

Guide to Summary Assessment of Costs

Foreword

2005 Edition

Since the introduction of the CPR, Judges at all levels are required to assess costs summarily at the end of a trial on the fast track or at the conclusion of any other hearing which has lasted not more than one day. This requirement led to an immediate request from Judges for some guidance as to how to go about summary assessment. A comprehensive Guide was published in 2002 by the Supreme Court Costs Office which contained, at Appendix 2, guideline figures for a large number of places on the circuits. Those guideline figures were revised in 2003, and, in order to avoid having a multiplicity of figures, three separate bands were introduced, each covering areas having broadly similar charging rates. In addition banded rates were also given for the City of London, Central London and Outer London.

The Retail Prices Index has been used on this occasion to arrive at rates for each area to take effect from 1 January 2005 with the intention that those rates should remain in force for 2 years.

Questions have been raised as to the provenance and standing of the Guide. Its provenance is that it was produced at the request of Sir Richard Scott V-C when Deputy Head of Civil Justice (now Lord Scott of Foscotte) in order to assist Judges who were faced for the first time with the task of summary assessment. As to the standing of the Guide it is, as it makes clear, no more than a guide and a starting point for Judges carrying out summary assessment. The figures set out in Appendix 2 to the Guide are broad approximations only. The Guide is intended to be of help and assistance to Judges but is not intended as a substitute for the proper exercise of their discretion having heard argument on the issues to be decided.

Dated 21 December 2004

**The Right Honourable
The Lord Phillips of Worth Matravers
Master of the Rolls**

Guide to the Summary Assessment of Costs - Revised January 2005

Introduction

1 Sections 13 and 14 of the Costs Practice Direction deal with the general provisions relating to summary assessment. Rule 43.2 defines costs and Rule 44.7 contains the court's power to make a summary assessment. (Appendix 1 contains extracts from the relevant Rules and Practice Directions.)

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

(a) 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

(b) 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 If there is a conditional fee agreement or other funding arrangement, Rule 44.3A 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. In such a case, the court should nonetheless make a summary assessment of the base costs of the hearing or application unless there is good reason not to do so. Where the court makes a summary assessment of the base costs, all statements of costs and estimates put before the Judge will be retained on the court file and the Judge carrying out a final assessment must be supplied with copies of all the costs orders previously made and, if required, be shown all the previous costs statements and estimates.

4 The court should not make a summary assessment of the costs of a receiving party who is an assisted person or LSC funded client. The court may make a summary assessment of costs payable by an assisted person or by a LSC funded client. Such an assessment is not by itself a determination of that person's liability to pay those costs (as to which see Rule 44.17 and paragraphs 20.1 to 22.33 of the Costs Practice Direction).

5 The court must not make a summary assessment of the costs of a receiving party who is a child or patient within Part 21 unless the solicitor acting for the child or patient has waived the right to further costs. The court may make a summary assessment of costs payable by a child or patient.

6 The court awarding costs cannot make an order for the summary assessment to be carried out by a costs officer. If summary assessment of costs is appropriate but the court awarding costs is unable to carry out the assessment on the day it must give directions as to a further hearing before the same Judge or order detailed assessment.

The Approach to Costs

7 General approach to summary and detailed assessment should be the same. For the summary assessment to be accurate the Judge must be informed about previous summary assessments carried out in the case. This is particularly important where the Judge is assessing all the costs at the conclusion of a case.

8 The court should not be seen to be endorsing disproportionate and unreasonable costs. Accordingly:

(a) When the amount of the costs to be paid has been agreed the court should make this clear by saying that the order is by consent.

(b) If the Judge is to make an order which is not by consent, he will, so far as possible, ensure that the final figure is not disproportionate and/or unreasonable having regard to Part 1 of the CPR. He will retain this responsibility notwithstanding the absence of challenge to individual items comprised in the figure sought.

9 Where a case is simple and straightforward it is obviously easier to decide whether the final figure is disproportionate than where the case is more complex. For this reason, it is impossible to ignore the work on the case which has had to be done.

10 The fact that the paying party is not disputing the amount of costs can be taken as some indication that the amount is proportionate and reasonable. The Judge therefore will intervene only if satisfied that the costs are so disproportionate that it is right to do so.

11 The court can allow a sum which it considers to be proportionate as a payment on account whilst at the same time ordering detailed assessment.

The Basis of Assessment

The standard basis

12 Rule 44.4(1) and (2) (Appendix 1) provide that where the court assesses the amount of costs on the standard basis it will not allow costs which have been unreasonably incurred or are unreasonable in amount and will only allow costs which are proportionate to the matters in issue. The court will resolve in favour of the paying party any doubt which it may have as to whether the costs were reasonably incurred or were reasonable and proportionate in amount.

The indemnity basis

13 Rule 44.4(1) and (3) (Appendix 1) provide that where the court assesses the amount of costs on the indemnity basis it will not allow costs which have been unreasonably incurred or are unreasonable in amount and it will resolve in favour of the receiving party any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount. The test of proportionality is not mentioned in the definition of the indemnity basis.

Proportionality

14 "Proportionality" is not defined in the rules or the Practice Direction. Section 11 of the Costs Practice Direction indicates, however, that in applying the test of proportionality the court will have regard to rule 1.1(2)(c) by, so far as practicable, dealing with the case in ways which are proportionate:

- (i) to the amount of money involved;
- (ii) to the importance of the case;
- (iii) to the complexity of the issues; and
 - i. to the financial position of each party.

15 Paragraphs 11.1 to 11.3 of the Practice Direction give the following warnings as to the test of proportionality.

- (i) The relationship between the total 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.
- (ii) 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.
- (iii) Where a trial takes place the time taken by the court in dealing with the 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.

16 The Court of Appeal has given guidance on the correct approach to proportionality when assessing 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, the cost of the item was reasonable"

(Home Office v Lownds [2002] EWCA Civ 365; [2002] 1 WLR 2450; [2002] 4 All ER 775 CA).

The text of rule 44.5(3) is included in Appendix 1 to this Guide.

17 The relevant costs for consideration at the first stage are the base costs only before VAT is added (CPD 11.5 and **Giambrone v JMC Holidays** [2003] 2 Costs LR 189).

18 The fact that, at the first stage, the costs as a whole appear to be proportionate does not prevent the court from finding individual items are disproportionate and applying the test of necessity to them alone (*Giambrone*).

Summary Assessment where Costs Claimed Include an Additional Liability

19 Rule 44.3A deals with costs orders relating to funding arrangements. An order for payment of "costs" includes an additional liability incurred under a funding arrangement. Where the court carries out a summary assessment of base costs before the conclusion of proceedings it is helpful if the order identifies separately the amount allowed in respect of: solicitors charges; Counsel's fees; other disbursements; and any value added tax. If this is not done, the court which later makes an assessment of an additional liability, will have to apportion the base costs previously assessed.

20 Rule 44.3B sets out the limits on recovery under funding arrangements. The court will consider the amount of any additional liability separately from the base costs and when considering the factors to be taken into account under rule 44.5 in assessing an additional liability the court 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.

Orders Made Before The Conclusion of Proceedings

21 Where an order for costs is made before the conclusion of the proceedings and a legal representative for the receiving party has entered into a conditional fee agreement the court may summarily assess the base costs. An order for payment of those costs will not be made unless the court is satisfied that the receiving party is at the time liable to pay to his legal representative an amount equal to or greater than the costs claimed. If the court is not so satisfied it may direct that any costs, for which the receiving party may not in

the final event be liable, be paid into court to await the outcome of the case or shall not be enforceable until further order, or the court may postpone the receiving party's right to receive payment in some other way.

Orders Made At The Conclusion of Proceedings

22 Where the court makes a summary assessment of an additional liability at the conclusion of the 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.

Factors to be Taken Into Account in Deciding the Amount of Costs

23 Rule 44.5 (Appendix 1) sets out the factors to be taken into account. Those factors include: the conduct of all the parties, including in particular, conduct before as well as during the proceedings and the efforts made, if any, before and during the proceedings in order to try to resolve the dispute.

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

25 The Judge, before commencing a summary assessment on the standard basis should, in accordance with the guidance in **Home Office v Lownds** [2002] EWCA Civ 365; [2002] 1 WLR 2450; [2002] 4 All ER 775 CA) (see paragraph 16 above), step back and consider the proportionality of the costs claimed. If the costs claimed overall appear proportionate they may be assessed applying a test of reasonableness. If on the other hand the costs appear to be disproportionate then the more stringent test of necessity should be applied. If previous orders for summarily assessed costs have been made then the Judge should, subject to paragraph 27, consider the proportionality of the total costs of the proceedings.

26. In considering what is 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 judgements 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 "reasonableness" but it is still a standard that a competent practitioner should be able to achieve without undue difficulty. 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. It is acceptable that that party should pay the costs for the expense which he has made necessary.

27 In arriving at a final figure the Judge should not reduce the costs of the receiving party on account of the costs awarded to that party under a previous summary assessment. To do so would impugn the decision of the earlier

Judge. Where however the amount of costs previously ordered to be paid has been agreed by the parties with no judicial assessment there is nothing to prevent the court taking these figures into account when considering proportionality.

Conditional Fee Agreements With A Success Fee

28 The factors to be taken into account when deciding whether a percentage increase is reasonable may include:

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

a. the legal representative's liability for any disbursements;

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

The court has the power to allow different percentages for different items of costs or for different periods during which costs were incurred (CPD 11.8(2)). The court should 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 agreement (CPD 11.7).

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

In road traffic accident claims where the accident occurred on or after 6 October 2003 the percentage increase to be allowed as a success fee is fixed by rules: see CPR 45 Section 111.

Insurance Premiums

30 Relevant factors to be taken into account when deciding whether the cost of insurance cover is reasonable include:

(a) 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;

(b) the level and extent of the cover provided;

(c) the availability of any pre-existing insurance cover;

(d) whether any part of the premium would be rebated in the event of early settlement;

(e) the amount of commission payable to the receiving party or his legal representatives or other agents.

Membership Organisation - Additional Amount

31 When considering a provision made by a membership organisation the court should not allow a 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. In those circumstances the court will have regard to the factors set out in paragraph 26 above in addition to the factors set out in rule 44.5 (Appendix 1).

Success Fee Disputes Between Legal Representative and Client: Procedure Following the Summary Assessment

32 A court which has made a summary assessment which disallows or reduces a legal representative's percentage increase may then and there decide the issue whether the disallowed amount should continue to be payable. The court may do this 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, a duly authorised officer) is present in court; and

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

33 In any other case the court will 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.

General Principles to be Applied in Summary Assessment

The Indemnity Principle

34 A party in whose favour an order for costs has been made may not recover more than he is liable to pay his own solicitors. See **Harold v Smith** [1865] H&N 381, 385; and **Gundry v Sainsbury** [1910] 1 KB 645 CA. There are exceptions to the principle, notably costs funded by the Legal Services Commission and fees payable under certain types of conditional fee agreement.

35 The statement of costs put before the court for summary assessment must be signed by the party or its legal representative. That form contains the statement:

"The costs estimated above do not exceed the costs which the [party] is liable to pay in respect of the work which this estimate covers."

36 Following the decision of Lord Justice Henry in **Bailey v IBC Vehicles Ltd.** [1998] 3 All ER 570 CA, the signature of a statement of costs (or a bill for detailed assessment) by a solicitor is, in normal circumstances, sufficient to enable the court to be satisfied that the indemnity principle has not been breached. A solicitor is an officer of the court and as Henry LJ stated:

"In so signing he 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 ... 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 ..."

Deferring Payment of Costs

37 As a general rule a paying party should be ordered to pay the amount of any summarily assessed costs within 14 days. Before making such an order the court should consider whether an order for payment of the costs might bring the action to an end and whether this would be just in all the circumstances.

Litigants in Person

38 Where the receiving party is a litigant in person rule 48.6 (Appendix 1) governs the way in which the question of costs should be dealt with. A litigant in person may be allowed a sum in respect of costs at the rate of £9.25 for each hour reasonably spent in preparation and attendance. He may be allowed a reasonable sum in excess of that amount if he can show that his work on the case has caused him financial loss justifying a higher award.

39 In all cases there is an absolute cap on the amount recoverable by a litigant in person, namely the reasonable costs of disbursements plus two thirds of the amount which would have been allowed if the litigant in person had been legally represented. (rule 48.6(2)). The litigant in person is entitled to recover in addition: payments reasonably made for legal services relating to the conduct of the proceedings; and the costs of obtaining expert assistance in connection with assessing the claim for costs. This does mean that a litigant in person may be able to claim both the cost of obtaining legal advice and services as well as the cost of undertaking the litigation in person. Those qualified to give expert assistance in connection with assessing the claim for costs are: a barrister, a solicitor, Fellow of the Institute of Legal Executives, Fellow of the Association of Law Costs Draftsmen, a law costs draftsman who is a member of the Academy of Experts and a law costs draftsman who is a member of the Expert Witness Institute.

40 Although the definition of litigant in person includes a solicitor, a solicitor who instead of acting for himself is represented in the proceedings by his firm, or by himself in his firm name, is not, for the purpose of the Civil Procedure Rules, a litigant in person (see Section 52 of the Costs Practice Direction).

Guideline Figures for Solicitors Hourly Rates

41 Guideline figures for solicitors charges (as at January 2005) are published in Appendix 2 to this Guide, which also contains some explanatory notes. The guideline rates are not scale figures: they are broad approximations only. In any particular area the Designated Civil Judge may supply more up to date guidelines for rates in that area. Costs and fees exceeding the guidelines may well be justified in an appropriate case and that is a matter for the exercise of discretion by the court.

42 The guideline figures are not intended to replace figures used by those with accurate local knowledge. They are intended to provide a starting point for those faced with summary assessment who do not have that local knowledge.

43 In substantial and complex litigation an hourly rate in excess of the guideline figures may be appropriate for grade A fee earners where other factors, including the value of the litigation, the level of the complexity, the urgency or importance of the matter, as well as any international element, would justify a significantly higher rate to reflect higher average costs.

Solicitor Advocates

44 Remuneration of solicitor advocates is based on the normal principles for remuneration of solicitors. It is not therefore appropriate to seek a brief fee and refreshers as if the advocate were a member of the Bar. If the cost of using a solicitor advocate is more than the cost of instructing Counsel, the higher cost is unlikely to be recovered. The figures properly recoverable by solicitor advocates should reflect the amount of preparation undertaken, the time spent in court and the weight and gravity of the case.

45 Where the solicitor advocate is also the solicitor who does the preparation work, the solicitor is entitled to charge normal solicitors' rates for that preparation, but once the solicitor advocate starts preparation for the hearing itself the fees recoverable should not exceed those which would be recoverable in respect of Counsel.

46 It is clearly wrong for the fees of a solicitor acting as a junior Counsel to exceed the fee appropriate for the leading Counsel.

Counsel Fees

47A proper measure for Counsels' fees is to estimate what fee a hypothetical Counsel, capable of conducting the case effectively, but unable or unwilling to insist on the higher fees sometimes demanded by Counsel of pre-eminent

reputation, would be content to take on the brief: but there is no precise standard of measurement and the judge must, using his or her knowledge and experience, determine the proper figure. (Per Pennycuik J in **Simpsons Motor Sales (London) Ltd. v Hendon Borough Council** [1965] 1 WLR 112.)

Guideline Figures

48 Appendix 2 contains a table of Counsels' fees relating to proceedings in run of the mill cases in the Queen's Bench and Chancery Divisions and in the Administrative Court. These figures are not recommended rates but it is hoped that Judges may find the figures of some help when they are called upon to assess Counsels' fees. It has not been possible to publish more specific guideline figures because of lack of sufficient data.

49 The figures contained in the table in Appendix 2 are based upon figures supplied by the Bar and in broad terms the figures are averages based on the information supplied.

The Time Spent by Solicitors and Counsel

50 There can be no guidance as to whether the time claimed has been reasonably spent, and it is for the Judge in each case to consider the work properly undertaken by Solicitors and Counsel and to arrive at a figure which is in all circumstances reasonable.

A Model Form of Statement of Costs

51 A model form of Statement of Costs is to be found in Appendix 3.

Fast Track Trial Costs

52 The amount of fast track trial costs is set out in the table to Rule 46.2. Rule 46.1(2) provides definitions of "advocate", "fast track trial costs" and "trial". The court may not award more or less than the amount shown in the table except where it decides not to award any fast track trial costs or where rule 46.3 applies. Rule 46.3 sets out the court's power to award more or less than the amount of fast track trial costs (Appendix 1).

Summary Assessment of Costs in the Court of Appeal

53 The Practice Direction supplementing CPR Part 52 identifies five types of hearing at which costs are likely to be assessed by way of summary assessment and states that parties attending any of those hearings should be prepared to deal with the summary assessment. The Costs Practice Direction (paragraph 13.5) places a duty on the parties and their legal representatives to file and serve a statement of any costs they intend to claim in respect of such hearings.

55 In this Guide the term "Counsel" includes a solicitor-advocate who is instructed by another solicitor.

Contested Directions Hearings; Applications for Permission to Appeal at which the Respondent is Present and Appeals from Case Management Decisions

56 The guidance given below in relation to contested directions hearings, applications for permission to appeal at which the respondent is present and appeals from case management decisions relates to hearings which, although important, are not difficult or complex and are not of general public importance and are listed either for a hearing not exceeding one hour or for a hearing not exceeding one half day.

57 If these hearings are attended by solicitor and Counsel the number of hours which it is reasonable to presume that the solicitor will undertake (in respect of preparation, attendance, travel in Central London and waiting) is 4 hours for a one hour appointment and 7.5 hours for a half day appointment. It is reasonable to presume that Counsel who has between 5 and 10 years' experience merits a fee of approximately £550 (exclusive of VAT) for a one hour appointment and merits a fee of approximately £880 (exclusive of VAT) for a half day appointment.

58 If these hearings were attended by a solicitor without Counsel it is reasonable to presume that the total number of hours the solicitor will spend (in respect of preparation, attendance, travel in Central London and waiting) is 5 hours for a one hour appointment and 10 hours for a half day appointment.

59 If these hearings are attended by a litigant in person it is reasonable to presume that the total number of hours the litigant in person will spend (in respect of preparation, attendance and waiting) is 9 hours for a one hour appointment and 14 hours for a half day appointment. In each case a further allowance should be made for time and expense in travelling to the appointment.

Dismissal List Hearing at which the Respondent is Present

60 The guidance given below in relation to dismissal list hearings in the Court of Appeal at which the respondent is present, relates to cases which are listed for less than one hour and are of significantly less weight than the contested directions hearings, applications for permission to appeal and appeals from case management decisions described above.

61 If the hearing is attended by solicitor and Counsel (for the appellant or the respondent), it is reasonable to presume that the total number of hours to allow the solicitor (in respect of preparation, attendance, travel in Central London and waiting) is 2 hours, and it is reasonable to presume that Counsel who has between 5 and 10 years' experience merits a fee of approximately £385 (exclusive of VAT).

62 If an appeal is dismissed and costs are awarded to the respondent, it will probably be appropriate to allow further costs in respect of work previously done in responding to the appeal. Consideration should be given to whether it is in fact appropriate to carry out a summary assessment, depending on the amount of work done by the respondent.

63 Subject to paragraph 62, if the hearing is attended by a solicitor without Counsel it is reasonable to presume that the total number of hours to allow the solicitor (in respect of preparation, attendance, travel in Central London and waiting) is 3 hours.

64 Subject to paragraph 62, if the hearing is attended by a litigant in person it is reasonable to presume that the total number of hours to allow the litigant in person (in respect of preparation, attendance and waiting) is 6 hours with a further allowance for time and expense in travelling to the appointment.

Appeals Listed for One Day or Less

65 Appeals listed for one day or less vary enormously as to weight, complexity and importance. Thus, it is not at present possible to give guidance as to the number of hours reasonably spent by solicitors (in respect of preparation, attendances, travel and waiting) in such appeals. The following general guidance is given:

(1) It may not be appropriate to carry out a summary assessment if a case lasts more than half a day or involves leading Counsel since in those circumstances the case is likely to be complex and weighty. It will often be unwise for the court summarily to assess costs in a matter which is not simple and straightforward, unless the difference between the parties is comparatively small, or unless the correct allowance appears clear.

(2) Where both Counsel and solicitors have been instructed, the reasonable fees of Counsel are likely to exceed the reasonable fees of the solicitor.

(3) The fact that the same Counsel appeared in the lower court does not greatly reduce the reasonable fee unless, for example, the lower court dealt with a great many more issues than are raised on the appeal. It is reasonable for Counsel to spend as much time preparing issues for the Court of Appeal hearing as he spent preparing those issues for the lower court hearing.

(4) If the case merits leading Counsel it may merit also the instruction of a junior to assist him. The junior's fees should be allowed at one half of the leader's fees unless:

- the junior is a senior junior and the case merited both a leader and a senior junior.
- The junior took a responsibility which was equal to or larger than that taken by the leader.
- The junior undertook work not covered by the brief.

(5) In many cases the largest element in the solicitors' reasonable fees for work in the Court of Appeal concerns instructing Counsel and preparing the appeal bundles. Time spent by the solicitor in the development of legal submissions will only be allowed where it does not duplicate work done by Counsel and is claimed at a rate the same or lower than the rate Counsel would have claimed.

(6) Although the solicitor may have spent many hours with the client, the client should have been warned that little of this time is recoverable against a losing party. Reasonable time spent receiving instructions and reporting events should not greatly exceed the time spent on attending the opponents.

(7) Given that the case will be presented by a barrister or a solicitor advocate there is usually no reason for any other solicitor to spend many hours perusing papers. A large claim for such perusal probably indicates that a new fee earner was reading in. Reading in fees are not normally recoverable from an opponent.

(8) Although it is usually reasonable to have a senior fee earner sitting with Counsel in the Court of Appeal, it is not usually reasonable to have two fee earners. The second fee earner may be there for training purposes only.

(9) In most appeals it will be appropriate to make an allowance for copy documents. The allowance for copying which is included in the solicitor's hourly rates will have already been used up or exceeded in the lower court. An hourly rate charge is appropriate for selecting and collating documents and dictating the indices. If the paperwork is voluminous much of this should be delegated to a trainee. Note that:

- a. for the copying itself, a fair allowance is 10p per page, i.e. £100 per 1,000 sheets. This includes an allowance for checking the accuracy of the copying.
- b. Time spent standing at the photocopier and time spent taking the papers to a local photocopy shop is not recoverable. Such work is not fee earner work; it is secretarial.

(10) It must be borne in mind that skeleton arguments will have been lodged at an early stage, and, in respect of floating appeals, the case may have come into and out of the list. In those circumstances it may be necessary to change Counsel which would inevitably increase the costs. New Counsel may decide to submit a different skeleton argument. Where this has occurred, detailed assessment is to be preferred.

Solicitors Charges in the Court of Appeal

66 Although many appointments in the Court of Appeal merit the attendance of a senior fee earner familiar with the case, the most minor appointments may not. For example, on an application in the dismissal list in a case tried in Newcastle, if Counsel who was briefed for the trial attends it may be unreasonable for a solicitor familiar with the case to travel from Newcastle to

attend also. In order to arrive at a notional figure to represent the instruction of and costs of an agent, it may be appropriate to disallow most of the travel time and travelling expenses claimed by the solicitor.

67 The Court of Appeal has stated that it is the duty of litigators (particularly trade unions and insurers) to keep down the cost of litigation. This means that if they instruct London solicitors who charge London rates for a case which has no obvious connection with London and which does not require expertise only to be found there, they will, even if successful, recover less than the solicitors have charged (see **Wraith v Sheffield Forgemasters Ltd** [1998] 1 WLR 132 CA).

68 In relation to the first four types of hearing appropriate for summary assessment in the Court of Appeal, some guidance is given above suggesting the number of hours which may be reasonable for the solicitor to spend. That guidance should be used as a starting point only. The court should also have regard to the number of hours actually claimed.

Counsels Fees in the Court of Appeal

69 Counsel's fees depend upon the seniority of Counsel which it was reasonable to instruct and the market price for the item of work in question. It is not appropriate to specify an hourly rate for Counsel and to remunerate them at a multiple of that rate according to the number of hours reasonably spent. Such an approach would reward the indolent and penalise the expeditious.

70 In previous paragraphs (paragraphs 57 and 61), figures were suggested for brief fees for Counsel who has between 5 and 10 years' experience. For less experienced Counsel it may be appropriate to reduce these figures; for more experienced Counsel it may be appropriate to increase these figures. The guideline figures are a starting point only and the Court has the discretion to allow fees appropriate to the particular circumstances of the appeal.

Conditional Fee Agreements with Success Fees

71 Although it is not common for appellants to enter into such agreements, it is common for respondents (the successful party at first instance) whose claim or defence was conducted under a conditional fee agreement: such agreements often cover appeals brought by the opponent.

72 Attention is drawn to paragraph 3 of this Guide dealing with summary assessment of an additional liability at the conclusion of proceedings.

73 Paragraphs 27 and 28 set out the factors to be taken into account when deciding whether a percentage increase is reasonable.

Costs Awarded to LIP

74 Attention is drawn to paragraphs 38 to 40 of this Guide.

P. T. Hurst
Senior Costs Judge

PTH\54\Guide to Summary Assessment of Costs

3.12.04

Appendix one of the Guide to Summary Assessment of Costs

Rule number	Description
Rule 43.2	Definitions and application
Rule 43.3	Meaning of summary assessment
Rule 44.3	Courts discretion and circumstances to be taken into account when exercising its discretion as to costs
Rule 44.4	Basis of assessment
Rule 44.5	Factors to be taken into account in deciding the amount of costs
Part 46	Fast track trial costs
46.1	Scope of this part
46.2	Amount of fast track trial costs
46.3	Power to award more or less than amount of fast track trial costs
46.4	Fast track trial costs where there is more than one claimant or defendant
48.5	Costs where money is payable by or to a child or patient
48.6	Litigants in person

Extracts from the Costs Practice Direction

Section	Description
Section 11	Factors to be taken into account in deciding the amount of costs Rule 44.5
Section 12	Procedure for assessing costs Rule 44.7 12.1 and 12.2
Section 13	Summary assessment general provisions
Section 14	Summary assessment where costs claimed include an additional liability
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
Section 52	Litigants in person Rule 48.6

Appendix 1 - Meaning of summary assessment

43.3 'Summary assessment' means the procedure by which the court, when making an order about costs, orders payment of a sum of money instead of fixed costs or 'detailed assessment'.

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

44.3(1) The court has discretion as to –

- (a) whether costs are payable by one party to another;
- (b) the amount of those costs; and
- (c) when they are to be paid.

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

- (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
- (b) the court may make a different order.

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

- (a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or
- (b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.

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

- (a) the conduct of all the parties;
- (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
- (c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36).

(Part 36 contains further provisions about how the court's discretion is to be exercised where a payment into court or an offer to settle is made under that Part)

(5) The conduct of the parties includes –

- (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;
- (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

- (c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and
- (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

(6) The orders which the court may make under this rule include an order that a party must pay –

- (a) a proportion of another party's costs;
- (b) a stated amount in respect of another party's costs;
- (c) costs from or until a certain date only;
- (d) costs incurred before proceedings have begun;
- (e) costs relating to particular steps taken in the proceedings;
- (f) costs relating only to a distinct part of the proceedings; and
- (g) interest on costs from or until a certain date, including a date before judgment.

(7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c).

(8) Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed.

(9) Where a party entitled to costs is also liable to pay costs the court may assess the costs which that party is liable to pay and either –

- (a) set off the amount assessed against the amount the party is entitled to be paid and direct him to pay any balance; or
- (b) delay the issue of a certificate for the costs to which the party is entitled until he has paid the amount which he is liable to pay.

Costs orders relating to funding arrangements

44.3A

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

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

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

- (a) make a summary assessment of all the costs, including any additional liability;
- (b) make an order for detailed assessment of the additional liability but make a summary assessment of the other costs; or
- (c) make an order for detailed assessment of all the costs.

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

Limits on recovery under funding arrangements

44.3B

(1) A party may not recover as an additional liability –

- (a) any proportion of the percentage increase relating to the cost to the legal representative of the postponement of the payment of his fees and expenses;
- (b) any provision made by a membership organisation which exceeds the likely cost to that party of the premium of an insurance policy against the risk of incurring a liability to pay the costs of other parties to the proceedings;
- (c) any additional liability for any period in the proceedings during which he failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order;
- (d) any percentage increase where a party has failed to comply with –

- (i) a requirement in the costs practice direction; or
- (ii) a court order,

to disclose in any assessment proceedings the reasons for setting the percentage increase at the level stated in the conditional fee agreement.

(2) This rule does not apply in an assessment under rule 48.9 (assessment of a solicitor's bill to his client).

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

Basis of assessment

44.4

(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –

- (a) on the standard basis; or
- (b) on the indemnity basis,

but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

(Rule 48.3 sets out how the court decides the amount of costs payable under a contract)

(2) Where the amount of costs is to be assessed on the standard basis, the court will –

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

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

(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.

(4) Where –

(a) the court makes an order about costs without indicating the basis on which the costs are to be assessed; or

(b) the court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis, the costs will be assessed on the standard basis.

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

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

44.5

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

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

(i) proportionately and reasonably incurred; or

(ii) were proportionate and reasonable in amount, or

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

(i) unreasonably incurred; or

(ii) unreasonable in amount.

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

(3) The court must also have regard to –

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

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

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

(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)

Part 46 Fast Track Trial Costs

Scope of this Part

46.1

(1) This Part deals with the amount of costs which the court may award as the costs of an advocate for preparing for and appearing at the trial of a claim in the fast track (referred to in this rule as 'fast track trial costs').

(2) For the purposes of this Part –

(a) 'advocate' means a person exercising a right of audience as a representative of, or on behalf of, a party;

(b) 'fast track trial costs' means the costs of a party's advocate for preparing for and appearing at the trial, but does not include –

(i) any other disbursements; or

(ii) any value added tax payable on the fees of a party's advocate; and

(c) 'trial' includes a hearing where the court decides an amount of money or the value of goods following a judgment under Part 12 (default judgment) or Part 14 (admissions) but does not include –

(i) the hearing of an application for summary judgment under Part 24; or

(ii) the court's approval of a settlement or other compromise under rule 21.10.

(Part 21 deals with claims made by or on behalf of, or against, children and patients)

46.2

(1) The following table shows the amount of fast track trial costs which the court may award (whether by summary or detailed assessment).

Value of the claim	Amount of fast track trial costs Amount of fast track trial costs which the court may award
Up to £3,000	£350
More than £3,000 but not more than £10,000	£500
More than £10,000	£750

(2) The court may not award more or less than the amount shown in the table except where –

(a) it decides not to award any fast track trial costs; or

(b) rule 46.3 applies,

but the court may apportion the amount awarded between the parties to reflect their respective degrees of success on the issues at trial.

(3) Where the only claim is for the payment of money –

(a) for the purpose of quantifying fast track trial costs awarded to a claimant, the value of the claim is the total amount of the judgment excluding –

(i) interest and costs; and

(ii) any reduction made for contributory negligence.

(b) for the purpose of the quantifying fast track trial costs awarded to a defendant, the value of the claim is –

(i) the amount specified in the claim form (excluding interest and costs);

(ii) if no amount is specified, the maximum amount which the claimant reasonably expected to recover according to the statement of value included in the claim form under rule 16.3; or

(iii) more than £10,000, if the claim form states that the claimant cannot reasonably say how much he expects to recover.

(4) Where the claim is only for a remedy other than the payment of money the value of the claim is deemed to be more than £3,000 but not more than £10,000, unless the court orders otherwise.

(5) Where the claim includes both a claim for the payment of money and for a remedy other than the payment of money, the value of the claim is deemed to be the higher of –

(a) the value of the money claim decided in accordance with paragraph (3); or

(b) the deemed value of the other remedy decided in accordance with paragraph (4),

unless the court orders otherwise.

(6) Where –

(a) a defendant has made a counterclaim against the claimant;

(b) the counterclaim has a higher value than the claim; and

(c) the claimant succeeds at trial both on his claim and the counterclaim,

for the purpose of quantifying fast track trial costs awarded to the claimant, the value of the claim is the value of the defendant's counterclaim calculated in accordance with this rule.

(Rule 20.4 sets out how a defendant may make a counterclaim)

Power to award more or less than the amount of fast track trial costs

46.3(1) This rule sets out when a court may award –

(a) an additional amount to the amount of fast track trial costs shown in the table in rule 46.2(1); and

(b) less than those amounts.

(2) If –

(a) in addition to the advocate, a party's legal representative attends the trial;

(b) the court considers that it was necessary for a legal representative to attend to assist the advocate; and

(c) the court awards fast track trial costs to that party,

the court may award an additional £250 in respect of the legal representative's attendance at the trial.

(Legal representative is defined in rule 2.3)

(2A) The court may in addition award a sum representing an additional liability.

(The requirements to provide information about a funding arrangement where a party wishes to recover any additional liability under a funding arrangement are set out in the costs practice direction)

(‘Additional liability’ is defined in rule 43.2)

(3) If the court considers that it is necessary to direct a separate trial of an issue then the court may award an additional amount in respect of the separate trial but that amount is limited in accordance with paragraph (4) of this rule.

(4) The additional amount the court may award under paragraph 3 must not exceed two-thirds of the amount payable for that claim, subject to a minimum award of £350.

(5) Where the party to whom fast track trial costs are to be awarded is a litigant in person, the court will award –

(a) if the litigant in person can prove financial loss, two-thirds of the amount that would otherwise be awarded; or

(b) if the litigant in person fails to prove financial loss, an amount in respect of the time spent reasonably doing the work at the rate specified in the costs practice direction.

(6) Where a defendant has made a counterclaim against the claimant, and –

(a) the claimant has succeeded on his claim; and

(b) the defendant has succeeded on his counterclaim,

the court will quantify the amount of the award of fast track trial costs to which –

(i) but for the counterclaim, the claimant would be entitled for succeeding on his claim; and

(ii) but for the claim, the defendant would be entitled for succeeding on his counterclaim,

and make one award of the difference, if any, to the party entitled to the higher award of costs.

(7) Where the court considers that the party to whom fast track trial costs are to be awarded has behaved unreasonably or improperly during the trial, it may award that party an amount less than would otherwise be payable for that claim, as it considers appropriate.

(8) Where the court considers that the party who is to pay the fast track trial costs has behaved improperly during the trial the court may award such additional amount to the other party as it considers appropriate.

Fast track trial costs where there is more than one claimant or defendant

46.4(1) Where the same advocate is acting for more than one party –

(a) the court may make only one award in respect of fast track trial costs payable to that advocate; and

(b) The parties for whom the advocate is acting are jointly entitled to any fast track trial costs awarded by the court.

(2) Where –

(a) The same advocate is acting for more than one claimant; and

(b) each claimant has a separate claim against the defendant,

the value of the claim, for the purpose of quantifying the award in respect of fast track trial costs is to be ascertained in accordance with paragraph (3).

(3) The value of the claim in the circumstances mentioned in paragraph (2) is –

(a) where the only claim of each claimant is for the payment of money –

(i) if the award of fast track trial costs is in favour of the claimants, the total amount of the judgment made in favour of all the claimants jointly represented; or

(ii) if the award is in favour of the defendant, the total amount claimed by the claimants,

and in either case, quantified in accordance with rule 46.2(3);

(b) where the only claim of each claimant is for a remedy other than the payment of money, deemed to be more than £3,000 but not more than £10,000; and

(c) where claims of the claimants include both a claim for the payment of money and for a remedy other than the payment of money, deemed to be –

(i) more than £3,000 but not more than £10,000; or

(ii) if greater, the value of the money claims calculated in accordance with sub paragraph (a) above.

(4) Where –

- (a) there is more than one defendant; and
- (b) any or all of the defendants are separately represented,

the court may award fast track trial costs to each party who is separately represented.

(5) Where –

- (a) there is more than one claimant; and
- (b) single defendant,

the court may make only one award to the defendant of fast track trial costs, for which the claimants are jointly and severally liable.

(6) For the purpose of quantifying the fast track trial costs awarded to the single defendant under paragraph (5), the value of the claim is to be calculated in accordance with paragraph (3) of this rule.

Costs where money is payable by or to a child or patient

48.5(1) This rule applies to any proceedings where a party is a child or patient and –

- (a) money is ordered or agreed to be paid to, or for the benefit of, that party; or
- (b) money is ordered to be paid by him or on his behalf.

(‘Child’ and ‘patient’ are defined in rule 2.3)

(2) The general rule is that –

- (a) the court must order a detailed assessment of the costs payable by any party who is a child or patient to his solicitor; and
- (b) on an assessment under paragraph (a), the court must also assess any costs payable to that party in the proceedings, unless the court has issued a default costs certificate in relation to those costs under rule 47.11.

(3) The court need not order detailed assessment of costs in the circumstances set out in the costs practice direction.

(4) Where –

- (a) a claimant is a child or patient; and

(b) a detailed assessment has taken place under paragraph (2)(a), the only amount payable by the child or patient to his solicitor is the amount which the court certifies as payable.

(This rule applies to a counterclaim by or on behalf of a child or patient by virtue of rule 20.3)

Litigants in person

48.6

(1) This rule applies where the court orders (whether by summary assessment or detailed assessment) that the costs of a litigant in person are to be paid by any other person.

(2) The costs allowed under this rule must not exceed, except in the case of a disbursement, two-thirds of the amount which would have been allowed if the litigant in person had been represented by a legal representative.

(3) The litigant in person shall be allowed –

(a) costs for the same categories of –

(i) work; and

(ii) disbursements,

which would have been allowed if the work had been done or the disbursements had been made by a legal representative on the litigant in person's behalf;

(b) the payments reasonably made by him for legal services relating to the conduct of the proceedings; and

(c) the costs of obtaining expert assistance in assessing the costs claim.

(4) The amount of costs to be allowed to the litigant in person for any item of work claimed shall be –

(a) where the litigant can prove financial loss, the amount that he can prove he has lost for time reasonably spent on doing the work; or

(b) where the litigant cannot prove financial loss, an amount for the time reasonably spent on doing the work at the rate set out in the practice direction.

(5) A litigant who is allowed costs for attending at court to conduct his case is not entitled to a witness allowance in respect of such attendance in addition to those costs.

(6) For the purposes of this rule, a litigant in person includes –

(a) a company or other corporation which is acting without a legal representative; and

(b) a barrister, solicitor, solicitor's employee or other authorised litigator (as defined in the Courts and Legal Services Act 1990 who is acting for himself.

Costs where the court has made a group litigation order

48.6A

(1) This rule applied where the court has made a Group Litigation Order ('GLO').

(2) In this rule –

(a) 'individual costs' means costs incurred in relation to an individual claim on the group register;

(b) 'common costs' means –

(i) costs incurred in relation to the GLO issues;

(ii) individual costs incurred in a claim while it is proceeding as a test claim, and

(iii) costs incurred by the lead solicitor in administering the group litigation; and

(c) 'group litigant' means a claimant or defendant, as the case may be, whose claim is entered on the group register.

(3) Unless the court orders otherwise, any order for common costs against group litigants imposes on each group litigant several liability for an equal proportion of those common costs.

(4) The general rule is that where a group litigant is the paying party, he will, in addition to any costs he is liable to pay to the receiving party, be liable for –

(a) the individual costs of his claim; and

(b) an equal proportion, together with all the other group litigants, of the common costs.

(5) Where the court makes an order about costs in relation to any application or hearing which involved –

(a) one or more GLO issues; and

(b) issues relevant only to individual claims,

the court will direct the proportion of the costs that is to relate to common costs and the proportion that is to relate to individual costs.

(6) Where common costs have been incurred before a claim is entered on the group register, the court may order the group litigant to be liable for a proportion of those costs.

(7) Where a claim is removed from the group register, the court may make an order for costs in that claim which includes a proportion of the common costs incurred up to the date on which the claim is removed from the group register. (Part 19 sets out rules about group litigation.)

Extracts from the costs practice direction

Section 11

Factors to be taken into account in deciding the amount of costs: rule 44.5

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 Subject to paragraph 17.8(2), 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.

(2) The court has the power, when considering whether a percentage increase is reasonable, to allow different percentages for different items of costs or for different periods during which costs were incurred.

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

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

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 the Practice Direction supplementing Part 52 (Appeals) 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 the costs he intends to claim 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 his 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 should be filed and the copies of it should be served as soon as possible and in any event not less than 24 hours before the date 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 patient within the meaning of Part 21 unless the solicitor acting for the child or patient 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 patient.

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

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 20 Procedure

Where legal representative wishes to recover from his client and agreed percentage increase which has been disallowed or reduced on assessment: Rule 44.16

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.

(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 52 litigants in person: Rule 48.6

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

(1) barrister,

(2) solicitor,

(3) Fellow of the Institute of Legal Executives,

(4) Fellow of the Association of Law Costs Draftsmen,

(5) law costs draftsman who is a member of the Academy of Experts,

(6) law costs draftsman who is a member of the Expert Witness Institute.

52.2 Where a litigant in person wishes to prove that he has suffered financial loss he should produce to the court any written evidence he relies on to support that claim, and serve a copy of that evidence on any party against whom he seeks costs at least 24 hours before the hearing at which the question may be decided.

52.3 Where a litigant in person commences detailed assessment proceedings under rule 47.6 he should serve copies of that written evidence with the notice of commencement.

52.4 The amount, which may be allowed to a litigant in person under rule 46.3(5)(b) and rule 48.6(4), is £9.25 per hour.

52.5 Attention is drawn to rule 48.6(6)(b). A solicitor who, instead of acting for himself, is represented in the proceedings by his firm or by himself in his firm name, is not, for the purpose of the Civil Procedure Rules, a litigant in person.