Sodeca SA v NE Investments Inc* [2002] EWHC 1700 (QB), Toulson J. Where a judge made an order for costs on the indemnity basis, having been misled as to the status of a Pt 36 offer the Court of Appeal intervened to substitute an order for costs on the standard basis: *Nash (t/a Elite Carcraft) v Daniel* [2002] EWCA Civ 1146.

Where a company had deliberately not complied with the Pre-action Practice Direction by unexpectedly serving proceedings the day before the claimant's annual general meeting, the court made an order for costs against the company on the indemnity basis. There was no injustice in denying the defendant the benefit of an assessment on a proportionate basis when they had shown no interest in proportionality by casting their claim disproportionately wide and requiring the claimant to meet the claim. The defendant had also forfeited its right to the benefit of the doubt on reasonableness. In respect of the defendant's successful defence of the original claim they were awarded costs on the standard basis, less 12.5 per cent because the defendant had called untruthful evidence in support of its case: *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2010] EWHC 888 (Ch), Morgan J.

The court also had the power, in attempting to achieve pragmatic fairness, to order that interest on costs should run from a date before the principal judgment in the action. The court could find no power in CPR to adjust the rate of interest that fell to be awarded: *ABCI v Banque Franco-Tunisienne (Costs)* [2002] EWHC 567 (Comm) H.H. Judge Chambers Q.C.

If a (commercial) party embarks upon, or brings upon itself and pursues, large scale litigation which results in a resounding defeat involving the rejection of much of the evidence adduced in support of its case that provides a proper basis on which to award costs on the indemnity basis. In the particular case the claimant had conducted itself throughout the relevant events on the basis that its commercial interest took precedence over the rights and wrongs of the situation and it was prepared to risk the outcome of the litigation: *Amoco UK Exploration Co v British American Off-Shore Ltd*, November 22, 2001, unrep., Langley J.

Accountants who successfully defended an action sought to rely on a clause in the claimant's articles of association, indemnifying auditors of companies against any liability incurred in defending any proceedings, as entitling them to an order for costs on the indemnity basis in those proceedings. The court held that any contractual right which the defendant might have was not formally an issue in the proceedings and they were not therefore entitled to their costs on the indemnity basis: *John v PriceWaterhouseCoopers (formerly Price Waterhouse)* [2002] 1 W.L.R. 953, Ferris J.; *Gomba Holdings Ltd v Minories Finance*, [1993] Ch. 171, CA, distinguished.

Following the above judgment the defendants submitted that they were contractually entitled to be indemnified from the assets of each of the companies against the costs incurred in defending the proceedings. The court refused the application since no such application had been made at the time the judgment had been handed down. As to deferment of the issue of costs the court's jurisdiction under s.51 of the Senior Courts Act 1981 was exhausted. It was open to the defendant to seek to recover the costs in separate proceedings: *John v PriceWaterhouseCoopers (Costs)* [2002] 1 W.L.R. 953, Ferris J.

Part 36 offers

44.4.3.1 An order for costs on the indemnity basis made under r.36.14(3) is not penal and carries no stigma or implied disapproval of the defendant's conduct. The making of such an order indicates only that the court has not considered it unjust to make the order for indemnity costs for which the rule provides: *McPhilemy v Times Newspapers Ltd (No.2)* [2001] EWCA Civ 933; [2002] 1 W.L.R. 934; [2001] 4 All E.R. 861, CA.

The provisions of para.8.4 of the Costs Practice Direction are directed at offers to settle in the ordinary sense of the word. Part of the culture of the CPR is to encourage parties to avoid proceedings if it is reasonable to do so. The Pt 36 offer is aimed at a genuine offer to settle and not some tactical ploy for the purpose of advancing a claim under r.36.14. In the circumstances the claimants were entitled to recover indemnity costs and enhanced interest from the date of their Pt 36 offers, not from the date of their claims: *Utankio Ltd v P & O Nedlloyd BV*; *East West Corp v DKBS 1912 (Costs)* [2002] EWHC 253 (Comm), Thomas J.

Respondents wishing to protect themselves against costs of an appeal cannot rely on an offer to settle made before trial. The particular appeal turned on a pure point of construction to which there could be only one answer. In those circumstances the claimant could not be expected to have offered to give up a substantial part of its judgment. The claimant was awarded costs on the indemnity basis with interest from the mid point between the lapse of the offer and the date of the appeal hearing: *CEL Group Ltd v Nedlloyd Lines UK Ltd (Costs)* [2003] EWCA Civ 1871.

The underlying rationale of r.36.14—to encourage claimants to make offers—has no counterpart with regard to defendants. Conduct, albeit falling short of misconduct, deserving of moral condemnation can be so unreasonable as to justify an order for indemnity costs. Such conduct would need to be unreasonable to a high degree, in this context that does not mean merely wrong or misguided in hindsight. An indemnity costs order made under r.44, rather than under r.36, does carry at least some stigma. It is of its nature penal rather than exhortatory: *Kiam v MGN Ltd (No.2)* [2002] EWCA Civ 66; [2002] 2 All E.R. 242, CA.

The court has a wide discretion under r.44.3. The fact that the claimant had made a Pt 36 offer to accept as much as it was awarded, was plainly an important factor, as was the fact that the offer had been made on appeal, the court below having awarded a lesser sum. Where the defendant had not acted unreasonably in seeking to resist the appeal, nor acted improperly in its conduct of the appeal, the court held that this was not one of those rare cases in which refusal of a settlement offer would attract, under CPR Pt 44, not merely an adverse order for costs but an order on the indemnity basis: *Ali Reza-Delta Transport Co Ltd v United Arab Shipping Co SAG (Costs)* [2003] EWCA Civ 811; [2003] 3 All E.R. 1297, CA.

In normal circumstances an order for costs under r.36.14(2) should be an order on the standard basis unless it is unjust to make such an order. Where a Pt 36 payment is not accepted by a claimant they should not automatically be liable for indemnity costs unless there is something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs: *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 879.

Rule 44.4(4)

44.4.4 The court has held that r.44.4(3) merely provides what is to be the legal consequence of an unqualified order for indemnity costs:

> "it in no way forecloses the court from making a qualified order for indemnity costs, that is to say, an order where the ordering provision is qualified by the imposition of the burden of proof of reasonableness on the third party entitled to the costs."

The court ordered that accountants should receive all their costs reasonably incurred in complying with an order for disclosure, but the burden of justifying and explaining the reasonableness of those costs should lie on them (*Westminster City Council v Porter (Third Party Disclosure: Costs Basis)* [2003] EWHC 2373). The terms of this order appear to cut directly across the provisions of r.44.4(4)(b) and may well result in the costs being assessed on the standard basis.

Family proceedings

44.4.5 A successful petitioning wife sought costs on the indemnity basis from the former husband who had unsuccessfully defended divorce proceedings. She argued that he had only defended in order to wear her down and make her behave as he wanted and that he had unreasonably pursued his defence. The court allowed the application stating that the test of reasonableness or otherwise of the husband's conduct had to be given its natural meaning without any extra gloss. The husband had sent a Calderbank letter to the wife shortly before the trial conceding that he saw no future in the marriage. From that point on it was wrong of the husband to continue to defend the petition on the basis that the marriage had not irretrievably broken down. The court found that the husband's conduct of the case was unreasonable and bordering on being dishonest: *Hadjimilitis v Tsavliris (Costs)* [2003] 1 F.L.R. 81 (Alison Ball Q.C.).

In proceedings concerning contact arrangements, the children's mother had sent a letter and medical certificate to the court explaining that she could not attend a hearing. Because of an administrative error of the court, the documents were not passed to the judge, who made an order against the mother on the indemnity basis, on the basis of her unreasonable action in not attending. On appeal the order was set

aside. Although the judge did not have the document submitted to the court, he did have a copy of the letter sent to the husband's solicitors which indicated that she had communicated with the court. The Court of Appeal found that to condemn the mother's conduct out of hand in those circumstances was wholly unwarranted. In any event it was unthinkable that such an order should be made given how unusual the awarding of indemnity costs was in such cases: *Re B (Children)*, February 21, 2007, unrep.

Human rights

44.4.6 For a case management decision on the proportionality of expert's fees see *Mann v Chetty & Patel* [2001] C.P. Rep. 24, CA and the note at para.44.5.4. See also the note at para.44.4.3.

The Court of Appeal expressed concern and gave guidance in relation to the procedures to be followed in relation to claims for damages under the Human Rights Act so that the costs of obtaining relief are proportionate to that relief. In relation to proceedings which include a claim for damages for maladministration under the Human Rights Act the court gave the following guidance:

"81. …

(i) The court should look critically at any attempt to recover damages under the HRA for maladministration by any procedure other than judicial review in the Administrative Court.

(ii) A claim for damages alone cannot be brought by judicial review (Part 54.3(2)) but in this case the proceedings should still be brought in the Administrative Court by an ordinary claim.

(iii) Before giving permission to apply for judicial review the Administrative Court Judge should require the claimant to explain why it would not be more appropriate to use any available internal complaint procedure or proceed by making a claim to the PCA or LGO at least in the first instance. The complaint procedures of the PCA and the LGO are designed to deal economically (the claimant pays no costs and does not require a lawyer) and expeditiously with claims for compensation for maladministration. (From enquiries the court has made it is apparent that the time scale for resolving complaints compares favourably with that of litigation).

(iv) If there is a legitimate claim for other relief permission should, if appropriate, be limited to that relief and consideration given to deferring permission for the damages claim, adjourning or staying that claim until use has been made of ADR, whether by reference to a mediator or ombudsman or otherwise or remitting that claim to a District Judge or Master if it cannot be dismissed summarily on grounds that, in any event, an award of damages is not required to achieve just satisfaction.

(v) It is hoped that with the assistance of this judgment in future claims that have had to be determined by the courts can be determined by the appropriate level of judge in a summary manner by the judge reading the relevant evidence, the citing of more than three authorities should be justified and the hearing should be limited to half a day except in exceptional circumstances.

(vi) There are no doubt other ways in which the proportionate resolution of this type of claim for damages can be achieved. We encourage their use and do not intend to be prescriptive. What we want to avoid is any repetition of what has happened in the court below in relation to each of these appeals and before us and when we have been deluged with extensive written and oral arguments and citation from numerous lever arch files crammed to overflowing with authorities the exercise that has taken place may be justifiable on one occasion but it will be difficult to justify it again."

Anufrijeva v London Borough of Southwark and two other appeals [2003] EWCA Civ1406.

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

44.5 **44.5—(1) The court is to have regard to all the circumstances in deciding whether costs were—**

(a) if it is assessing costs on the standard basis—

(i) proportionately and reasonably incurred; or

(ii) were proportionate and reasonable in amount, or

(b) if it is assessing costs on the indemnity basis—

(i) unreasonably incurred; or

(ii) unreasonable in amount.

(2) In particular the court must give effect to any orders which have already been made.

(3) The court must also have regard to—

(a) the conduct of all the parties, including in particular—

(i) conduct before, as well as during, the proceedings; and

(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;

(b) the amount or value of any money or property involved;

(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.)

Editorial note

Rule 44.3 sets out the circumstances which the court must take into account when exercising its discretion as to costs. Rule 44.5 sets out the factors to be taken into account when deciding the amount of costs whether on a summary or detailed assessment. The conduct of all the parties is again relevant to the amount to be allowed and that conduct may be before as well as during the proceedings and includes the efforts made before and during the proceedings to try to resolve the dispute. **44.5.1**

Separate actions were brought by four claimants against several defendants. The actions were not consolidated but were tried together. Some costs incurred by the defendants were common to all four actions, other costs were specific to each claim. The actions were dismissed by the trial judge who carried out a summary assessment and found that the claimants were jointly and severally liable for the common costs: *Bairstow v Queens Moat Houses Plc* [2000] B.C.C. 1025, Nelson J.

Where four different commercial interests commenced separate proceedings against the same defendant, which were not consolidated, the court awarded the successful claimants their costs but directed that the costs judge was free to consider the four actions as if they had been consolidated at the date of the order for mutuality of evidence. Regard had to be had to the reasonableness of the claimants maintaining separate representation and separate expert witnesses during the period after that order: *Cipla Ltd v Glaxo Group Ltd and other actions* [2004] EWHC 819 (Ch), Pumfrey J. The Court of Appeal has held that there is nothing fundamentally different or special about generic costs, they were simply costs that have been shared for the sensible purpose of keeping the costs of each claim down.

The Court of Appeal suggested that it would be good practice for a solicitor to mention in a client care letter that some of the work to be done would be for the benefit of a group of clients, and that the individual would be liable only for his share. It would also be sensible for a solicitor to keep records of the number of clients for whom they were acting at any time. Such records would help them to demonstrate, if

need be, that the proportion claimed for any individual client was justified: *Brown v Russell Young & Co* [2007] EWCA Civ 43; [2007] 2 All E.R. 453, CA.

In *Francis v Francis and Dickerson* [1956] P. 87; [1953] 3 All E.R. 836, it was held that the correct viewpoint to be taken by a costs officer in considering whether any step was reasonable is that of a sensible solicitor considering what, in the light of his then knowledge, was reasonable in the interest of his client. It was further held that any step taken on the advice of a properly instructed counsel should rarely be disallowed, but the Court of Appeal in *Davy-Chiesman v Davy-Chiesman* [1984] 2 W.L.R. 291; [1984] 1 All E.R. 321 held that a solicitor did not abdicate his own responsibility by instructing counsel, and where counsel's advice was "glaringly wrong" the solicitor should have expressed his own views.

Where both claimant and defendant appealed against costs orders made in relation to injunctive proceedings. The Court of Appeal dismissed both appeals ordering each party to pay most of the other party's costs of the unsuccessful appeal. The costs judge was directed to apportion those costs between various applications. In the event, the costs judge awarded one party all its reasonable costs. The other party appealed on the basis that the costs judge had failed to carry out an apportionment as directed by the Court of Appeal. On appeal the court found that, in circumstances where costs had been incurred for two purposes, a broad apportionment of them had to be made between each of the two purposes. The approach of the costs judge was incorrect as a matter of law: *Fourie v Le Roux* [2006] EWHC 1840 (Ch), Warren J.

Failure to serve statement of costs

44.5.2 The failure of a party to comply with s.13 of the Costs Practice Direction by omitting to file and serve a copy of the statement of costs not less than 24 hours before the date fixed for the hearing did not warrant the wholesale disallowance of costs. Where the only factor against awarding costs was merely the failure to serve a statement of costs without aggravating factors a party should not be deprived of all their costs. The court would take the matter into account but its reaction should be proportionate. The court should ask itself what if any prejudice there had been to the paying party and how that prejudice should be dealt with, e.g. by allowing a short adjournment or adjourning the summary assessment to another date, or directing detailed assessment: *MacDonald v Taree Holdings Ltd*, *The Times*, December 28, 2000, Neuberger J.

Summary assessment

44.5.3 It is wrong in principle for a judge to conclude that, because the paying party's costs are much the same as the receiving party's, the latter's costs could be assumed to be costs that it was reasonable for the paying party to pay. The judge's task is to focus on the heads of costs they are being asked to assess and to form their best judgment of the proportion it was reasonable to require the paying party to pay: *Machinery Developments Ltd v St Merryn Meat Ltd* [2005] EWCA Civ 29.

The judge in a trademark dispute summarily assessed the costs at the end of the trial at £10,000 as against the £38,000 claimed. In carrying out the summary assessment the judge had not gone into any sort of detailed analysis of the objector's statement of costs but appeared to have applied his own tariff as to what costs were appropriate for a one day paper only appeal. That approach was wrong in principle: *1-800 Flowers Inc v Phonenames Ltd* [2001] EWCA Civ 721; *The Times*, July 9, 2001. In respect of a hearing for assessment of damages, the claimant successfully applied for an adjournment but no provision was made for costs. In those circumstances neither party was entitled to its costs relating to that order. Accordingly the defendant could not recover the consequential cost of his expert witnesses' cancellation fee: *Beahan v Stoneham* [2001] 2 Q.R. 8 (Buckley J.).

In proceedings claiming damages of £9,000 it was ultimately decided, because of double counting and an error in the exchange rate calculation, that only one head of claim was made out in the sum of £2,502. Because of the complicated procedural history the case had never been allocated to a track. The district judge awarded costs against the defendant and summarily assessed them on the basis that it was not a small claim. On appeal it was held that even on the most successful outcome from the claimant's point of view, an award in excess of £4,003 could not have been made. Non allocation to a track meant that the small claims costs regime did not follow as an automatic starting point but it did not preclude the court from considering whether it would be reasonable to make an assessment consistent with the small claims costs regime or to apply the regime to a claim which should never have exceeded and never

was anything more than a small claim. In the absence of any specific factors suggesting otherwise, in a case where an allocation to the small claims track would normally have been made, the normal rule should be that the small claims costs regime should apply: *Voice & Script International Ltd v Alghafar* [2003] EWCA Civ 736.

Proportionality

44.5.4 The Court of Appeal considered the question of proportionality in relation to costs which were to be summarily assessed. The court quoted with approval the judgment of H.H. Judge Alton in the Birmingham County Court on June 22, 2000 in an unnamed case:

> "In modern litigation, with the emphasis on proportionality, it is necessary for parties to make an assessment at the outset of the likely value of the claim and its importance and complexity, and then to plan in advance the necessary work, the appropriate level of person to carry out the work, the overall time which will be necessary and appropriate to spend on the various stages in bringing the action to trial, and the likely overall cost. While it is not unusual for costs to exceed the amount in issue, it is, in the context of modern litigation such as the present case, one reason for seeking to curb the amount of work done, and the cost by reference to the need for proportionality."

The court expressed the view that for the future it would be helpful for a judge carrying out a summary assessment to express their reasoning in rather more detail than happened in the particular case: *Jefferson v National Freight Carriers Plc* [2001] EWCA Civ 2082; [2001] 2 Costs L.R. 313, CA; *Lownds v Home Office* [2002] EWCA Civ 365. See also note at para.44.4.3.

Where a respondent successfully opposed an application to the Court of Appeal for permission to appeal, the court awarded the respondent their costs of opposing the application which had lasted half a day. The claim for costs was £54,487. On summary assessment, on the basis of written submissions, the court held that the total claimed was disproportionate and would be a surprise to most members of the public. The question for the court was whether it was just to require the appellant to pay the large sums claimed as the price of losing. It was not the concern of the court whether a bill of this size was to be presented to the respondent by their solicitors. On assessment the costs were limited to £16,195. The court reduced the amount of time claimed for perusal and preparation of documents, the amount claimed for attendance of solicitors at court and the fees of leading and junior counsel (*Habib Bank Ltd v Ahmed* [2004] EWCA Civ 805).

Where a judge forms the view that the costs as claimed are disproportionate and then looks at each item in turn to consider whether it was necessary, it is wrong for the judge, if of the view that the costs are still disproportionate, to simply reduce the global figure further to reach a figure which appears proportionate. The correct approach was to have gone back over each item in turn again *Re Michaelides* [2003] EWHC 3029 (Ch); [2004] BPIR 613, Blackburne J.

Considering proportionality was a more complex exercise than simply comparing the amount of the costs with the amount that was recovered. The Appeal Court found that the amount of costs claimed was excessive when looked at globally. The fact that the costs judge had not expressly referred to each of the factors set out in CPR r.44.5(3) was not material. *Young v JR Smart (Builders) Ltd (Costs)* [2004] EWHC 103 (QB); [2004] 2 Costs LR 298, Henriques J. It is too simplistic to focus on the amount of financial compensation compared to the costs when considering proportionality. In defamation proceedings the claimant's main concern was the delivery up and destruction of photographs. The defendant had prolonged the length of time that the proceedings went on by pursuing bad points on liability. Settlement was only achieved 20 months after the cause of action arose and costs had built up in the intervening period. Furthermore one of the defendants was outside the jurisdiction which had caused problems. Thus, although the amount of financial compensation may provide a useful starting point in determining proportionality, there were cases where the need to press for other remedies would assume greater significance: *Cox v MGN Ltd* [2006] EWHC 1235, QB, Eady J.

As to the issue of conduct see note at 44.3.10above: *Northstar Systems Ltd v Fielding* [2006] EWCA Civ 1660 and see *Drukker & Co v Pridie Brewster & Co* [2005] EWHC 2788, QB, Openshaw J.

Costs incurred in foreign jurisdictions

44.5.5 Costs incurred by a litigant in another jurisdiction should be assessed in accordance

with the rules and procedure of that jurisdiction, see *Wentworth v Lloyd* (1866) LR2 EQ 607, *Slingsby v Attorney General* [1918] P236, *McCullie v Butler (No.2) (Costs: Taxation)* [1962] 2 Q.B.309. Whilst r.44.5 requires the court to have regard to all the circumstances and factors, the relevance of those factors will vary from case to case and item to item. When assessing costs incurred in a foreign jurisdiction, r.44.5(3)(g) assumes significant importance and other factors might not be a feature of assessment in other jurisdictions. This however, would not prevent a paying party from contending, on detailed assessment, that fees were disproportionate or unreasonable: *Societa Finanziaria Industie Turistiche SPA v Di Balsorano*, June 30, 2006, unrep., SCCO, Master Gordon-Saker.

Editorial note

44.5.6 A personal injury action, which settled prior to allocation for £400 general damages and £719 hire charges, was concluded by a consent order providing that the defendant should pay the claimant's "reasonable costs and disbursements on the standard basis". On assessment the district judge had held that the order was for costs to be assessed on the standard basis, and none of the fixed costs regimes, including the small claims track regime, applied. The Court of Appeal held that the district judge was not free to rule that the costs would be assessed on the small claims track basis, but, when making the assessment, was entitled to take into account all the circumstances in accordance with r.44.5(1), including the fact that the case would almost certainly have been allocated to the small claims track if allocation had taken place. Although it was not open to the district judge to vary the original order, or to assess by reference to the small claims track, it was quite legitimate to give items in the bill anxious scrutiny to see whether the costs were necessarily and reasonably incurred, and thus whether it was reasonable for the paying party to pay more than would have been recoverable in a case that should have been allocated to the small claims track: *O'Beirne v Hudson* [2010] EWCA Civ 52; [2010] 1 W.L.R. 1717, CA.

Fixed costs

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

Procedure for assessing costs[1]

44.7 **44.7 Where the court orders a party to pay costs to another party (other than fixed costs) it may either—**

(a) make a summary assessment of the costs; or

(b) order detailed assessment of the costs by a costs officer,

unless any rule, practice direction or other enactment provides otherwise.

(The Costs Practice Direction sets out the factors which will affect the court's decision under this rule.)

Editorial note

44.7.1 Attention is drawn to ss.12, 13 and 14 of the Costs Practice Direction dealing with the procedure for assessment and the summary assessment of costs. The court will make a summary assessment of costs unless it is not practicable to do so at the conclusion of a trial of a case which has been dealt with on the fast track or at the conclusion of any other hearing which has lasted not more than one day. The parties are required to prepare and serve upon each other a statement of costs in the form of a statement. The statement must be filed at the court and served on the other parties as early as possible and in any event not less than 24 hours before the hearing at which the assessment will take place, and see note at 44.5.2.

Where costs are assessed at a separate hearing following the end of a trial, the costs hearing itself may be subject to the fair trial requirements of ECHR art.6(1): *Robins v United Kingdom* (1998) 26 E.H.R.R. 527.

[1] Amended by the Civil Procedure (Amendment No.2) Rules 2009 (SI 2009/3390).

Only the judge who hears a case is in a position to make a summary assessment of the costs, otherwise the issue of costs should be sent to a costs judge for consideration: *Mahmood v Penrose* [2002] EWCA Civ 457, CA. A claimant can in principle recover by way of costs sums in respect of work by its own employee experts carried out in relation to the claim. There is nothing unjust in the reasonable recovery of the costs of in-house experts. The court stated that it was not obvious why the costs of outside experts should be recoverable but not those of in-house experts. Whilst *Buckland v Watts* [1971] W.L.R. 70 appeared to suggest that such costs were irrecoverable that was in conflict with *Re Nossen's Letter Patent* [1969] 1 W.L.R. 638 and the decision of the Court of Appeal in *Field v Leeds City Council*, *The Times*, January 18, 2000, CA. *Admiral Management Services Ltd v Para-Protect Europe Ltd* [2002] EWHC 233, Ch D, Stanley Burnton J. The question was raised as to whether the successful claimant was entitled to recover, as damages, the costs of its internal management and staff time and internal overheads, due to the diversion of internal resources caused by the actionable wrong of the defendant. The court held that there should be no difference, in principle, between the recoverability of damages in respect of times spent by employees, in a department specifically set up to investigate and mitigate anticipated and actual breaches of the claimant's conditions of trade, and the recoverability of damages, in respect of time spent by employees investigating actual torts committed against the claimant, where there was no such department. (*Admiral Management Services* above disapproved). *R + V Versicherung AG v Risk Insurance and Reinsurance Solutions SA (No.3)* [2006] EWHC 42 (Comm) Gloster J.

The Court of Appeal has considered in detail the question of staff costs and whether, where properly incurred, they should be recoverable as damages or costs. In *Aerospace Publishing Ltd v Thames Water Utilities Ltd* [2007] EWCA Civ 3, the claimant claimed damages in respect of a private archive which had been damaged by a burst water main. As part of their claim for special damage the claimants included a claim for staff work necessarily undertaken in relation to and consequent upon the flood. The majority of the claim was in respect of work done by the claimants' employees, but part of it was in respect of two ex-employees who returned to work on a freelance basis. The defendant's position was that the freelance costs were costs of the action to be assessed. The court was referred to five authorities (*Tate & Lyle Food and Distribution Ltd v Greater London Council* [1982] 1 W.L.R. 149; *Standard Chartered Bank v Pakistan National Shipping Corporation* [2001] EWCA Civ 55; *Horace Holman Group Ltd v Sherwood International Group* [2001] All E.R. (D.) 83 (Nov); *Admiral Management Services Ltd v Para-Protect Europe Ltd* [2002] EWHC 233 (Ch); [2002] 1 W.L.R. 2722; and *R+V Versicherung AG v Risk Insurance and Reinsurance Solutions SA* [2006] EWHC 42 (Comm)) of which *Admiral Management Services* and *R+V Versicherung AG* were the most recent. The court (Wilson L.J.) stated:

> "85. In my view the divide between the decisions of Stanley Burnton J in *Admiral Management Services* and of Gloster J in *R + V Versicherung AG* is not as stark as may appear. But, to the extent that there is a difference, I consider that the approach of Gloster J is preferable as being, unsurprisingly, more consonant with the decision of this court in Standard Chartered Bank not cited to Stanley Burnton J."

The court stated that the authorities established the following propositions:

> "86. …
>
> (a) The fact and, if so, the extent of the diversion of staff time have to be properly established and, if in that regard evidence which it would have been reasonable for the claimant to adduce is not adduced, he is at risk of finding that they have not been established.
>
> (b) The claimant also has to establish that the diversion caused significant disruption to its business.
>
> (c) Even though it may well be that strictly the claim should be cast in terms of loss of revenue attributable to the diversion of staff time, nevertheless in the ordinary case, and unless the defendant can establish the contrary, it is reasonable for the court to infer from the disruption that, had their time not been thus diverted, staff would have applied it to activities which would, directly or indirectly, have generated revenue for the claimant in an amount at least equal to the costs of employing them during that time."

On that basis the court could see no error in the judge's allowance within the damages of the costs of the employees referable to the diversion: *Aerospace Publishing Ltd v Thames Water Utilities Ltd* (above).

A non-solicitor litigant in person, even if a professional, cannot recover costs in respect of their time spent, other than in respect of time spent on matters within their own professional expertise and requiring the attention of an expert. The position of an office holder (liquidator/administrator) is no different. Even if the office holder had to bring or defend litigation, that did not mean that it was part of their profession to conduct litigation, in the way that it was part of the profession of a solicitor to do so. Only that part of the firm's costs which related to in-house expert services carried out by experts doing work which was such as to require the exercise of that particular expertise could be brought into account on the detailed assessment: *Sisu Fund Ltd v Tucker* [2005] EWHC 2321 (Ch); [2006] 1 All E.R. 167, Warren J. (The appeal against this decision was subsequently withdrawn.)

In litigation arising out of the foot and mouth disease outbreak in February 2001 the claimant, which had been engaged by DEFRA to carry out cleansing and disinfecting work, sued the Department in respect of unpaid invoices. The action was compromised on the basis that the defendant would pay the claimant's costs "including the (claimant's) reasonable internal costs of the main claim … to be subject to detailed assessment on the standard basis if not agreed." The question arose as to the meaning of "reasonable". The court found that it was a word in common use and quoted the definition from the Shorter Oxford English Dictionary. It was unusual to find a provision for "internal costs" in an order relating to costs and "internal costs" must refer to all the non legal costs incurred by the claimant. The court held that the parties must have intended that the claimant was entitled to recover such in-house costs and so "reasonable" must qualify the assessment of those costs. The words "to be subject to detailed assessment on the standard basis if not agreed" related to the claimants' costs as a whole and not to the internal costs only. The addition of the word "reasonable" was surplus usage: *Ruttle Plant Hire Ltd v Department for Environment Food and Rural Affairs* [2007] EWHC 1633 (QB) Griffith Williams J.

Estimates of costs

44.7.2 On completing the allocation questionnaire and the pre-trial questionnaire the party must set out an estimate of costs incurred to date and an estimate of likely future costs s.6 of the Costs Practice Direction. deals with this. Considerable care and precision is required in the preparation of such estimates since the estimates of opposing parties are likely to be compared one with another. An over generous estimate may result in an opponent recovering a similar amount, while an under-generous estimate may result in a recovery on behalf of the client which does not reflect the actual costs involved.

Signing the bill of costs

44.7.3 In signing the bill or statement of costs the solicitor certifies that the contents of the bill are correct:

> "that signature is no empty formality, the bill specifies the hourly rates applied […]. If an agreement between the receiving solicitor and his client […] restricted (say) the hourly rate payable by the client, that hourly rate is the most that can be claimed or recovered on [assessment] […]. The signature of the bill of costs under the rules is effectively the certificate of an officer of the court that the receiving party's solicitors are not seeking to recover in relation to any item more than they have agreed to charge their client". Per Henry L.J., in *Bailey v IBC Vehicles Ltd* [1998] 3 All E.R. 570, CA.
>
> "[…] in view of the increasing interest taken in (the indemnity principle) by unsuccessful parties to litigation coupled with the developing practice in relation to conditional fees, the extension of the client care letter and contentious business agreements under s.60(3) (of the Solicitors Act 1974), in future a short written explanation […] should normally be attached to the bill of costs. This will avoid skirmishes which add unnecessarily to the costs of litigation." Per Judge L.J., in *Bailey v IBC Vehicles Ltd* [1998] 3 All E.R. 570, CA.

See s.4 of the Costs Practice Direction.

Summary assessment

44.7.4 See Guide to Summary Assessment of Costs, para.48.16.

Judges are required to assess the costs of a case if practicable, and in cases lasting 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

s.13 of the Costs Practice Direction). A Registrar in Bankruptcy was wrong in law not to assess costs on the detailed breakdown of costs actually incurred, as shown by the successful party's statement of costs, and instead substituting his own tariff: *McLinden v Redbond* [2006] EWHC 234 (Ch), Evans-Lombe J.

An order for costs following a summary assessment, other than one made at a final hearing, is exempt from registration under the Register of County Court Judgments Regulations 1985, as amended by the Register of County Court Judgments (Amendment) Regulations 1999 (SI 1999/1845).

Where an interim injunction is granted the court will normally reserve the costs of the application until the determination of the substantive issue. *Desquenne et Giral UK Ltd v Richardson* [2001] F.S.R. 1, CA). The court's hands are not tied however and if special factors are present a different order may be made. *Picnic at Ascot Inc v Derigs* [2001] F.S.R. 2, Neuberger J.

Family proceedings

44.7.5 There is no rebuttable presumption against summary assessment in relation to costs where hearings last longer than one day. The exercise of the power to make a summary assessment should be considered in every case. In family proceedings the aggravation of detailed assessment of costs could run counter to the design of reducing contention and achieving satisfactory resolution of disputes: *Q v Q (Costs: Summary Assessment)* [2002] 2 F.L.R. 668, Wilson J.

Appeals relating to summary assessment

44.7.6 Such appeals are dealt with under the ordinary rules relating to appeals. (See Pt 52.)

The court allowed a stay of execution pending appeal against an order for the payment of summarily assessed costs, where the hearing of the application for permission was near and the court hearing that application would have the time to investigate the situation. In addition to which the schedule of costs had not been signed, in clear breach of the rules: *Wilson v Howard Pawnbrokers* [2002] EWHC 1489 (Ch), Etherton J.

Detailed assessment

44.7.7 For the practice and procedure of detailed assessment see Pt 47 and Sections 28 to 49 of the Costs Practice Direction.

Time for complying with an order for costs[1]

44.8 **44.8 A party must comply with an order for the payment of costs within 14 days of—**

(a) the date of the judgment or order if it states the amount of those costs;

(b) if the amount of those costs (or part of them) is decided later in accordance with Part 47, the date of the certificate which states the amount; or

(c) in either case, such later date as the court may specify.

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

Editorial note

44.8.1 All certificates (default costs certificates, interim certificates and final certificates) contain an order to pay.

The court has a discretion under r.44.3 as to when costs are to be paid but, unless otherwise ordered, costs become payable within 14 days of the date of the order. If a party seeks an extension of time in which to pay the costs it is for that party to make an application supported by evidence. In the absence of any alternative order, r.44.8 applies and the costs are payable within 14 days of the original order (*Pepin v Watts* [2001] C.P.L.R. 9, CA).

[1] Amended by Civil Procedure (Amendment No.3) Rules 2000 (SI 2000/1317).

Costs on the small claims track and fast track[1]

44.9 **44.9—(1) Part 27 (small claims) and Part 46 (fast track trial costs) contain special rules about—**

(a) liability for costs;

(b) the amount of costs which the court may award; and

(c) the procedure for assessing costs.

(2) Once a claim is allocated to a particular track, those special rules shall apply to the period before, as well as after, allocation except where the court or a practice direction provides otherwise.

Editorial note

44.9.1 The rules relating to small claims and fast track trial costs do not apply until a claim is allocated to a particular track (see ss.15 and 16 of the Costs Practice Direction). Rule 44.11(1) provides that any costs orders made before a claim is allocated will not be affected by the allocation. See also note at 44.5.3 (*Voice & Script International Ltd v Alghafar* [2003] EWCA Civ 736).

In a housing disrepair case the Court of Appeal had to decide the question whether that in order to make the rules and the protocol operate in the manner which must be intended, some order for pre-allocation costs is necessary and if so what. The court stated:

> "33. In our view, the answer to the question posed … is clear. Since the promulgation of the protocol it is no longer the case that a claim is only made (for costs purposes at least) when and if litigation is begun. On the contrary, the protocol requires a claim to be advanced initially in accordance with its terms, under a warning that there is likely to be a costs penalty if it is not. The references to costs which are contained in the protocol … clearly demonstrate that the object of the protocol is to achieve settlement of disrepair claims without recourse to litigation. Its object is very clearly that, provided the claim is justified, it ought to be settled on terms which include the payment of the tenant's reasonable costs; and costs calculated according to the track on which the claim would fall to if made by way of litigation."

The court made an order that the claimant should have her costs in the cause on the fast track up to the date when the repairs were completed. Any costs relating to the period after September 26 would remain governed by the allocation to the small claims track: *Birmingham City Council v Lee* [2008] EWCA Civ 891.

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

44.10 **44.10—(1) Where the court—**

(a) assesses costs in relation to a claim which—

(i) has been allocated to the fast track; and

(ii) settles before the start of the trial; and

(b) is considering the amount of costs to be allowed in respect of a party's advocate for preparing for the trial,

it may not allow, in respect of those advocate's costs, an amount that exceeds the amount of fast track trial costs which would have been payable in relation to the claim had the trial taken place.

(2) When deciding the amount to be allowed in respect of the advocate's costs, the court shall have regard to—

(a) when the claim was settled; and

(b) when the court was notified that the claim had settled.

(3) In this rule, "advocate" and "fast track trial costs" have the meanings given to them by Part 46.

[1] Amended by SI 1999/1008.

(Part 46 sets out the amount of fast track trial costs which may be awarded.)

Editorial note

44.10.1 Lord Woolf's original intention was that all fast track costs should be fixed or capped. There are some fixed costs provisions affecting the fast track in Pt 45, Sections II and III. Also fast track trial costs are fixed and this is dealt with at Pt 46. "Fast track trial costs" means the costs of a party's advocate for preparing for and appearing at the trial (see r.46.1(2)(b)). Rule 44.10 deals only with the amount of costs to be allowed in respect of a party's advocate for preparing for a fast track trial which settles before the start of the trial. The costs which may be allowed in respect of that work may not exceed the amount which would have been payable in accordance with Pt 46 had the trial taken place.

Costs following allocation and reallocation

44.11 **44.11—(1) Any costs orders made before a claim is allocated will not be affected by allocation.**

(2) Where—

(a) a claim is allocated to a track; and

(b) the court subsequently re-allocates that claim to a different track,

then unless the court orders otherwise, any special rules about costs applying—

(i) to the first track, will apply to the claim up to the date of reallocation; and

(ii) to the second track, will apply from the date of reallocation.

(Part 26 deals with the allocation and reallocation of claims between tracks.)

Editorial note

44.11.1 The special rules which apply to small claims and fast track trial costs do not apply until the claim is allocated to a particular track (see r.44.9(2)). Any costs orders which are made before the claim is allocated to a track are not affected by subsequent allocation. Where the claim is re-allocated to a different track the special rules apply, according to track, up to and after the re-allocation unless the court makes a different order. See s.16 of the Costs Practice Direction.

Cases where costs orders deemed to have been made[1]

44.12 **44.12—(1) Where a right to costs arises under—**

(a) rule 3.7 (defendant's right to costs where claim struck out for non-payment of fees);

(b) rule 36.10(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

[1] Amended by the Civil Procedure (Amendment No.3) Rules 2006 (SI 2006/3435) and the Civil Procedure (Amendment) Rules 2008 (SI 2008/2178).

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 or section 74 of the County Courts Act 1984 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.

Editorial note

44.12.1 In certain cases costs orders are deemed to have been made. Rule 3.7 introduces an automatic strike-out for non payment of fees which gives the defendant the right to costs.

The Civil Procedure (Amendment No.3) Rules 2006 amend r.44.12(1)(b) to refer to r.36.10(1) or (2) being the relevant clauses of the amended Pt 36.

Rule 44.12(1)(c) (claimant's right to costs when defendant accepts the claimant's Pt 36 offer) is omitted altogether. The text below must be read as referring only to the rule as it applied prior to the date of amendment (April 6, 2007).

Rule 44.12(1)(b) Part 36

44.12.2 Paragraphs 7.1–7.11 of PD 36 deal with acceptance by a claimant of a defendant's Pt 36 offer or payment, or a defendant's acceptance of the claimant's Pt 36 offer. Rule 38.6 deals with a claimant's liability for costs where a claimant has discontinued wholly or in part. Part 38 gives the court power to order otherwise and an order for costs on the indemnity basis may therefore be made. *Atlantic Bar & Grill Ltd v Posthouse Hotels Ltd (Costs)* [2000] C.P. Rep. 32 (Ratee J.). Defendants, who made an offer under the Warsaw Convention, which was refused, and subsequently made a payment into court exceeding the offer, which was accepted, applied that the claimants should not be entitled to their costs and that no costs order should be deemed to have been made under r.44.12(1)(b). The court held that the payment in exceeded the defendants' earlier offer and fell within "the amount of damages awarded" in art.22.4 of the Convention. The exception contained in art.22.4 did not apply and there was therefore no conflict between the Convention and the provisions of the rule: *GKN Westland Helicopters Ltd v Korean Air Lines Co Ltd* [2003] EWHC 1120 (Comm); *The Times*, June 11, 2003 (Morison J.).

Where a claimant who had suffered a back injury sought damages of £150,000 the defendants made a pre-action offer of £5,000 inclusive of costs. The offer was rejected and proceedings were commenced. The defendant then paid into court £4,000, which the claimant accepted within 21 days, thereby becoming entitled to costs on the standard basis to be assessed if not agreed. The defendants argued that the district judge should allow the claimant no more than 25 per cent of the costs claimed. On appeal to the circuit judge the district judge's decision was upheld. On appeal to the Court of Appeal the court confirmed that the district judge had no power to vary the deemed order giving the claimant his costs, or to decide that the claimant should only be entitled to 25 per cent of the assessed costs. The court continued:

> "20. There is a real distinction between (a) carrying out an assessment and deciding as part of the assessment to reduce the bill by a percentage and (b) deciding in advance of the assessment that the receiving party will only receive a percentage of the assessed costs. The figure that results from (a) represents 100% of the assessed costs. In deciding as part of the assessment to reduce the bill by percentage, the Costs Judge is giving effect to an order that the successful party is entitled to his costs, to be assessed if not agreed. The figure that results from (b) represents less than 100% of the assessed costs. In deciding in advance of the assessment that the receiving party will only receive a percentage of the assessed costs, the Costs Judge is not giving effect to an order that the successful party is entitled to his costs, to be assessed if not agreed." *Lahey v Pirelli Tyres Ltd* [2007] EWCA Civ 91.

Rule 44.12(1)(d)—discontinuance

44.12.3 The court may feel able to deprive a defendant of costs where proceedings are discontinued in circumstances which include but are not limited to:

(a) where the claimant has obtained an advantage from suing the defendant against whom it is discontinuing; and

(b) where the claim to be discontinued has become academic by some act on the part of the defendant for some independent party.

On the facts of the case discontinuance could not be equated with defeat or acknowledgment of likely defeat. The court permitted discontinuance with no order as to costs: *Everton v WPBSA (Promotions) Ltd* December 12, 2001, unrep., Gray J.

Where claimants deleted a claim for compensation by amendment, this amounted to discontinuance under CPR r.38.6. The claimants were therefore liable for the defendants' costs of the discontinued claim down to the date of the discontinuance: *Isaac v Isaac (No.2)* [2005] EWHC 435, Park J.

In circumstances where claimants were held to have been unreasonably trying to delay the trial of the action, and who then discontinued, the court ordered the claimants to pay the defendant's costs on the indemnity basis: *Naskaris v ANS Plc* [2002] EWHC 1782 (Ch), Blackburn J.

Where a judge granted a claimant permission to discontinue judicial review proceedings and ordered the respondents to pay the claimant's costs to be assessed if not agreed, held on appeal that the judge was wrong on assessment to limit the costs to one only of several issues raised in the claim. The original order for costs could only mean that the claimant had been awarded all their costs: *R. (Chorion Plc) v Westminster City Council* [2002] EWCA Civ 1126; *The Times*, October 21, 2002, CA.

Where a judicial review application was discontinued the defendant's costs were reduced to reflect the defendant's failure to comply with the judicial review pre-action protocol: *Aegis, Re* ; *Aegis Group Plc v Inland Revenue Commissioners* [2005] EWHC 1468, Park J.

The general rule is that a claimant who has been granted an order discontinuing its action, is liable for the defendant's costs up to the date when notice of discontinuation is served. It was appropriate that the burden should be on the party seeking to persuade the court to make a different order. In a case where a claimant had become alive at a late stage to commercial factors, which were clear from the outset of the proceedings, it was held that there was nothing to show that it was fair to depart from the general rule. It was not just or fair to allow a liquidator to walk away from an action in which they had made allegations which would undoubtedly have been resisted and to leave the defendant to pay their own costs when there had been no material change since the proceedings had commenced: *Walker v Walker* [2005] EWCA Civ 247; [2006] 1 W.L.R. 2194; [2006] 1 All E.R. 272, CA.

Where a party discontinues under r.38.5(3) the discontinuance does not affect any proceedings to deal with any question of costs. The court has a discretion to exercise when considering an application under r.38.6, and one of the factors it may take into account is the fact that such an application was made sometime after discontinuance. On the facts of the case there was no relevant change in circumstances which would justify departing from the usual order that the discontinuing party should pay the costs of the discontinued action. Costs of the counterclaim were excluded from the order against the discontinuing claimant since any work on the counterclaim before the commencement of the proceedings would not have been part of the defendant's defence to the action: *Hoist UK Ltd v Reid Lifting Ltd* [2010] EWHC 1922 (Ch), Roger Wyand Q.C.

When a party discontinues proceedings there was a presumption under r.38.6 that the defendant would be awarded their costs, and the burden was on the claimant to show that there was good reason to disapply that presumption. The fact that the claimant might well have succeeded at trial was not itself a good reason. The fact that the claimant's decision to discontinue might have been motivated by practical, pragmatic or financial reasons, as opposed to lack of confidence in the merits of the case, did not assist. The claimant had taken the risk of litigation and had exposed the defendant to the costs involved in defending it. It was difficult to see how any change in circumstances could amount to a good reason, unless connected with some conduct on the part of the defendant which deserved to result in an order for costs against them: *Teasdale v HSBC Bank Plc & Other Cases* [2010] EWHC 612 (QB), H.H. Judge Waksman Q.C.

Rule 38.6 makes it clear that a defendant starts from the position of being entitled to its costs following discontinuance, and it is for the claimant to justify the making of some other order. The correct approach is for the court to consider all matters relied on as justifying the making of some alternative order for costs, and then to decide whether those circumstances were sufficient to support such an order. Where a claimant achieves satisfaction of his whole claim against one set of defendants, and

discontinues against the remaining defendants, the fact that a trial had been avoided could not of itself justify a departure from the normal rule. There had to be something more than that to justify that departure, otherwise the normal rule would be disapplied in every case: *Messih v McMillan Williams* [2010] EWCA Civ 844.

Where the claimant's personal tax claim had become academic the claimant sought permission to discontinue, and an order that he should not have to pay the costs under CPR r.38.6(1). The court held there was a line of authority suggesting that where a claim had become academic by some act on the part of the defendant, or of an independent third party, it might be proper to make no order for costs on discontinuance. The question was to be approached by reference to the general consideration set out in CPR r.44.3, rather than within the constraints imposed by r.38.6: *Dhillon & Bachmann Trust Co Ltd v Siddiqui* [2010] EWHC 1400 Ch, Norris J.

The court has jurisdiction to entertain an application for costs to be paid on the indemnity basis even where the claimants had discontinued their action and offered to pay costs on the indemnity basis, although they did not accept that the defendant was entitled to such an order. On the facts one reason why it was appropriate to award costs on the indemnity basis was because there were circumstances that took the case out of the ordinary, including the pursuit of hopeless but widely publicised allegations of dishonesty against many officers of the defendant. The fact that the claimants denied that the defendant was entitled to such an order itself created a sufficient lis to justify dealing with the application: *Three Rivers DC v Bank of England (Indemnity Costs)* [2006] EWHC 816 (Comm), Tomlinson J.

The Court of Appeal has held that service on the court by tenants, of notice under the Landlord and Tenant Act 1954 stating that they did not want a new tenancy, was the equivalent of a notice of discontinuance of the proceedings in which the tenants had been seeking an order for a new tenancy. It therefore followed that the tenants were liable to pay the costs of the proceedings under CPR r.38.6(1) unless special circumstances justified a different order: *Lay v Drexler* [2007] EWCA Civ 464.

The burden is on the party discontinuing to establish a valid reason for departing from the usual rule that a claimant who discontinues is liable for the costs which a defendant has incurred on or before the date on which the notice of discontinuance was served; see *Walker v Walker* above. In the particular case the discontinuing claimant was ordered to pay the costs on the indemnity basis, because:

(a) it had started the proceedings which were unlikely to succeed;
(b) there was no sensible reason to bring them;
(c) the proceedings, and therefore the duration of the burden of costs on the defendant, were unduly protracted; and
(d) the claimant's grossly excessive demands and unreasonable refusal to negotiate sensibly with a co-defendant made earlier settlement impossible: *Far Out Productions Inc v Unilever UK* [2009] EWHC 16 (Ch), N Strauss Q.C.

Rule 44.12(2)—interest

44.12.4 Interest under the Judgments Act 1838 s.17 or County Courts Act 1984 s.74 runs from the date on which the event giving rise to the entitlement to costs occurred or from such date as the court may order. Section 17(1) of the Judgments Act 1838 has been amended by the Civil Procedure (Modification of Enactments) Order 1998 (SI 1998/2940) to provide that interest will run from such time as is prescribed by rules of court. See r.44.3(6)(g). In a patent action the judge ordered the claimant to pay part of the defendant's costs. Interest on the amount of costs assessed was payable from the date of the judgment. The claimant appealed and the defendants cross-appealed against the limited order for costs. The appeal was dismissed but the cross-appeal as to costs succeeded, on the basis that the trial judge had pre-judged the results of detailed assessment without considering the facts. The defendants were therefore entitled to recover costs as eventually assessed. The effect of this order setting aside the original order as to costs was to make interest payable from the date of the Court of Appeal order. It was held that, although the Court of Appeal could not, under the slip rule, order that interest should be recoverable on all costs from the date of the original judge's order, it was possible under that rule to give effect to the intention of the court. Interest was therefore to run from the date of the judge's order pursuant to his original order and from the date of the Court of Appeal judgment pursuant to that order: *Bristol Myers Squibb Co v Baker Norton Pharmaceuticals Inc* [2001] EWCA Civ 414.

Costs-only proceedings[1]

44.12A—(1) This rule sets out a procedure which may be followed where— **44.12A**

(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 or Section VI of Part 45 applies, the court shall assess the costs in the manner set out in that Section.

(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.)

Editorial note

This rule is designed to deal with the situation where parties have agreed the substantive issue between them and one party has agreed to pay the other's costs, but it has not been possible to agree the amount of those costs. An application is made under Pt 8 and a reduced fee is payable. Where the court makes an order for costs in an application under this rule it will order detailed assessment. There will normally be no need for the parties to attend court for the Pt 8 application. If the applicant does not satisfy the court as to the existence of an agreement or the application is opposed, it will be dismissed. Sub-paragraph (1)(c) of r.44.12A was substituted by, and paras (1A) and (4A) were inserted by the Civil Procedure (Amendment No.4) Rules 2003; these changes came into effect on October 6, 2003. Sections II and VI of Pt 45 (referred to in r.44.12A(4A), as amended by the Civil Procedure (Amendment) Rules 2010, impose fixed recoverable costs regimes on, respectively, certain proceedings arising from road traffic accidents, and on claims that have been started (or should have been started) under Practice Direction 8B (Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents—Stage 3 Procedure). Practice Direction 8B sets out the procedure for a claim where the parties have followed the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the RTA Protocol"). There are two sequential stages to the Protocol process, Stage 1 and Stage 2, which the parties are expected to follow, before embarking (if necessary) on court **44.12A.1**

[1] Introduced by the Civil Procedure (Amendment No.3) Rules 2000 (SI 2000/1317) and amended by the Civil Procedure (Amendment) Rules 2002 (SI 2002/2058), the Civil Procedure (Amendment No.4) Rules 2003 (SI 2003/2113) and the Civil Procedure (Amendment) Rules 2010 (SI 2010/621).

proceedings in accordance with the procedures set out in Practice Direction 8B ("the Stage 3 procedure") (see further, as to the RTA Protocol processes Stage 1 and Stage 2, para. C13A–001 below, and as to the Stage 3 Procedure, para. 8BPD.0 above). During the Stage 1 and 2 processes, upon the happening of certain events in negotiations for settlement, the claimant may become entitled to fixed costs (as provided by Section VI of Pt 45) and to certain disbursements. Where there is a dispute as to the amount or validity of any disbursement, the parties may use the procedure set out in r.44.12A (RTA Protocol para.7.38).

This rule is supplemented by the provisions in Section 17 of the Costs Practice Direction.

Order for costs

44.12A.2 An order for costs made under this rule is treated as an order for the amount of costs to be decided by detailed assessment under Pt 47 (see para.17.8 of the Costs Practice Direction).

Offers to settle in costs only proceedings

44.12A.3 Paragraph 46.2 of the Costs Practice Direction states that any offer should specify whether or not it is inclusive of the costs of preparation of the bill, interest and VAT. If the offer is silent it is treated as including these items. Since the purpose of the offer is to avoid a detailed assessment hearing, the cost of that hearing is excluded from the offer. Until the time the substantive claim is settled, "the proceedings" relate to liability and the amount of any compensation. After the substantive claim is settled "the proceedings" relate to the assessment of costs the paying party has to pay. Even when Pt 8 proceedings have to be commenced in order to obtain a court order for detailed assessment the "costs of the proceedings" within the meaning of CPR r.47.19 still relate only to the costs leading up to the disposal (by agreement) of the substantive claim. They are "the proceedings which gave rise to the assessment proceedings" and the assessment proceedings cover the whole period of negotiations about the amount of costs payable through the Pt 8 proceedings to the ultimate disposal of those proceedings, whether by agreement or by a court order. If the costs judge considers that the receiving party ought to have accepted an offer made before the Pt 8 proceedings commenced then they are likely to conclude that the paying party should receive all their costs including any costs involved in the subsequent Pt 8 proceedings pursuant to CPR r.47.18(2). The substantive proceedings and the assessment proceedings are quite different: *Crosbie v Munroe* [2003] EWCA Civ 350; [2003] 1 W.L.R. 2033, CA.

Costs only proceedings—costs in respect of insurance premium in publication cases

44.12B **44.12B—(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.

Effect of rule

44.12B.1 This rule took effect from October 1, 2009, and makes it clear that in relation to publication cases (defamation and similar cases) insurance premiums for after the event insurance cannot be recovered for any period if the information about the insurance policy required by the Rules or Practice Direction were not given as required, and to provide that an ATE insurance premium cannot be recovered in costs only proceedings by a party if an admission of liability leading to settlement was made by the other party within 42 days of being given the required information.

Costs-only application after a claim is started under Part 8 in accordance with Practice Direction 8B[1]

44.12C—(1) This rule sets out the procedure where— **44.12C**

(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) proceedings have been started under Part 8 in accordance with Practice Direction 8B.

(2) Either party may make an application for the court to determine the costs.

(3) Where an application is made under this rule the court will assess the costs in accordance with rule 45.34 or rule 45.37.

(4) Rule 48.3 (amount of costs where costs are payable pursuant to a contract) does not apply to an application under this rule.

(Practice Direction 8B sets out the procedure for a claim where the parties have followed the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents.)

Effect of rule

44.12C.1 The procedure set out in this rule describes a procedure for making an application in the course of proceedings; see further commentary following r.45.36.

Practice Direction 8B (Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents—Stage 3 Procedure) deals with the position where the parties have followed the pre-action protocol for low value personal injury claims in road traffic accidents (the RTA protocol), but are unable to agree the amount of damages payable at the end of stage 2 of the RTA protocol. The Practice Direction also applies where the claimant is a child, the damages have been agreed, but the approval of the court is required; and where compliance with the RTA protocol is not possible before the expiration of a limitation period and proceedings are commenced. The above rule applies where the parties have reached an agreement on all issues, including which party is to pay the costs, which is confirmed in writing, but have failed to agree the amount of those costs and proceedings have been started under Pt 8 in accordance with Practice Direction 8B. Under this rule the court will assess the costs under Section VI of Pt 45.

[1] Introduced by the Civil Procedure (Amendment) Rules 2010 (SI 2010/621).

Special situations[1]

44.13 **44.13—(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.[2]

(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.

Effect of rule

44.13.1 Rule 44.13(1) makes it clear that where an order is silent as to costs no party is entitled to the costs in relation to that order.

See the table at para.8.5 of the Costs Practice Direction as to the meaning of "Costs here and below" and the exception for the Divisional Court.

Where an action had been automatically struck out due to the claimant's delay and the claimant successfully applied for it to be reinstated, the order made on that application was silent as to costs between the parties. The question of wasted costs was reserved to the trial judge. When, at the trial the claimant was successful, the trial judge had no jurisdiction to vary the earlier order to make the defendant pay the costs arising out of the strike out and reinstatement application: *Griffiths v Commissioner of Police* [2003] EWCA Civ 313.

Court's powers in relation to misconduct[3]

44.14 **44.14—(1) The court may make an order under this rule where—**

(a) a party or his legal representative, in connection with a

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[1] Amended by the Civil Procedure (Amendment No.5) Rules 2001 (SI 2001/4015) and the Civil Procedure (Amendment) Rules 2008 (SI 2008/2178).

[2] Paragraph (1) substituted by the Civil Procedure (Amendment No.5) Rules 2001 SI 2001/4015, in force March 25, 2002.

[3] Amended by the Civil Procedure (Amendment No.3) Rules 2000 (SI 2000/1317).

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.

Editorial note

44.14.0 The provisions relating to misconduct now extend to the legal representative of a party as well as to the party personally. The provisions relate both to unreasonable or improper conduct before or during the proceedings giving rise to the assessment proceedings, and during the assessment proceedings themselves. The effect of this is that a costs judge may of their own initiative, or at the request of a party, investigate and make orders in respect of unreasonable or improper conduct by a party or a legal representative. This means that a legal representative who has been found to have acted unreasonably or improperly may be ordered personally to pay costs which another party has been caused to incur. This power is in addition to the power to make wasted costs orders in accordance with s.51(6) of the Senior Courts Act 1981 (see r.48.7). In matrimonial proceedings, where an adjournment was wrongly obtained, the court found that there had been a culpable failure on the part of the wife's solicitors to invite an opposing party's solicitors to agree to an adjournment and a culpable misrepresentation on their part to the Clerk of the Rules that all the relevant parties agreed. The judge made no order as to costs between the parties on the adjournment. On appeal, the court held that there was no legitimate reason for depriving either the husband or the other party of their costs. The wife's gross delays had precipitated an adjournment of what turned out to be in excess of a year. In respect of the opposing party, there was a further compelling reason for awarding her costs, namely that solicitors had made to the Clerk of the Rules the misrepresentation which had secured an adjournment of the matter without reference to the opposing party's solicitors and without giving them the opportunity to object to it. The wife was ordered to pay the opposing party's costs of the hearing before the judge at first instance and any other costs thrown away as a result of the adjournment of the substantive hearing: *Gamboa-Garzon v Langer* [2006] EWCA Civ 1246.

Where the court makes an order against a party who is legally represented (whether the order is against the party personally or against the legal representative personally) the party's solicitor must notify the client in writing within seven days of receipt of notice of the order if the party was not present when the order was made. This provision is in terms similar to r.44.2 which refers to "a costs order" made against a legally represented party.

As to wasted costs orders see r.48.7.

Delay

44.14.1 Unsuccessful claimants applied for detailed assessment proceedings to be struck out or stayed on the grounds of delay and failing to comply with the Rules and Costs Practice Direction. The court held that to impose the sanction of disallowance of costs, pursuant to r.44.14, on the ground of misconduct would be disproportionate. The blame for the delay was not all on the side of the defendant. Although there was

culpable delay on the defendant's part, the claimants had not availed themselves of the right to apply under r.47.8(1) for an order requiring the defendant to commence detailed assessment within a specified period. The delay had not prevented fair assessment of the defendant's costs. The court found the defendant's bill of costs was valid and in compliance with the relevant rules. Even if there was a technical non compliance it would have reasonable justification and would not be a sound basis for the imposition of sanctions for misconduct pursuant to r.44.14(1)(a): *Botham v Khan* [2004] EWHC 2602, QB, Richards J.

The solicitor and counsel relationship

44.14.2 In *Davy-Chiesman v Davy-Chiesman* [1984] Fam. 48; [1984] 1 All E.R. 311, the Court of Appeal held that where the relief sought as advised by counsel was glaringly wrong, the solicitor had a duty to inform the legal aid authorities of the change of circumstances, and to express his own views, and did not abdicate his own responsibility by instructing counsel. He was ordered to pay the costs of both sides personally.

In *Re A (A Minor)* [1988] Fam. Law. 339, CA, solicitors were held personally responsible for the costs of four abortive hearings, in a case where it was apparent that counsel was not competent and the solicitors should have withdrawn the instructions. (A wasted costs order might now have been made against counsel.)

Although solicitors cannot automatically shelter behind counsel, if the circumstances warrant it they may be justified in relying upon counsel's advice (*Swedac Ltd v Magnet & Southern plc* [1990] F.S.R. 89). In circumstances where there was no evidence that a solicitor had expertise in the field of judicial review, the proposition that a solicitor who acted on counsel's advice had to bear responsibility for that advice in all circumstances could not be supported: *R. v Luton Family Proceedings Court Justices, Ex p. R.* (1998) 4 C.L. 51, CA.

Counsel is under a duty to reassess any advice in the light of further information. Failure to do so may lead to a wasted costs order (*C v C (Wasted Costs Order)* [1994] 2 F.L.R. 34, Ewbank J.).

It was unreasonable for a barrister in sole practice to rely wholly on instructing solicitors to notify them of the dates and times of their cases. It was counsel's responsibility to adopt a system which enabled barristers to keep abreast of the listing arrangements for their cases (*Re A Barrister (Wasted Costs Order) (No.4 of 1992)*, *The Times*, March 15, 1994; *Independent*, March 15, 1994, CA (Criminal Division) and see *Re A Barrister (Wasted Costs Order) (No.4 of 1993)*, *The Times*, April 21, 1993, CA (Criminal Division)).

Where the conduct of both the barrister and the solicitor in a case are the subject of criticism, any investigation of their professional conduct should be conducted by a joint tribunal (*Vowles v Vowles*, *The Times*, October 4, 1990, CA).

Providing information about funding arrangements[1]

44.15 **44.15—(1) A party who seeks to recover an additional liability must provide information about the funding arrangement to the court and to other parties as required by a rule, practice direction or court order.**

(2) Where the funding arrangement has changed, and the information a party has previously provided in accordance with paragraph (1) is no longer accurate, that party must file notice of the change and serve it on all other parties within 7 days.

(3) Where paragraph (2) applies, and a party has already filed—

(a) an allocation questionnaire; or

(b) a 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—

[1] Introduced by the Civil Procedure (Amendment No.3) Rules 2000 (SI 2000/1317) and amended by the Civil Procedure (Amendment) Rules 2002 (SI 2002/2058).

- **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.)

Editorial note

44.15.1 The rule provides that any party who seeks to recover an additional liability must provide certain information about it and must also provide information where the funding arrangement changes. The information to be provided in the notice of funding, and in the estimate of costs, is limited. Much fuller disclosure of information is required when the final assessment of costs takes place. See Section 19 of the Costs Practice Direction.

This rule and Section 19 of the Costs Practice Direction are not retrospective in their effect. Therefore no rules of court requiring notice of funding to be given apply to defendants entering into insurance arrangements between April 1 and July 2, 2000: *Inline Logistics Ltd v UCI Logistics Ltd* [2002] EWHC 519, Ferris J.

Adjournment where legal representative seeks to challenge disallowance of any amount of percentage increase[1]

44.16 **44.16—(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.)

Editorial note

44.16.1 The effect of reg.(3)(2)(b) of the Conditional Fee Agreements Regulations 2000

[1] Introduced by the Civil Procedure (Amendment No.3) Rules 2000 (SI 2000/1317) and amended by the Civil Procedure (Amendment) Rules 2001 (SI 2001/256), Civil Procedure (Amendment) Rules 2002 (SI 2002/2058) and the Civil Procedure (Amendment No.4) Rules 2005 (SI 2005/3515).

(now revoked) is to prevent a legal representative from recovering from the client more, in respect of a success fee than the court has ordered the paying party to pay. The Costs Practice Direction s.20 sets out how the court may resolve the conflict between the legal representatives and the client when such an order is made. Rule 44.3B(1)(a) provides that any percentage increase relating to the cost of the postponement of the payment of fees and expenses is not recoverable against another party. There is potential for an application to be made under this rule, in many cases supported by a conditional fee agreement.

Procedure

44.16.2 Section 20 of the Costs Practice Direction sets out the procedure to be followed in the assessment proceedings. If in detailed assessment proceedings, the points of dispute disclose that any percentage increase claimed by counsel is challenged, the solicitors must within three days of service deliver to counsel a copy of the relevant points of dispute and the relevant part of the bill. Counsel then has seven days within which to inform the solicitor in writing whether or not the reduction sought is accepted or what reply they wish to make. The solicitor must serve this reply on the paying party. The Practice Direction sets out the steps to be taken where solicitor or counsel wish to apply for an order that the amount of any percentage increase disallowed against the paying party shall continue to be paid by the client. It should be noted that if the client is present when the application is made and agrees that it should be dealt with straight away or the court is satisfied by evidence that the client consents to an order being made in their absence, the court may, if it thinks fit, deal with the application without adjourning. Section 74(3) of the Solicitors Act 1974 (which prevents a solicitor recovering from the client more than the amount recoverable from an opposing party) applies, unless the solicitor and client have a written agreement which expressly permits payment to the solicitor of a greater amount in accordance with r.48.8(1A).

Application of costs rules[1]

44.17 **44.17 This Part and Part 45 (fixed costs), Part 46 (fast track trial costs), Part 47 (procedure for detailed assessment of costs and default provisions) and Part 48 (special cases), do not apply to the assessment of costs in proceedings to the extent that—**

(a) section 11 of the Access to Justice Act 1999, and provisions made under that Act; or

(b) regulations made under the Legal Aid Act 1988;

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.)

Editorial note

44.17.1 Section 11 of the Access to Justice Act 1999 deals with orders for costs against a LSC funded client and the Legal Services Commission. The Costs Practice Directions ss.21 to 23 set out the procedure to be followed, which is similar to but not identical with detailed assessment. The Civil Legal Aid (General) Regulations 1989, as amended, continue to apply to the assessment of costs where a certificate has been issued by the Legal Aid Board or by the Legal Services Commission.

Section 11(1) of the 1999 Act provides that costs ordered against an assisted party should not exceed a reasonable amount. The protection of the subsection does not apply to those whose conduct amounts to serious crime, e.g. pursuing fraudulent claims against insurers: *Jones v Congregational and General Insurance Plc* [2003] EWHC 1027 (QB); [2003] 1 W.L.R. 3001 (H.H. Judge Chambers Q.C.).

A legally aided litigant had, under theLegal Aid Act 1988, received several overlap-

[1] Introduced by the Civil Procedure (Amendment No.3) Rules 2000 (SI 2000/1317) and amended by the Civil Procedure (Amendment No.2) Rules 2009 (SI 2009/3390).

ping legal aid certificates, which were from time to time discharged and then reinstated when she retained new solicitors. The litigant acted in person during the periods when she was without legal representation. The question arose as to the extent of any costs protection under s.17 of the Legal Aid Act 1988. The Costs Judge found that, for those dates upon which the litigant was acting for herself she did not have costs protection. The litigant appealed, arguing that she had been a legally assisted party within the meaning of s.17 of the 1988 Act for the whole period of the litigation, and that when she was without legal representation she had taken no active steps herself. On appeal the court held, pursuant to s.2(11) that during any period when she was acting in person she was not a legally assisted person, even though she was actively seeking to reinstate the provision of her legal aid certificates. The litigant was not a legally assisted party for the purposes of s.17 during any period after a firm of solicitors had ceased to act for her, and had communicated that fact to the respondents' solicitors. The state of mind of the litigant acting in person was not determinative of the question of whether she had at that stage ceased to be legally assisted. The reinstatement of a legal aid certificate did not have the effect, retrospectively, that the litigant was deemed to have been legally assisted for the purposes of s.17 during the period between discharge and reinstatement of the certificate. The question whether, at any particular time the litigant was legally aided was of real importance to the other litigants in the case in respect of the consequences arising under ss.17 and 18: *Mohammadi v Shellpoint Trustees Ltd* [2009] EWHC 1098 (Ch); [2010] 1 All ER 433 Briggs J.

Community Legal Service (Costs) Regulations 2000 regulation 5

44.17.2 An order should be made for the determination of an appellant's liability to pay costs and for any application by the respondent for an order for payment of costs by the Legal Services Commission to be referred to the costs judge in accordance with reg.10 of the Costs Regulations. If the LSC took the point that the application was premature the costs judge had the power to adjourn until final resolution of the proceedings but that should not be necessary (see *General Accident Fire and Life Assurance Corporation Ltd v Foster* [1972] 3 All E.R. 877, CA) since the relevant proceedings were those in the Court of Appeal. The proceedings in the Court of Appeal had been finally determined and there was no difficulty in the exercise by a costs judge of their jurisdiction in relation to the costs of those proceedings: *Masterman-Lister v Brutton & Co* [2003] EWCA Civ 70. Nothing in r.44.3 prevents the court from applying the Community Legal Service (Costs) Regulations 2000 in considering whether, but for cost protection, the court would have made an order against the unsuccessful party in the context of an application under s.11(1) of the 1999 Act: *Portsmouth Hospital NHS Trust v Wyatt (Costs)* [2006] EWCA Civ 529.

The Court of Appeal has held that it is clear from the wording of s.11of the 1999 Act that the provisions concerning the assessment of costs apply only to those costs which were actually funded by the CLS. CPR Pts 44 to 48 apply generally in relation to costs in civil actions, whereas the s.11 regime relates exclusively to funded costs. Accordingly, where a paying party has been CLS funded only for part of the litigation s.11 and the Regulations made under it, apply to that part of the litigation costs that were funded, CPR Pt 47 applies to the remaining costs. The fact that the receiving party had lost the opportunity to seek costs for the period covered by CLS funding did not exclude her from seeking costs for the non funded period: *Re B (Children)* [2005] EWCA Civ 779.

Costs capping orders—General

44.18 **44.18—(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;

(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.

Editorial note

44.18.1 The Civil Procedure Rule Committee has codified the position with regard to costs capping orders. Rules 44.18, 44.19 and 44.20 set out the general principles, the procedure for applying for a costs capping order and for varying such an order.

Rule 44.18(1)(2)

44.18.2 Costs capping orders can only be made in respect of costs (including disbursements) to be incurred in the future. The Rule Committee took the view that the costs capping order should not include any amount for any additional liability. It is necessary to distinguish between costs capping orders and protective costs orders, as to which see r.48.15.7.

Rule 44.18(4)(4)

44.18.3 The court may make a costs capping order in respect of the whole of the litigation, or any particular issue or issues ordered to be tried separately. Although the court may make a costs capping order at any stage of the proceedings, if the application is made too late the costs capping order will be pointless, since the bulk of the costs will already have been incurred.

Rule 44.18(5)(6)

44.18.4 The criteria which have to be satisfied before the court will make a costs capping order are, that it is in the interests of justice to do so; there is a substantial risk that without such an order costs will be disproportionately incurred; and it is not satisfied that that risk can be adequately controlled by case management directions and detailed assessment of the costs. The court is required to take into account all the circumstances of the case, including the factors set out at r.48.18(6).

A defendant's application for a costs capping order limiting the claimant's costs to the limit of its ATE policy was refused. The court held that it was entirely random to link the amount at which a claimant's costs could be capped to the amount that the defendant could recover against the claimant under the ATE policy. No costs capping order would be made if the risk of proportionate costs being incurred could be contained by case management or detailed assessment. Although the court refused to make a costs capping order, the court instead made an order linking the claimant's ultimate costs recovery to its estimate of their future costs. The court also granted them liberty to apply to modify that order if their costs estimate was subsequently altered as a result of an order or direction by the court: *Barr v Biffa Waste Services Ltd (No.2)* [2009] EWHC 2444 (TCC), Coulson J.

Application for a costs capping order[1]

44.19—(1) An application for a costs capping order must be made on notice in accordance with Part 23. **44.19**

(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.

Costs capping

When an application for a costs capping order is made the application must specify whether the order sought is in respect of the whole of the litigation or a particular issue which is ordered to be tried separately, or (although the rule does not specifically so state), up to a particular point in the proceedings. The application must be accompanied by an estimate of costs setting out the costs and disbursements incurred by the applicant to date, and the likely future costs and disbursements of the proceedings. **44.19.1**

The order may be made by the judge to whom the application is made, or that judge may sit with an assessor who will normally be a costs judge or Regional costs judge.

[1] Amended by the Civil Procedure (Amendment No.2) Rules 2009 (SI 2009/3390).

For the procedure to be followed, and for the matters to be taken into account by the court, where a party makes an application for an order limiting the amount of future costs (including disbursements) which a party may recover pursuant to an order for costs subsequently made (a "costs capping order"), see rr.44.18 to 44.20, and Practice Direction (Costs) Section 23A.

In *AB v Leeds Teaching Hospitals NHS Trust* [2003] EWHC 1034 (QB) Gage J. put a cap on the costs to be incurred by the claimants; a practice adopted by some district judges ever since the CPR came into force. This reasoning was followed by Hallett J. in making a costs capping order in *Various Ledward Claimants v Kent and Medway HA* [2003] EWHC 2551; [2004] 1 Costs L.R. 101.

The purpose of a costs capping order is to enable the capped party to plan the appropriate level of expenditure to bring the case to trial, at a cost which is in line with amount of the cap. The imposition of a costs cap very close to trial, would in effect, penalise a claimant. The amount of cover and existence of material exclusions in a ATE policy are of obvious relevance to an opposing party who must be in a position to make informed choices as to the conduct of the litigation. On the facts, the application for a cap was refused. *Henry v British Broadcasting Corporation* [2005] EWHC 2503 (QB); [2006] 1 All E.R. 154, Gray J.

Although the court does have jurisdiction to make cost cap orders, where the claimant solicitors were experienced in the field and there was not a real and substantial risk that costs would be disproportionately or unreasonably incurred, a post trial detailed assessment was sufficient to ensure that costs did not become disproportionate. The risk could be managed by conventional case management and detailed assessment after trial. It was very unlikely that it would be appropriate for the court to adopt a practice of capping costs in the majority of clinical negligence cases other than where group litigation was involved. When such an application was made it should be supported by evidence showing a prima facie case that the conditions could be satisfied. The allocation and pre trial questionnaire should have attached estimates of the likely overall costs which should give a good guide; the court should be able to deal with an application at a comparatively short hearing; and the benefit of the doubt in respect of reasonableness of prospective costs should be resolved in favour of the party being capped (*Smart v East Cheshire NHS Trust* [2003] EWHC 2806 (QB), Gage J.).

In group litigation in which the LSC had withdrawn funding, a number of claimants wished to carry on either unconditionally or until the outcome of a further funding review. They sought a costs capping order against the defendants. The court expressed the view that a prospective costs capping order should only be contemplated where there are grounds for believing that a party may incur excessive or disproportionate legal costs and where the risk that excessive legal costs are being incurred unnecessarily will not be picked up by the court when exercising its case management functions or when conducting a detailed assessment of the costs after trial. Costs capping is a relatively dramatic course to take and will only be ordered on cogent evidence: *Sayers v SmithKline Beecham* [2004] EWHC 1899 (QB), Keith J.

In group litigation it is important for the parties to know and to budget for the costs consequences of losing. Where a judge is asked to make a costs capping order it is necessary to take a broad brush approach and to fix overall figures, having regard to the individual costs heads that make up each party's estimate. In the particular case the judge imposed a cap on both sides, which included a 5 per cent addition to allow for contingencies. The parties had agreed that any cap on the claimant's costs would not include any success fee element. The order made was limited up to the end of the trial of generic issues and the parties were at liberty to apply if circumstances unforeseeable and beyond their reasonable control should occur, giving rise to a genuine need to adjust the figures: *Multiple Claimants v Corby BC* [2008] EWHC 619 (TCC), Akenhead J.

In *Willis v Nicolson* [2007] EWCA Civ 199, a costs capping application in a catastrophic injury case, the Court of Appeal commented that the court would be careful before imposing a cap, particularly when those restricted were acting for a claimant who had suffered catastrophic injuries. To conduct the exercise properly the court would need reliable information about, and understanding of the nature of the particular case and the general demands of that type of litigation. For reasons both of fairness and of practicality a cap could not be imposed retrospectively, so that the enquiry must take place at a sufficiently early stage to have a real effect on the expenditure. There has therefore to be careful selection of the right moment in the litigation process for consideration of a costs cap. The court also pointed out that the exercise of

costs capping should not be entered upon lightly, since the cap has to be determined by a costs judge, a scarce resource; and if the exercise is to be done properly it is likely, as in effect a substitute for final assessment, to be as expensive and time consuming as a final assessment itself. The Court of Appeal had considered giving a comprehensive set of guiding principles for costs capping cases, but after further consideration decided that such guidance should emanate from the Civil Procedure Rule Committee after consultation.

In *King v Telegraph Group Ltd* [2004] EWCA Civ 613, the Court of Appeal said that the view expressed by Gage J. in *AB v Leeds Teaching Hospitals NHS Trust* [2003] EWHC 1034 (QB), to the effect that the court possesses the power to make a costs capping order in an appropriate case, is correct. In the *King* case the court said:

> "The language of section 51 of the Senior Courts Act 1981 is very wide and CPR 3.2(m) confers the requisite power. Needless to say, in deciding what order to make the court should take the principles set out in CPR 44.3 (which govern the retrospective assessment of costs) as an important point of reference."

In this case the court also referred to the judgment of Dyson L.J. in *Leigh v Michelin Tyre Plc* [2003] EWCA Civ 1766; [2004] 2 All E.R. 175, CA, where his lordship expressed the opinion that the prospective fixing of costs budgets was likely to achieve the objective of controlling the costs of litigation more effectively than estimates.

In dealing with a costs capping application in defamation proceedings the judge held that the amount allowed by the costs judge in respect of solicitors costs was too low. The court on appeal declined to interfere with the allowance in respect of counsel's fees, expressing the view that while it would not wish to endorse a decision which involved precluding the claimant from instructing leading counsel, whilst the defendant was free to do so, in the instant case the defendant had made a concession that it would instruct only junior counsel. In those circumstances it would not be so unfair as to be unreasonable that the claimant should be similarly confined: *Tierney v News Group Newspapers Ltd* [2006] EWHC 3275 (QB), Eady J. In a passing off action, where the claimant was represented on a CFA with no ATE cover, the court was not persuaded that this was in itself enough to justify a costs capping order. Notwithstanding that the defendants had demonstrated a significant risk of excessive or extravagant expenditure in two specific areas, the judge was not satisfied that excessive expenditure could not adequately be dealt with on detailed assessment: *Knight v Beyond Properties Pty Ltd* [2006] EWHC 1242 (Ch); [2007] 1 W.L.R. 625, Mann J.

Application to vary a costs capping order

44.20 An application to vary a costs capping order must be made by application notice pursuant to Part 23. **44.20**

Application for costs capping order (rr.44.18 to 44.20)

Rules 44.18 to 44.20 were inserted in the CPR by Civil Procedure (Amendment No.3) Rules 2008 (SI 2008/3327) r.9(c) and came into effect on April 6, 2009. These provisions are supplemented by Practice Direction—Costs, Section 23A: see para.44PD.18 below. Paragraph 23A states that the estimate of costs required by rr.44.19 and 44.20(2) must be in the form illustrated in Precedent H in the Schedule of Costs Precedents annexed to this Practice Direction. For commentary on costs capping orders, see para.43.2.1.2 above. **44.20.1**

If either party wishes to vary the costs capping order the application is made on notice pursuant to Pt 23. No variation will be made unless there has been a material and substantial change of circumstances since the day when the order was made, or there is some other compelling reason why a variation should be made (see r.44.18(7)).

THE COSTS PRACTICE DIRECTION (CPR PT 44)

General Rules About Costs

Section 7 Solicitor's Duty to Notify Client: Rule 44.2

44PD.1 **7.1** For the purposes of rule 44.2 "client" includes a party for whom a solicitor is acting and any other person (for example, an insurer, a trade union or the LSC) who has instructed the solicitor to act or who is liable to pay his fees.

7.2 Where a solicitor notifies a client of an order under that rule, he must also explain why the order came to be made.

7.3 Although rule 44.2 does not specify any sanction for breach of the rule the court may, either in the order for costs itself or in a subsequent order, require the solicitor to produce to the court evidence showing that he took reasonable steps to comply with the rule.

Section 8 Court's Discretion and Circumstances to be Taken Into Account When Exercising its Discretion as to Costs: Rule 44.3

44PD.2 **8.1** Attention is drawn to the factors set out in this rule which may lead the court to depart from the general rule stated in rule 44.3(2) and to make a different order about costs.

8.2 In a probate claim where a defendant has in his defence given notice that he requires the will to be proved in solemn form (see paragraph 8.3 of Practice Direction 57), the court will not make an order for costs against the defendant unless it appears that there was no reasonable ground for opposing the will. The term "probate claim" is defined in rule 57.1(2).

8.3(1) The court may make an order about costs at any stage in a case.

(2) In particular the court may make an order about costs when it deals with any application, makes any order or holds any hearing and that order about costs may relate to the costs of that application, order or hearing.

(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. (Paragraphs 2.4 and 2.5 above explain when proceedings are concluded. As to the time when detailed assessment may be carried out see paragraphs 28.1, below.)

8.4 In deciding what order to make about costs the court is required to have regard to all the circumstances including 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.

8.5 There are certain costs orders which the court will commonly make in proceedings before trial. The following table sets out the general effect of these orders. The table is not an exhaustive list of the orders which the court may make.

Term	Effect
• Costs • Costs in any event	The party in whose favour the order is made is entitled to the costs in respect of the part of the proceedings to which the order relates, whatever other costs orders are made in the proceedings.
• Costs in the case • Costs in the application	The party in whose favour the court makes an order for costs at the end of the proceedings is entitled to his costs of the part of the proceedings to which the order relates.
• Costs reserved	The decision about costs is deferred to a later occasion, but if no later order is made the costs will be costs in the case.
• Claimant's/ Defendant's costs in case/ application	If the party in whose favour the costs order is made is awarded costs at the end of the proceedings, that party is entitled to his costs of the part of the proceedings to which the order relates. If any other party is awarded costs at the end of the proceedings, the party in whose favour the final costs order is made is not liable to pay the costs of any other party in respect of the part of the proceedings to which the order relates.
• Costs thrown away	Where, for example, a judgment or order is set aside, the party in whose favour the costs order is made is entitled to the costs which have been incurred as a consequence. This includes the costs of— a. preparing for and attending any hearing at which the judgment or order which has been set aside was made; b. preparing for and attending any hearing to set aside the judgment or order in question; c. preparing for and attending any hearing at which the court orders the proceedings or the part in question to be adjourned; d. any steps taken to enforce a judgment or order which has subsequently been set aside.

Term	Effect
• Costs of and caused by	Where, for example, the court makes this order on an application to amend a statement of case, the party in whose favour the costs order is made is entitled to the costs of preparing for and attending the application and the costs of any consequential amendment to his own statement of case.
• Costs here and below	The party in whose favour the costs order is made is entitled not only to his costs in respect of the proceedings in which the court makes the order but also to his costs of the proceedings in any lower court. In the case of an appeal from a Divisional Court the party is not entitled to any costs incurred in any court below the Divisional Court.
• No order as to costs • Each party to pay his own costs	Each party is to bear his own costs of the part of the proceedings to which the order relates whatever costs order the court makes at the end of the proceedings.

8.6 Where, under rule 44.3(8), the court orders an amount to be paid before costs are assessed—

(1) the order will state that amount, and

(2) if no other date for payment is specified in the order, rule 44.8 (Time for complying with an order for costs) will apply.

Fees of counsel

8.7(1) This paragraph applies where the court orders the detailed assessment of the costs of a hearing at which one or more counsel appeared for a party.

(2) Where an order for costs states the opinion of the court as to whether or not the hearing was fit for the attendance of one or more counsel, a costs officer conducting a detailed assessment of costs to which that order relates will have regard to the opinion stated.

(3) The court will generally express an opinion only where:

(a) the paying party asks it to do so;

(b) more than one counsel appeared for a party or,

(c) the court wishes to record its opinion that the case was not fit for the attendance of counsel.

Fees payable to conveyancing counsel appointed by the court to assist it

8.8(1) Where the court refers any matter to the conveyancing counsel of the court the fees payable to counsel in respect of the work done or to be done will be assessed by the court in accordance with rule 44.3.

(2) An appeal from a decision of the court in respect of the fees of such counsel will be dealt with under the general rules as to appeals set out in Part 52. If the appeal is against the decision of an authorised court officer, it will be dealt with in accordance with rules 47.20 to 47.23.

Section 9 Costs Orders Relating to Funding Arrangements: Rule 44.3A

44PD.3 **9.1** Under an order for payment of "costs" the costs payable will include an additional liability incurred under a funding arrangement.

9.2(1) If before the conclusion of the proceedings the court carries out a summary assessment of the base costs it may identify separately the amount allowed in respect of: solicitors' charges; counsels' fees; other disbursements; and any value added tax (VAT). (Sections 13 and 14 of this Practice Direction deal with summary assessment.)

(2) If an order for the base costs of a previous application or hearing did not identify separately the amounts allowed for solicitor's charges, counsel's fees and other disbursements, a court which later makes an assessment of an additional liability may apportion the base costs previously ordered.

Section 10 Limits on Recovery Under Funding Arrangements: Rule 44.3B

44PD.4 **10.1** In a case to which rule 44.3B(1)(c) or (d) applies the party in default may apply for relief from the sanction. He should do so as quickly as possible after he becomes aware of the default. An application, supported by evidence, should be made under Part 23 to a costs judge or district judge of the court which is dealing with the case. (Attention is drawn to rules 3.8 and 3.9 which deal with sanctions and relief from sanctions.)

10.2 Where the amount of any percentage increase recoverable by counsel may be affected by the outcome of the application, the solicitor issuing the application must serve on counsel a copy of the application notice and notice of the hearing as soon as practicable and in any event at least 2 days before the hearing. Counsel may make written submissions or may attend and make oral submissions at the hearing. (Paragraph 1.4 contains definitions of the terms "counsel" and "solicitor".)

Section 10A Orders in Respect of Pro Bono Representation: Rule 44.3C

44PD.4.1 **10A.1** Rule 44.3C(2) sets out how the court may determine the amount of payment when making an order under section 194(3) of the Legal Services Act 2007. Paragraph 13.2 of this Practice Direction provides that the general rule is that the court will make a summary assessment of costs in the circumstances outlined in that paragraph unless there is good reason not to do so. This will apply to rule 44.3C(2)(b) with the modification that the summary assessment of the costs is to be read as meaning the summary assessment of the sum equivalent to the costs that would have been claimed by the party with pro bono representation in respect of that representation had it not been provided free of charge.

10A.2 Where an order under section 194(3) of the Legal Services Act 2007 is sought, to assist the court in making a summary assessment of the amount payable to the prescribed charity, the party who has pro bono representation must prepare, file and serve in accordance with paragraph 13.5(2) a written statement of the sum equivalent to the costs that party would have claimed for that legal representation had it not been provided free of charge.

Section 11 Factors to be Taken Into Account in Deciding The Amount of Costs: Rule 44.5

44PD.5

11.1 In applying the test of proportionality the court will have regard to rule 1.1(2)(c). The relationship between the total of the costs incurred and the financial value of the claim may not be a reliable guide. A fixed percentage cannot be applied in all cases to the value of the claim in order to ascertain whether or not the costs are proportionate.

11.2 In any proceedings there will be costs which will inevitably be incurred and which are necessary for the successful conduct of the case. Solicitors are not required to conduct litigation at rates which are uneconomic. Thus in a modest claim the proportion of costs is likely to be higher than in a large claim, and may even equal or possibly exceed the amount in dispute.

11.3 Where a trial takes place, the time taken by the court in dealing with a particular issue may not be an accurate guide to the amount of time properly spent by the legal or other representatives in preparation for the trial of that issue.

11.4 Where a party has entered into a funding arrangement the costs claimed may, subject to rule 44.3B include an additional liability.

11.5 In deciding whether the costs claimed are reasonable and (on a standard basis assessment) proportionate, the court will consider the amount of any additional liability separately from the base costs.

11.6 In deciding whether the base costs are reasonable and (if relevant) proportionate the court will consider the factors set out in rule 44.5.

11.7 When the court is considering the factors to be taken into account in assessing an additional liability, it will have regard to the facts and circumstances as they reasonably appeared to the solicitor or counsel when the funding arrangement was entered into and at the time of any variation of the arrangement.

11.8(1) In deciding whether a percentage increase is reasonable relevant factors to be taken into account may include:

(a) the risk that the circumstances in which the costs, fees or expenses would be payable might or might not occur;

(b) the legal representative's liability for any disbursements;

(c) what other methods of financing the costs were available to the receiving party.

11.9 A percentage increase will not be reduced simply on the ground that, when added to base costs which are reasonable and (where relevant) proportionate, the total appears disproportionate.

11.10 In deciding whether the cost of insurance cover is reasonable, relevant factors to be taken into account include:

(1) where the insurance cover is not purchased in support of a conditional fee agreement with a success fee, how its cost compares with the likely cost of funding the case with a conditional fee agreement with a success fee and supporting insurance cover;
(2) the level and extent of the cover provided;
(3) the availability of any pre-existing insurance cover;
(4) whether any part of the premium would be rebated in the event of early settlement;
(5) the amount of commission payable to the receiving party or his legal representatives or other agents.

11.11 Where the court is considering a provision made by a membership organisation, rule 44.3B(1)(b) provides that any such provision which exceeds the likely cost to the receiving 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 is not recoverable. In such circumstances the court will, when assessing the additional liability, have regard to the factors set out in paragraph 11.10 above, in addition to the factors set out in rule 44.5.

Section 12 Procedure for Assessing Costs: Rule 44.7

44PD.6

12.1 Where the court does not order fixed costs (or no fixed costs are provided for) the amount of costs payable will be assessed by the court. This rule allows the court making an order about costs either

(a) to make a summary assessment of the amount of the costs, or
(b) to order the amount to be decided in accordance with Part 47 (a detailed assessment).

12.2 An order for costs will be treated as an order for the amount of costs to be decided by a detailed assessment unless the order otherwise provides.

12.3 Whenever the court awards costs to be assessed by way of detailed assessment it should consider whether to exercise the power in rule 44.3(8) (Courts Discretion as to Costs) to order the paying party to pay such sum of money as it thinks just on account of those costs.

Section 13 Summary Assessment: General Provisions

44PD.7

13.1 Whenever a court makes an order about costs which does not provide for fixed costs to be paid the court should consider whether to make a summary assessment of costs.

13.2 The general rule is that the court should make a summary assessment of the costs:

(1) at the conclusion of the trial of a case which has been dealt with on the fast track, in which case the order will deal with the costs of the whole claim, and
(2) at the conclusion of any other hearing, which has lasted not more than one day, in which case the order will deal with the costs of the application or matter to which the hearing related. If this hearing disposes of the claim, the order may deal with the costs of the whole claim;

(3) in hearings in the Court of Appeal to which paragraph 14 of Practice Direction 52 applies;

unless there is good reason not to do so, e.g. where the paying party shows substantial grounds for disputing the sum claimed for costs that cannot be dealt with summarily or there is insufficient time to carry out a summary assessment.

13.3 The general rule in paragraph 13.2 does not apply to a mortgagee's costs incurred in mortgage possession proceedings or other proceedings relating to a mortgage unless the mortgagee asks the court to make an order for his costs to be paid by another party. Paragraphs 50.3 and 50.4 deal in more detail with costs relating to mortgages.

13.4 Where an application has been made and the parties to the application agree an order by consent without any party attending, the parties should agree a figure for costs to be inserted in the consent order or agree that there should be no order for costs. If the parties cannot agree the costs position, attendance on the appointment will be necessary but, unless good reason can be shown for the failure to deal with costs as set out above, no costs will be allowed for that attendance.

13.5(1) It is the duty of the parties and their legal representatives to assist the judge in making a summary assessment of costs in any case to which paragraph 13.2 above applies, in accordance with the following paragraphs.

(2) Each party who intends to claim costs must prepare a written statement of those costs showing separately in the form of a schedule:

(a) the number of hours to be claimed,

(b) the hourly rate to be claimed,

(c) the grade of fee earner;

(d) the amount and nature of any disbursement to be claimed, other than counsel's fee for appearing at the hearing,

(e) the amount of solicitor's costs to be claimed for attending or appearing at the hearing,

(f) the fees of counsel to be claimed in respect of the hearing, and

(g) any value added tax (VAT) to be claimed on these amounts.

(3) The statement of costs should follow as closely as possible Form **N260** and must be signed by the party or the party's legal representative. Where a litigant is an assisted person or is a LSC funded client or is represented by a solicitor in the litigant's employment the statement of costs need not include the certificate appended at the end of Form **N260**.

(4) The statement of costs must be filed at court and copies of it must be served on any party against whom an order for payment of those costs is intended to be sought. The statement of costs must be filed and the copies of it must be served as soon as possible and in any event—

(a) for a fast track trial, not less than 2 days before the trial; and

(b) for all other hearings, not less than 24 hours before the time fixed for the hearing.

(5) Where the litigant is or may be entitled to claim an additional liability the statement filed and served need not reveal the amount of that liability.

13.6 The failure by a party, without reasonable excuse, to comply with the foregoing paragraphs will be taken into account by the court in deciding what order to make about the costs of the claim, hearing or application, and about the costs of any further hearing or detailed assessment hearing that may be necessary as a result of that failure.

13.7 If the court makes a summary assessment of costs at the conclusion of proceedings the court will specify separately

(1) the base costs, and if appropriate, the additional liability allowed as solicitor's charges, counsel's fees, other disbursements and any VAT; and

(2) the amount which is awarded under Part 46 (Fast Track Trial Costs).

13.8 The court awarding costs cannot make an order for a summary assessment of costs by a costs officer. If a summary assessment of costs is appropriate but the court awarding costs is unable to do so on the day, the court must give directions as to a further hearing before the same judge.

13.9 The court will not make a summary assessment of the costs of a receiving party who is an assisted person or LSC funded client.

13.10 A summary assessment of costs payable by an assisted person or LSC funded client is not by itself a determination of that person's liability to pay those costs (as to which see rule 44.17 and paragraphs 21.1 to 23.17 of this Practice Direction).

13.11

(1) The court will not make a summary assessment of the costs of a receiving party who is a child or protected party within the meaning of Part 21 unless the solicitor acting for the child or protected party has waived the right to further costs (see paragraph 51.1 below).

(2) The court may make a summary assessment of costs payable by a child or protected party.

13.12

(1) Attention is drawn to rule 44.3A which prevents the court from making a summary assessment of an additional liability before the conclusion of the proceedings or the part of the proceedings to which the funding arrangement relates. Where this applies, the court should nonetheless make a summary assessment of the base costs of the hearing or application unless there is a good reason not to do so.

(2) Where the court makes a summary assessment of the base costs all statements of costs and costs estimates put before the judge will be retained on the court file.

13.13 The court will not give its approval to disproportionate and unreasonable costs. Accordingly:

(a) When the amount of the costs to be paid has been agreed between the parties the order for costs must state that the order is by consent.

(b) If the judge is to make an order which is not by consent, the judge will, so far as possible, ensure that the final figure is not disproportionate and/or unreasonable having regard to Part 1 of the CPR. The judge will retain this responsibility notwithstanding the absence of challenge to individual items in the make-up of the figure sought. The fact that the paying party is not disputing the amount of costs can however be taken as some indication that the amount is proportionate and reasonable. The judge will therefore intervene only if satisfied that the costs are so disproportionate that it is right to do so.

Section 14 Summary Assessment Where Costs Claimed Include an Additional Liability

Orders made before the conclusion of the proceedings

44PD.8 **14.1** The existence of a conditional fee agreement or other funding arrangement within the meaning of rule 43.2 is not by itself a sufficient reason for not carrying out a summary assessment.

14.2 Where a legal representative acting for the receiving party has entered into a conditional fee agreement the court may summarily assess all the costs (other than any additional liability).

14.3 Where costs have been summarily assessed an order for payment will not be made unless the court has been satisfied that in respect of the costs claimed, the receiving party is at the time liable to pay to his legal representative an amount equal to or greater than the costs claimed. A statement in the form of the certificate appended at the end of Form **N260** may be sufficient proof of liability. The giving of information under rule 44.15 (where that rule applies) is not sufficient.

14.4 The court may direct that any costs, for which the receiving party may not in the event be liable, shall be paid into court to await the outcome of the case, or shall not be enforceable until further order, or it may postpone the receiving party's right to receive payment in some other way.

Orders made at the conclusion of the proceedings

14.5 Where there has been a trial of one or more issues separately from other issues, the court will not normally order detailed assessment of the additional liability until all issues have been tried unless the parties agree.

14.6 Rule 44.3A(2) sets out the ways in which the court may deal with the assessment of the costs where there is a funding arrangement. Where the court makes a summary assessment of the base costs:

(1) The order may state separately the base costs allowed as (a) solicitor's charges, (b) counsel's fees, (c) any other disbursements and (d) any VAT;

(2) the statements of costs upon which the judge based his summary assessment will be retained on the court file.

14.7 Where the court makes a summary assessment of an additional liability at the conclusion of proceedings, that assessment must relate to the whole of the proceedings; this will include any additional liability relating to base costs allowed by the court when making a summary assessment on a previous application or hearing.

14.8 Paragraph 13.13 applies where the parties are agreed about the total amount to be paid by way of costs, or are agreed about the amount of the base costs that will be paid. Where they disagree about the additional liability the court may summarily assess that liability or make an order for a detailed assessment.

14.9 In order to facilitate the court in making a summary assessment of any additional liability at the conclusion of the proceedings the party seeking such costs must prepare and have available for the court a bundle of documents which must include—

(1) a copy of every notice of funding arrangement (Form **N251**) which has been filed by him;

(2) a copy of every estimate and statement of costs filed by him;

(3) a copy of the risk assessment prepared at the time any relevant funding arrangement was entered into and on the basis of which the amount of the additional liability was fixed.

Section 15 Costs on the Small Claims Track and Fast Track: Rule 44.9

15.1(1) Before a claim is allocated to one of those tracks the court is not restricted by any of the special rules that apply to that track. **44PD.9**

(2) Where a claim has been allocated to one of those tracks, the special rules which relate to that track will apply to work done before as well as after allocation save to the extent (if any) that an order for costs in respect of that work was made before allocation.

(i) This paragraph applies where a claim, issued for a sum in excess of the normal financial scope of the small claims track, is allocated to that track only because an admission of part of the claim by the defendant reduces the amount in dispute to a sum within the normal scope of that track.

(3) (See also paragraph 7.4 of Practice Direction 26.)

(ii) On entering judgment for the admitted part before allocation of the balance of the claim the court may allow costs in respect of the proceedings down to that date.

Section 16 Costs Following Allocation and Re-Allocation: Rule 44.11

16.1 This paragraph applies where the court is about to make an order to re-allocate a claim from the small claims track to another track. **44PD.10**

16.2 Before making the order to re-allocate the claim, the court

must decide whether any party is to pay costs to any other party down to the date of the order to re-allocate in accordance with the rules about costs contained in Part 27 (The Small Claims Track).

16.3 If it decides to make such an order about costs, the court will make a summary assessment of those costs in accordance with that Part.

Section 17 Costs-Only Proceedings: Rule 44.12A

44PD.11 **17.1** A claim form under this rule should not be issued in the High Court unless the dispute to which the agreement relates was of such a value or type that had proceedings been begun they would have been commenced in the High Court.

17.2 A claim form which is to be issued in the High Court at the Royal Courts of Justice will be issued in the Costs Office.

17.3 Attention is drawn to rule 8.2 (in particular to paragraph (b)(ii)) and to rule 44.12A(3). The claim form must:

(1) identify the claim or dispute to which the agreement to pay costs relates;

(2) state the date and terms of the agreement on which the claimant relies;

(3) set out or have attached to it a draft of the order which the claimant seeks;

(4) state the amount of the costs claimed; and,

(5) state whether the costs are claimed on the standard or indemnity basis. If no basis is specified the costs will be treated as being claimed on the standard basis.

17.4 The evidence to be filed and served with the claim form under Rule 8.5 must include copies of the documents on which the claimant relies to prove the defendant's agreement to pay costs.

17.5 A costs judge or a district judge has jurisdiction to hear and decide any issue which may arise in a claim issued under this rule irrespective of the amount of the costs claimed or of the value of the claim to which the agreement to pay costs relates. A costs officer may make an order by consent under paragraph 17.7, or an order dismissing a claim under paragraph 17.9 below.

17.6 When the time for filing the defendant's acknowledgement of service has expired, the claimant may by letter request the court to make an order in the terms of his claim, unless the defendant has filed an acknowledgement of service stating that he intends to contest the claim or to seek a different order.

17.7 Rule 40.6 applies where an order is to be made by consent. An order may be made by consent in terms which differ from those set out in the claim form.

17.8 An order for costs made under this rule will be treated as an order for the amount of costs to be decided by a detailed assessment to which Part 47 and the practice directions relating to it apply. Rule 44.4(4) (determination of basis of assessment) also applies to the order.

17.9(1) For the purposes of rule 44.12A(4)(b)—

(a) a claim will be treated as opposed if the defendant files an acknowledgment of service stating that he

intends to contest the making of an order for costs to seek a different remedy; and

(b) a claim will not be treated as opposed if the defendant files an acknowledgment of service stating that he disputes the amount of the claim for costs.

(2) An order dismissing the claim will be made as soon as an acknowledgment of service opposing the claim is filed. The dismissal of a claim under rule 44.12A(4) does not prevent the claimant from issuing another claim form under Part 7 or Part 8 based on the agreement or alleged agreement to which the proceedings under this rule related.

17.10(1) Rule 8.9 (which provides that claims issued under Part 8 shall be treated as allocated to the multi-track) shall not apply to claims issued under this rule. A claim issued under this rule may be dealt with without being allocated to a track.

(2) Rule 8.1(3) and Part 24 do not apply to proceedings brought under rule 44.12A.

17.11 Nothing in this rule prevents a person from issuing a claim form under Part 7 or Part 8 to sue on an agreement made in settlement of a dispute where that agreement makes provision for costs, nor from claiming in that case an order for costs or a specified sum in respect of costs.

Section 18 Court's Powers in Relation to Misconduct: Rule 44.14

44PD.12

18.1 Before making an order under rule 44.14 the court must give the party or legal representative in question a reasonable opportunity to attend a hearing to give reasons why it should not make such an order.

18.2 Conduct before or during the proceedings which gave rise to the assessment which is unreasonable or improper includes steps which are calculated to prevent or inhibit the court from furthering the overriding objective.

18.3 Although rule 44.14(3) does not specify any sanction for breach of the obligation imposed by the rule the court may, either in the order under paragraph (2) or in a subsequent order, require the solicitor to produce to the court evidence that he took reasonable steps to comply with the obligation.

Section 19 Providing Information About Funding Arrangements: Rule 44.15

44PD.13

19.1(1) A party who wishes to claim an additional liability in respect of a funding arrangement must give any other party information about that claim if he is to recover the additional liability. There is no requirement to specify the amount of the additional liability separately nor to state how it is calculated until it falls to be assessed. That principle is reflected in rules 44.3A and 44.15, in the following paragraphs and in Sections 6, 13, 14 and 31 of this Practice Direction. Section 6 deals with estimates of costs, Sections 13 and 14 deal with summary assessment and Section 31 deals with detailed assessment.

(2) In the following paragraphs a party who has entered into a funding arrangement is treated as a person who intends to recover a sum representing an additional liability by way of costs.

(3) Attention is drawn to paragraph 57.9 of this Practice Direction which sets out time limits for the provision of information where a funding arrangement is entered into between March 31 and July 2, 2000 and proceedings relevant to that arrangement are commenced before July 3, 2000.

Method of giving information

19.2(1) In this paragraph, "claim form" includes petition and application notice, and the notice of funding to be filed or served is a notice containing the information set out in Form **N251**.

(a) A claimant who has entered into a funding arrangement before starting the proceedings to which it relates must provide information to the court by filing the notice when he issues the claim form.

(b) He must provide information to every other party by serving the notice. If he serves the claim form himself he must serve the notice with the claim form. If the court is to serve the claim form, the court will also serve the notice if the claimant provides it with sufficient copies for service.

(3) A defendant who has entered into a funding arrangement before filing any document

(a) must provide information to the court by filing notice with his first document. A "first document" may be an acknowledgement of service, a defence, or any other document, such as an application to set aside a default judgment.

(b) must provide information to every party by serving notice. If he serves his first document himself he must serve the notice with that document. If the court is to serve his first document the court will also serve the notice if the defendant provides it with sufficient copies for service.

(4) In all other circumstances a party must file and serve notice within 7 days of entering into the funding arrangement concerned.

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

Notice of change of information

19.3(1) Rule 44.15 imposes a duty on a party to give notice of change if the information he has previously provided is no longer accurate. To comply he must file and serve notice containing the information set out in Form N251. Rule 44.15(3) may impose other duties in relation to new estimates of costs.

(2) Further notification need not be provided where a party has already given notice:
  (a) that he has entered into a conditional fee agreement with a legal representative and during the currency of that agreement either of them enters into another such agreement with an additional legal representative; or
  (b) of some insurance cover, unless that cover is cancelled or unless new cover is taken out with a different insurer.

(3) Part 6 applies to the service of notices.

(4) The notice must be signed by the party or by his legal representative.

Information which must be provided

19.4(1) Unless the court otherwise orders, a party who is required to supply information about a funding arrangement must state whether he has—

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

taken out an insurance policy to which section 29 of the Access to Justice Act 1999 applies;

made an arrangement with a body which is prescribed for the purpose of section 30 of that Act;

or more than one of these.

(2) Where the funding arrangement is a conditional fee agreement, the party must state the date of the agreement and identify the claim or claims to which it relates (including Part 20 claims if any).

(3) Where the funding arrangement is an insurance policy, the party must—
  (a) state the name and address of the insurer, the policy number and the date of the policy and identify the claim or claims to which it relates (including Part 20 claims if any);
  (b) state the level of cover provided by the insurance; and
  (c) state whether the insurance premiums are staged and, if so, the points at which an increased premium is payable.

(4) Where the funding arrangement is by way of an arrangement with a relevant body the party must state the name of the body and set out the date and terms of the undertaking it has given and must identify the claim or claims to which it relates (including Part 20 claims if any).

(5) Where a party has entered into more than one funding arrangement in respect of a claim, for example a conditional fee agreement and an insurance policy, a single notice containing the information set out in Form **N251** may contain the required information about both or all of them.

19.5 Where the court makes a Group Litigation Order, the court may give directions as to the extent to which individual parties should provide information in accordance with rule 44.15. (Part 19 deals with Group Litigation Orders.)

Transitional Provision

19.6 The amendments to the parenthesis below paragraph 19.2 and to paragraph 19.4(3) do not apply where the funding arrangement was entered into before 1st October 2009 and the parenthesis below paragraph 19.2 and paragraph 19.4(3) in force immediately before that date will continue to apply to that funding arrangement as if those amendments had not been made.

Section 20 Procedure Where Legal Representative Wishes to Recover From His Client an Agreed Percentage Increase Which has Been Disallowed or Reduced on Assessment: Rule 44.16

44PD.14 **20.1**(1) Attention is drawn to Regulation 3(2)(b) of the Conditional Fee Agreements Regulations 2000 and to Regulation 5(2)(b) of the Collective Conditional Fee Agreements Regulations 2000, which provide that some or all of a success fee ceases to be payable in certain circumstances. [Both sets of regulations were revoked by the Conditional Fee Agreements (Revocation) Regulations 2005 but continue to have effect in relation to conditional fee agreements and collective conditional fee agreements entered into before 1st November 2005.]

(2) Rule 44.16 allows the court to adjourn a hearing at which the legal representative acting for the receiving party applies for an order that a disallowed amount should continue to be payable under the agreement.

20.2 In the following paragraphs "counsel" means counsel who has acted in the case under a conditional fee agreement which provides for a success fee. A reference to counsel includes a reference to any person who appeared as an advocate in the case and who is not a partner or employee of the solicitor or firm which is conducting the claim or defence (as the case may be) on behalf of the receiving party.

Procedure following Summary Assessment

20.3(1) If the court disallows any amount of a legal representative's percentage increase, the court will, unless sub-paragraph (2) applies, give directions to enable an application to be made by the legal representative for the disallowed amount to be payable by his client, including, if appropriate, a direction that the application will be determined by a costs judge or district judge of the court dealing with the case.

(2) The court that has made the summary assessment may then and there decide the issue whether the disallowed amount should continue to be payable, if:

(a) the receiving party and all parties to the relevant agreement consent to the court doing so;

(b) the receiving party (or, if corporate, an officer) is present in court; and

(c) the court is satisfied that the issue can be fairly decided then and there.

Procedure following Detailed Assessment

20.4(1) Where detailed assessment proceedings have been commenced, and the paying party serves points of dispute (as to which see Section 34 of this Practice Direction), which show that he is seeking a reduction in any percentage increase charged by counsel on his fees, the solicitor acting for the receiving party must within 3 days of service deliver to counsel a copy of the relevant points of dispute and the bill of costs or the relevant parts of the bill.

(2) Counsel must within 10 days thereafter inform the solicitor in writing whether or not he will accept the reduction sought or some other reduction. Counsel may state any points he wishes to have made in a reply to the points of dispute, and the solicitor must serve them on the paying party as or as part of a reply.

(3) Counsel who fails to inform the solicitor within the time limits set out above will be taken to accept the reduction unless the court otherwise orders.

20.5 Where the paying party serves points of dispute seeking a reduction in any percentage increase charged by a legal representative acting for the receiving party, and that legal representative intends, if necessary, to apply for an order that any amount of the percentage disallowed as against the paying party shall continue to be payable by his client, the solicitor acting for the receiving party must, within 14 days of service of the points of dispute, give to his client a clear written explanation of the nature of the relevant point of dispute and the effect it will have if it is upheld in whole or in part by the court, and of the client's right to attend any subsequent hearings at court when the matter is raised.

20.6 Where the solicitor acting for a receiving party files a request for a detailed assessment hearing it must if appropriate, be accompanied by a certificate signed by him stating:

(1) that the amount of the percentage increase in respect of counsel's fees or solicitor's charges is disputed;

(2) whether an application will be made for an order that any amount of that increase which is disallowed should continue to be payable by his client;

(3) that he has given his client an explanation in accordance with paragraph 20.5; and,

(4) whether his client wishes to attend court when the amount of any relevant percentage increase may be decided.

20.7(1) The solicitor acting for the receiving party must within 7 days of receiving from the court notice of the date of the assessment hearing, notify his client, and if appropriate, counsel in writing of the date, time and place of the hearing.

(2) Counsel may attend or be represented at the detailed assessment hearing and may make oral or written submissions.

20.8(1) At the detailed assessment hearing, the court will deal with the assessment of the costs payable by one party to another, including the amount of the percentage increase, and give a certificate accordingly.

(2) The court may decide the issue whether the disallowed amount should continue to be payable under the relevant conditional fee agreement without an adjournment if:

(a) the receiving party and all parties to the relevant agreement consent to the court deciding the issue without an adjournment,

(b) the receiving party (or, if corporate, an officer or employee who has authority to consent on behalf of the receiving party) is present in court, and

(c) the court is satisfied that the issue can be fairly decided without an adjournment.

(3) In any other case the court will give directions and fix a date for the hearing of the application.

Section 21 Application of Costs Rules: Rule 44.17

44PD.15 **21.1** Rule 44.17(b) excludes the costs rules to the extent that regulations under the Legal Aid Act 1988 make different provision. The primary examples of such regulations are the regulations providing prescribed rates (with or without enhancement).

21.2 Rule 44.17(a) provides that the procedure for detailed assessment does not apply to the extent that section 11 of the Access to Justice Act 1999 and provisions made under that Act make different provision.

21.3 Section 11 of the Access to Justice Act 1999 provides special protection against liability for costs for litigants who receive funding by the LSC (Legal Services Commission) as part of the Community Legal Service. Any costs ordered to be paid by a LSC funded client must not exceed the amount which is reasonable for him to pay having regard to all the circumstances including:

(a) the financial resources of all the parties to the proceedings, and

(b) their conduct in connection with the dispute to which the proceedings relate.

21.4 In this Practice Direction

"cost protection" means the limit on costs awarded against a LSC funded client set out in Section 11(1) of the Access to Justice Act 1999.

"partner" has the meaning given by the Community Legal Service (Costs) Regulations 2000.

21.5 Whether or not cost protection applies depends upon the "level of service" for which funding was provided by the LSC in accordance with the Funding Code approved under section 9 of the Access to Justice Act 1999. The levels of service referred to are:

(1) Legal Help—advice and assistance about a legal problem, not including representation or advocacy in proceedings.

(2) Help at Court—advocacy at a specific hearing, where the advocate is not formally representing the client in the proceedings.

(3) Family Mediation.

(4) Legal Representation—representation in actual or contemplated proceedings. Legal Representation can take the form of Investigative Help (limited to investigating the merits of a potential claim) or Full Representation.

(5) General Family Help and Help with Mediation.

21.6 Levels of service (4) and (5) are provided under a certificate (similar to a legal aid certificate). The certificate will state which level of service is covered. Where there are proceedings, a copy of the certificate will be lodged with the court.

21.7 Cost protection does not apply where—

(1) The LSC funded client receives Help at Court;

(2) The LSC funded client receives Legal Help only i.e. where the solicitor is advising, but not representing a litigant in person. However, where the LSC funded client receives Legal Help e.g. to write a letter before action, but later receives Legal Representation or General Family Help or Help with Mediation in respect of the same dispute, other than in family proceedings, cost protection does apply to all costs incurred by the receiving party in the funded proceedings or prospective proceedings;

(3) The LSC funded client receives General Family Help or Help with Mediation in family proceedings;

(4) The LSC funded client receives Legal Representation in family proceedings.

21.8 Where cost protection does not apply, the court may award costs in the normal way.

21.9 Where work is done before the issue of a certificate, cost protection does not apply to those costs, except where:

(1) pre-action Legal Help is given and the LSC funded client subsequently receives Legal Representation or General Family Help or Help with Mediation in respect of the same dispute, other than in family proceedings; or

(2) where urgent work is undertaken immediately before the grant of an emergency certificate, other than in family proceedings, when no emergency application could be made as the LSC's offices were closed, provided that the solicitor seeks an emergency certificate at the first available opportunity and the certificate is granted.

21.10 If a LSC funded client's certificate is revoked, costs protection does not apply to work done before or after revocation.

21.11 If a LSC funded client's certificate is discharged, costs protection only applies to costs incurred before the date on which funded services ceased to be provided under the certificate. This may be a date before the date on which the certificate is formally discharged by the LSC (*Burridge v Stafford*: *Khan v Ali* [2000] 1 W.L.R. 927; [1999] 4 All E.R. 660, CA).

21.11A Where an LSC funded client has cost protection, the procedure described in sections 22 and 23 of this Practice Direction applies. However that procedure does not apply in relation to costs claimed during any periods in the proceedings when the LSC funded

client did not have cost protection, and the procedure set out in CPR Parts 45 to 47 will apply (as appropriate) in relation to those periods.

Assessing a LSC Funded Client's Resources

21.12 The first £100,000 of the value of the LSC funded client's interest in the main or only home is disregarded when assessing his or her financial resources for the purposes of S.11 and cannot be the subject of any enforcement process by the receiving party. The receiving party cannot apply for an order to sell the LSC funded client's home, but could secure the debt against any value exceeding £100,000 by way of a charging order.

21.13 The court may only take into account the value of the LSC funded client's clothes, household furniture, tools and implements of trade to the extent that it considers that having regard to the quantity or value of the items, the circumstances are exceptional.

21.14 The LSC funded client's resources include the resources of his partner, unless the partner has a contrary interest in the dispute in respect of which funded services are provided.

Party acting in a Representative, Fiduciary or Official Capacity

21.15(1) Where a LSC funded client is acting in a representative, fiduciary or official capacity, the court shall not take the personal resources of the party into account for the purposes of either a Section 11 order or costs against the Commission, but shall have regard to the value of any property or estate or the amount of any fund out of which the party is entitled to be indemnified, and may also have regard to the resources of any persons who are beneficially interested in the property, estate or fund.

(2) Similarly, where a party is acting as a litigation friend to a client who is a child or a protected party, the court shall not take the personal resources of the litigation friend into account in assessing the resources of the client.

(3) The purpose of this provision is to ensure that any liability is determined with reference to the value of the property or fund being used to pay for the litigation, and the financial position of those who may benefit from or rely on it.

Costs against the LSC

21.16 Regulation 5 of the Community Legal Service (Cost Protection) Regulations 2000 governs when costs can be awarded against the LSC. This provision only applies where cost protection applies and the costs ordered to be paid by the LSC funded client do not fully meet the costs that would have been ordered to be paid by him if cost protection did not apply.

21.17 In this Section and the following two Sections of this Practice Direction "non-funded party" means a party to proceedings who has not received LSC funded services in relation to these proceedings under a legal aid certificate or a certificate issued under the LSC Funding Code other than a certificate which has been revoked.

21.18 The following criteria set out in Regulation 5 must be satisfied before the LSC can be ordered to pay the whole or any part of the costs incurred by a non-funded party:

(1) the proceedings are finally decided in favour of a non-funded party;

(2) unless there is good reason for delay the non-funded party provides written notice of intention to seek an order against the LSC within three months of the making of the section 11(1) costs order;

(3) the court is satisfied that it is just and equitable in the circumstances that provision for the costs should be made out of public funds; and

(4) where costs are incurred in a court of first instance, the following additional criteria must also be met:

(i) the proceedings were instituted by the LSC funded client;

(ii) the non-funded party is an individual; and

(iii) the non-funded party will suffer financial hardship unless the order is made.

("Section 11(1) costs order" is defined in paragraph 22.1, below.)

21.19 In determining whether conditions (3) and (4) are satisfied, the court shall take into account the resources of the non-funded party and his partner, unless the partner has a contrary interest.

21.19A An order under Regulation 5 may be made in relation to proceedings in the Court of Appeal, High Court or a County Court, by a Costs Judge or a District Judge.

Effect of Appeals

21.20(1) An order for costs can only be made against the LSC when the proceedings (including any appeal) are finally decided. Therefore, where a court of first instance decides in favour of a non-funded party and an appeal lies, any order made against the LSC shall not take effect unless:

(a) where permission to appeal is required, the time limit for permission to appeal expires, without permission being granted;

(b) where permission to appeal is granted or is not required, the time limit for appeal expires without an appeal being brought.

(2) Accordingly, if the LSC funded client appeals, any earlier order against the LSC can never take effect. If the appeal is unsuccessful, an application can be made to the appeal court for a fresh order.

Section 22 Orders for costs to which section 11 of the Access to Justice Act 1999 Applies

22.1 In this Practice Direction: **44PD.16**

"order for costs to be determined" means an order for costs to which Section 11 of the Access to Justice Act 1999 applies under which the amount of costs payable by the LSC funded client is

to be determined by a costs judge or district judge under Section 23 of this Practice Direction.

"order specifying the costs payable" means an order for costs to which Section 11 of the Act applies and which specifies the amount which the LSC funded client is to pay.

"full costs" means, where an order to which Section 11 of the Act applies is made against a LSC funded client, the amount of costs which that person would, had cost protection not applied, have been ordered to pay.

"determination proceedings" means proceedings to which paragraphs 22.1 to 22.10 apply.

"Section 11(1) costs order" means an order for costs to be determined or an order specifying the costs payable other than an order specifying the costs payable which was made in determination proceedings.

"statement of resources" means

(1) a statement, verified by a statement of truth, made by a party to proceedings setting out:

(a) his income and capital and financial commitments during the previous year and, if applicable, those of his partner;

(b) his estimated future financial resources and expectations and, if applicable, those of his partner ("partner" is defined in paragraph 21.4 above);

(c) a declaration that he and, if applicable, his partner, has not deliberately foregone or deprived himself of any resources or expectations;

(d) particulars of any application for funding made by him in connection with the proceedings; and,

(e) any other facts relevant to the determination of his resources; or

(2) a statement, verified by a statement of truth, made by a client receiving funded services, setting out the information provided by the client under Regulation 6 of the Community Legal Service (Financial) Regulations 2000, and stating that there has been no significant change in the client's financial circumstances since the date on which the information was provided or, as the case may be, details of any such change.

"Regional Director" means any Regional Director appointed by the LSC and any member of his staff authorised to act on his behalf.

22.2 Regulations 8 to 13 of the Community Legal Service (Costs) Regulations 2000 as amended set out the procedure for seeking costs against a funded client and the LSC. The effect of these Regulations is set out in this section and the next section of this Practice Direction.

22.3 As from 5 June 2000, Regulations 9 to 13 of the Community

Legal Service (Costs) Regulations 2000 as amended also apply to certificates issued under the Legal Aid Act 1988 where costs against the assisted person fall to be assessed under Regulation 124 of the Civil Legal Aid (General) Regulations 1989. In this section and the next section of this Practice Direction the expression "LSC funded client" includes an assisted person (defined in rule 43.2).

22.4 Regulation 8 of the Community Legal Service (Costs) Regulations 2000 as amended provides that a party intending to seek an order for costs against a LSC funded client may at any time file and serve on the LSC funded client a statement of resources. If that statement is served 7 or more days before a date fixed for a hearing at which an order for costs may be made, the LSC funded client must also make a statement of resources and produce it at the hearing.

22.5 If the court decides to make an order for costs against a LSC funded client to whom cost protection applies it may either:

(1) make an order for costs to be determined, or

(2) make an order specifying the costs payable.

22.6 If the court makes an order for costs to be determined it may also

(1) state the amount of full costs, or

(2) make findings of facts, e.g. concerning the conduct of all the parties which are to be taken into account by the court in the subsequent determination proceedings.

22.7 The court will not make an order specifying the costs payable unless:

(1) it considers that it has sufficient information before it to decide what amount is a reasonable amount for the LSC funded client to pay in accordance with Section 11 of the Act, and

(2) either

(a) the order also states the amount of full costs, or

(b) the court considers that it has sufficient information before it to decide what amount is a reasonable amount for the LSC funded client to pay in accordance with Section 11 of the Act and is satisfied that, if it were to determine the full costs at that time, they would exceed the amounts specified in the order.

22.8 Where an order specifying the costs payable is made and the LSC funded client does not have cost protection in respect of all of the costs awarded in that order, the order must identify the sum payable (if any) in respect of which the LSC funded client has cost protection and the sum payable (if any) in respect of which he does not have cost protection.

22.9 The court cannot make an order under Regulations 8 to 13 of the Community Legal Service (Costs) Regulations 2000 as amended except in proceedings to which the next section of this Practice Direction applies.

Section 23 Determination Proceedings and Similar Proceedings Under the Community Legal Service (Costs) Regulations 2000

23.1 This section of this Practice Direction deals with **44PD.17**

(1) proceedings subsequent to the making of an order for costs to be determined,

(2) variations in the amount stated in an order specifying the amount of costs payable,

(3) the late determination of costs under an order for costs to be determined, and

(4) appeals in respect of determination.

23.2 In this section of this Practice Direction "appropriate court office" means:

(1) the district registry or county court in which the case was being dealt with when the Section 11(1) order was made, or to which it has subsequently been transferred; or

(2) in all other cases, the Costs Office.

23.2A(1)This paragraph applies where the appropriate office is any of the following county courts:

Barnet, Bow, Brentford, Bromley, Central London, Clerkenwell and Shoreditch, Croydon, Edmonton, Ilford, Kingston, Lambeth, Mayors and City of London, Romford, Uxbridge, Wandsworth, West London, Willesden and Woolwich.

(2) Where this paragraph applies:—

(i) a receiving party seeking an order specifying costs payable by an LSC funded client and/or by the Legal Services Commission under this section must file his application in the Costs Office and, for all purposes relating to that application, the Costs Office will be treated as the appropriate office in that case; and

(ii) unless an order is made transferring the application to the Costs Office as part of the High Court, an appeal from any decision made by a costs judge shall lie to the Designated Civil Judge for the London Group of County Courts or such judge as he shall nominate. The appeal notice and any other relevant papers should be lodged at the Central London Civil Justice Centre.

23.3(1) A receiving party seeking an order specifying costs payable by an LSC funded client and/or by the LSC may within 3 months of an order for costs to be determined, file in the appropriate court office an application in Form **N244** accompanied by

(a) the receiving party's bill of costs (unless the full costs have already been determined);

(b) the receiving party's statement of resources (unless the court is determining an application against a costs order against the LSC and the costs were not incurred in the court of first instance); and

(c) if the receiving party intends to seek costs against the LSC, written notice to that effect.

(2) If the LSC funded client's liability has already been determined and is less than the full costs, the application will be for costs against the LSC only. If the LSC funded

client's liability has not yet been determined, the receiving party must indicate if costs will be sought against the LSC if the funded client's liability is determined as less than the full costs.

(The LSC funded client's certificate will contain the addresses of the LSC funded client, his solicitor, and the relevant Regional Office of the LSC.)

23.4 The receiving party must file the above documents in the appropriate court office and (where relevant) serve copies on the LSC funded client and the Regional Director. In respect of applications for funded services made before 3 December 2001 a failure to file a request within the 3 months time limit specified in Regulation 10(2) is an absolute bar to the making of a costs order against the LSC. Where the application for funded services was made on or after 3 December 2001 the court does have power to extend the 3 months time limit, but only if the applicant can show good reason for the delay.

23.5 On being served with the application, the LSC funded client must respond by filing a statement of resources and serving a copy of it on the receiving party (and the Regional Director where relevant) within 21 days. The LSC funded client may also file and serve written points disputing the bill within the same time limit. (Under rule 3.1 the court may extend or shorten this time limit.)

23.6 If the LSC funded client fails to file a statement of resources without good reason, the court will determine his liability (and the amount of full costs if relevant) and need not hold an oral hearing for such determination.

23.7 When the LSC funded client files a statement or the 21 day period for doing so expires, the court will fix a hearing date and give the relevant parties at least 14 days' notice. The court may fix a hearing without waiting for the expiry of the 21 day period if the application is made only against the LSC.

23.8 Determination proceedings will be listed for hearing before a costs judge or district judge. The determination of the liability on the LSC funded client will be listed as a private hearing.

23.9 Where the LSC funded client does not have cost protection in respect of all of the costs awarded, the order made by the costs judge or district judge must in addition to specifying the costs payable, identify the full costs in respect of which cost protection applies and the full costs in respect of which cost protection does not apply.

23.10 The Regional Director may appear at any hearing at which a costs order may be made against the LSC. Instead of appearing, he may file a written statement at court and serve a copy on the receiving party. The written statement should be filed and a copy served, not less than 7 days before the hearing.

Variation of an order specifying the costs payable

23.11(1) This paragraph applies where the amount stated in an order specifying the costs payable plus the amount ordered to be paid by the LSC is less than the full costs to which cost protection applies.

(2) The receiving party may apply to the court for a variation of the amount which the LSC funded client is required to pay on the ground that there has been a significant change in the client's circumstances since the date of the order.

23.12 On an application under paragraph 23.11, where the order specifying the costs payable does not state the full costs:

(1) the receiving party must file with his application the receiving party's statement of resources and bill of costs and copies of these documents should be served with the application.

(2) The LSC funded client must respond to the application by making a statement of resources which must be filed at court and served on the receiving party within 21 days thereafter. The LSC funded client may also file and serve written points disputing the bill within the same time limit.

(3) The court will, when determining the application assess the full costs identifying any part of them to which cost protection does apply and any part of them to which cost protection does not apply.

23.13 On an application under paragraph 23.11 the order specifying the costs payable may be varied as the court thinks fit. That variation must not increase:

(1) the amount of any costs ordered to be paid by the LSC, and

(2) the amount payable by the LSC funded client,

to a sum which is greater than the amount of the full costs plus the costs of the application.

23.14(1) Where an order for costs to be determined has been made but the receiving party has not applied, within the three month time limit under paragraph 23.2, the receiving party may apply on any of the following grounds for a determination of the amount which the funded client is required to pay:

(a) there has been a significant change in the funded client's circumstances since the date of the order for costs to be determined; or

(b) material additional information about the funded client's financial resources is available which could not with reasonable diligence have been obtained by the receiving party at the relevant time; or

(c) there were other good reasons for the failure by the receiving party to make an application within the time limit.

(2) An application for costs payable by the LSC cannot be made under this paragraph.

23.15(1) Where the receiving party has received funded services in relation to the proceedings, the LSC may make an application under paragraphs 23.11 and 23.14 above.

(2) In respect of an application under paragraph 23.11 made by the LSC, the LSC must file and serve copies of the documents described in paragraph 23.12(1).

23.16 An application under paragraph 23.11, 23.14 and 23.15 must be commenced before the expiration of 6 years from the date on which the court made the order specifying the costs payable, or (as the case may be) the order for costs to be determined.

23.17 Applications under paragraphs 23.11, 23.14 and 23.15 should be made in the appropriate court office and should be made in Form **N244** to be listed for a hearing before a costs judge or district judge.

Appeals

23.18(1) Save as mentioned above any determination made under Regulation 9 or 10 of the Costs Regulations is final (Regulation 11(1)). Any party with a financial interest in the assessment of the full costs, other than a funded party, may appeal against that assessment in accordance with CPR Part 52 (Regulation 11(2) and CPR rule 47.20).

(2) The receiving party or the Commission may appeal on a point of law against the making of a costs order against the Commission, against the amount of costs the Commission is required to pay or against the court's refusal to make such an order (Regulation 11(4)).

Section 23A Costs Capping Orders

When to make an application

23A.1 The court will make a costs capping order only in exceptional circumstances. **44PD.18**

23A.2 An application for a costs capping order must be made as soon as possible, preferably before or at the first case management hearing or shortly afterwards. The stage which the proceedings have reached at the time of the application will be one of the factors the court will consider when deciding whether to make a costs capping order.

Estimate of costs

23A.3 The estimate of costs required by rule 44.19 must be in the form illustrated in Precedent H in the Schedule of Costs Precedents annexed to this Practice Direction.

Schedule of costs

23A.4 The schedule of costs referred to in rule 44.19(3)—

(a) must set out—

(i) each sub-heading as it appears in the applicant's estimate of costs (column 1);

(ii) alongside each sub-heading, the amount claimed by the applicant in the applicant's estimate of costs (column 2); and

(iii) alongside the figures referred to in sub-paragraph (ii) the amount that the respondent proposes should be allowed under each sub-heading (column 3); and

(b) must be supported by a statement of truth.

Assessing the quantum of the costs cap

23A.5 When assessing the quantum of a costs cap, the court will take into account the factors detailed in rule 44.5 and the relevant provisions supporting that rule in this Practice Direction. The court may also take into account when considering a party's estimate of the costs they are likely to incur in the future conduct of the proceedings a reasonable allowance on costs for contingencies.