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COST PRINCIPLES

From the White Book and Cook on Costs

CPR PARTS 44-47

PART 44 CPR – GENERAL RULES ABOUT COSTS

I. SUMMARY OF PART 44(2) CPR

A.THE COURT'S DISCRETION AS TO COSTS

44.2(1)- the court has a discretion as to (a) whether payable; (b) amount; and (c) when they are paid

44.2(2) - general rule is that costs follow the event, i.e. the unsuccessful party pays costs of successful party; but (b) the court may make a different order.

44.2(4) - 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 a case even if unsuccessful overall; and

(c) any offer to settle which does not have Part 36 costs consequences.

44.2(5) - the conduct of the parties includes:

(a) conduct before and during proceedings – in particular compliance with pre-action conduct PD or any pre-action protocol.

(b) whether it was reasonable for a party to raise pursue, or contest an allegation or issue;

(c) manner in which party pursues or defends case or allegation or issue.

(d) whether a successful claimant exaggerated its claim.

44.2(6) - orders the court may make

(a) a proportion payable;

(b) a stated amount;

(c) costs from or until a certain date;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in proceedings;

(f) costs relating to only distinct part of proceedings; and

(g) interest on costs from or until date (inc before judgment).

44.2(7) - before making an order under 44.2(g)(f) above court must consider whether practicable to make order under (a) to (c) instead.

44.2(8) - where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.

II. PRINCIPLES APPLIED BY THE COURT

A. THE GENERAL RULE

(1) Order to pay costs (in full) is an order to pay unsuccessful parties costs in totality subject to assessment.

B. COSTS WHICH ARE RECOVERABLE

(1) Costs are awarded as indemnity to incurring party so that costs in excess of liability to own solicitor not recoverable (*Gundry v Sainsbury* [1910] 1 K.B. 645) For exceptions see *R v Miller & Glennie* [1983] 1 W.L.R. 1056; also *Hazlett v Sefton* MBC [2000] 4 All E.R. 887 DC and others in White Book Vol. 1 (2017), p1327, para 44.2.5)

Question for the court is whether the receiving party has become liable to pay the costs claimed; who actually pays is irrelevant (*Edwin LLP v Popat*, 12 February 2013, unrep.)

(2) Simple costs order gives entitlement to costs of and incidental to *(Newall v Lewis* [2008] EWHC 910 (Ch), 20 April 2008, unrep. (Briggs J & assessors), at para 16: a simple order *"costs of … proceedings to be assessed on the standard basis"* gives entitlement to costs or and incidental to.

(3) Costs prior to proceedings are capable of being recoverable as costs in the proceedings (*Societe Anonyme Pecheries Ostendaises v Merchant's Marine Insurance Company* [1928] 1 K.B. 750, CA at p 757; see also [1931] 1 Ch. 428, CA)

(4) (a) Expense of complying with pre-action protocol in respect of claims brought in subsequent proceedings can be costs "incidental to"; but (b) costs incurred at pre-action stage in dealing with or responding to issues that are later dropped are not recoverable save in exceptional circumstances. (*McGlinn v Waltham Contractors* Ltd [2005] EWHC 1419 (TCC))

C. OTHER

(1) Judge should clearly state reasons when making order for costs, particularly where costs are disproportionate to amount in issue. (*English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605)

(2) Reasons may be apparent from judgment, where counsel are unsure they should seek a note of reasons from the judge (*Darougar v Belcher* [2002] EWCA Civ 1262, 25 July 2002, unrep., CA at para 7)

D. 'DIFFERENT ORDERS'

(1) Different orders under r.44.2(6)(a), (b), (c), and (f) demand an "issue-based approach"

Propositions from the Cases

(1) A judge:

(a) may make different orders for costs "in relation to discrete issues"; and

(b) should consider doing so where a party has been successful on one issue but unsuccessful on another issue;

(2) in that event, a judge may make an order which not only deprives him on an issue, but also entitles the other party to costs on that issue;

(3) it is no longer necessary for a party to have acted unreasonably or improperly before requiring him to pay costs on an issue on which he has failed (even if successful overall). (*Johnsey Estates (1990) Ltd v Secretary of State for the* Environment [2001] EWCA Civ 535, 11 April 2001, unrep., CA; and *Summit Property Ltd v Pitmans* [2001] EWCA Civ 2020)

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(4) Justification for considering other orders before making a different order (r.44.2(7)) is that an issue-based approach will require a more detailed assessment thereby giving rise to further costs and time which may be disproportionate to the benefit gained (a percentage order under (a) will often produce a fairer result) (*English v Emery Reimbold & Strick Ltd* [2002] 1 W.L.R. 2409, CA.

(5) Wide discretion under r.44.2 makes predicting the outcome of an issue-based approach extremely difficult. There has been criticism for failing to employ the general starting point (*Fox v Foundation Piling Limited* [2011] EWCA Civ 790)

E. SANDERSON AND BULLOCK ORDERS

(1) A "*Sanderson* order" is an order that(successful) D1's costs payable by (unsuccessful) D2 These are commonly made where C is legally aided (*Sanderson v Blyth Theatre Company* [1903] 2 K.B. 533, CA).

(2) A "Bullock order" is an order that costs payable by C to successful D1, to be paid by (unsuccessful) D2.

(3) Often the same term is used to describe a *Sanderson* order and the form of order remains in the discretion of the court (*Bullock v London General Omnibus Co* [1907] 1 K.B. 264, CA).

(4) Justification for these orders is that it avoids injustice to C in cases in which he is unsure which of two D's ought to be sued. Justification does not arise where C completely unsuccessful.

(5) Cases list different factors but common thread is the reasonableness of the original joinder. Some cited factors are:

(i) whether the claim against the successful D had been made in 'the alternative';

(ii) whether the causes of action had been connected with those on which the claimant had been successful; and

(iii) whether it had been reasonable for C to join and pursue a claim against the successful D. (*Irvine v Commissioner of Police for the Metropolis* [2005] EWCA Civ 129).

(6) There are no hard and fast rules with these orders (*Moon v Garrett* [2006] EWCA Civ 1121)

F. ASSESSMENT OF COSTS OF A COUNTERCLAIM OR OF AN ISSUE

The Medway Principles

(1) Where D succeeds on defence and fails on counterclaim he is entitled to costs which he has actually and properly incurred in defeating C's claim but not to those he would not have incurred had he not counterclaimed. C will not be entitled to costs of the claim but will be entitled to costs of defending the counterclaim.

(2) Where the matters in controversy are common to both the claim and the counterclaim, the costs should be apportioned by the costs judge (in so far as they are common). The judge should divide common costs notionally. (*Medway Oil and Storage Company Ltd v Continental Contractors Ltd* [1929] A.C. 88, HL)

(3) Although it is preferable for there to be only a single adjusted costs order where multiple parties are successful in claiming and counterclaiming, the court will sometimes make a cross-order. In the latter case, the principles on attribution in *Medway* (above) apply.

(4) Where two or more costs orders are made, any successful counterclaim will have attributed to it only the increase in costs which it had brought about (*Medway* above).

(5) Where both claim and counterclaim are unsuccessful, D will recover costs save those attributable to the counterclaim (*Medway* above).

(6) In these cases, time records will be important when it comes to assessment (*Dyson Technology Ltd v Strutt* [2007] EWHC 1756 (Ch).

(7) Unless there a specific order that costs are apportioned between claim and counterclaim, costs cannot be so apportioned.

(8) There is a distinction between 'division' on the one hand, and 'apportionment' on the other. Some costs will be insusceptible to division because they do not relate solely to a particular claim or issue as between only two parties (*Hay v Szterbin* [2010] EWHC 1967 (Ch), [2010] 6 Costs LR 926.

(9) The *Medway* approach will not necessarily be followed where injustice might arise to D merely because C issued proceedings first so that D is not entitled under that approach to any costs in respect of liability since they would have been necessitated by C's claim in any event (*Burchell v Bullard* [2005] EWCA Civ 358; *Square Mile Partnership Ltd v Fitzmaurice McCall Ltd* [2006] EWHC 236 (Ch); *Villa Agencies SPF Ltd v Kestrel Travel Consultancy Ltd* [2012] EWCA Civ 219)

(10) However, where amounts are large, attempting the set off at the award of costs stage itself creates injustice, instead it may be more appropriate to award a percentage of costs to each party leaving the monetary value to be determined by assessment or agreement (*Amin v Amin and 17 ors (costs)* [2007] EWHC 827 (Ch D)

G. NO ORDER AS TO COSTS

(1) Where a court makes no mention of costs the general rule is that no party is entitled to costs (CPR r44.10; *Griffiths v Metropolitan Police Commissioner* [2003] EWCA Civ 313).

(2) Exceptions are when court (1) gives permission to appeal, (2) permission to apply for judicial review, or (3) makes an order on a not on notice application, but is silent on costs then an order for 'the applicant's costs in the case' is deemed (CPR 44.10(2)).

(3) The deemed 'costs in the case order provided for under CPR 44.10(2)(c) supports the contention that a court can make an order for costs on a not on notice application against the party who has not had notice (*Makay and Busby v Ashwood Enterprises Ltd* [2013] EWCA Civ 959 (subject to right to apply to set aside/vary CPR r23.10).

H. TYPES OF ORDER

(1) CPR PD 44, para 2, sets out a list of costs orders available following interim and appeal hearings: Costs/Costs in any event; Costs in the case/ Costs in the application; Costs reserved; Claimant's/Defendant's costs in case/application; Costs thrown away; Costs of and caused by; Costs here and below; No order as to costs/Each party to pay own costs.

(2) An order for 'costs reserved' becomes an order for 'costs in the case', if there is no later determination of where the responsibility for those costs lies (Cook's on Costs (2017) at para 22.3, p333).

(3) Where both parties are awarded costs at the end of the claim, an interim order for costs in the case is determined by reference to which parties overall order for costs covered the period when the 'costs in the case' order was made so that that party benefits from the order (*Ontulmus v Collett* [2014] EWHC 4117 (QB)

I. DEEMED COSTS ORDERS

(1) Deemed cost order are available: (1) in favour of the Claimant on acceptance of a Part 36 offer (See Cooks on Costs RE PART 36]); and (2) where a claim is discontinued.

Discontinuance

(2) A C who discontinues is liable for D's costs up until the date of discontinuance unless court orders otherwise (CPR r38.6).

(3) Where C deletes a claim by amendments to the particulars of claim this is in effect discontinuance with the same costs consequences (*Isaac v Isaac* [2005] EWHC 435 (Ch).

(4) The burden is on C to persuade court that some other order is appropriate, perhaps because of some unavoidable and unforeseeable change in circumstances (*Re Walker Windail Systems Ltd, Walker v Walker* [2005] EWCA Civ 247).

(5) It will be unusual for a change in circumstances to amount to a good reason unless connected with some conduct on the part of D which merited departure from the general rules (Teasdale v HSBC Bank plc [2010] EWHC 612 (QB)).

(6) CPR 38.6 (liability for costs on discontinuance) does not create a general discretion as to costs on discontinuance: D starts from position of being entitled to costs and it is for C to justify the making of some other order (*Messih v McMillan Williams* [2010] EWCA Civ 844).

(7) An example of court exercising its discretion (*Webb v Environment Agency* (2011) QBD 5 April*).*

(8) One of the factors the court will consider is the fact that an application to depart from the general rule is made some time after discontinuance (*Hoist UK Ltd v Reid Lifting Ltd* [2010] EWHC 1922 (Ch)).

Basis of assessment

(9) By CPR 44.9(1) assessment under the above deemed orders is conducted on the standard basis. However, where the court has a residual discretion that extends to making an order for indemnity costs on the application of the party against whom the claim has been discontinued if appropriate (*Sharokh Mireskandari v Law Society* [2009] EWHC 2223 (Ch) – discontinued claim had always been entirely speculative).

Interest on costs under deemed order

(10) By CPR 44.9(4) interest runs from the dare when the deemed cost order is made.

J. COSTS ORDERS BY CONSENT

(1) Parties may agree costs between themselves, including by Tomlin order which stays a claim on (scheduled) terms – if it is agreed that costs will be assessed if not agreed then this MUST be in the body of the order.

Uncertain and unclear terms

(2) Where a consent order does not include a term on application to vary, the court will likely not have jurisdiction (*Richardson Roofing Co Ltd v Colman Partnership Ltd* [2009] EWCA Civ 839)

(3) In interpreting a consent order, it seems the courts will treat the issues raised as questions of fact and law rather than discretion (*Re Gibson's Settlement Trusts, Mellors v Gibson* [1981] Ch 179, [1981] 1 All ER 233)

K. CONTESTED AWARDS BETWEEN THE PARTIES

(1) CPR 44.2(2) (above) contains a rebuttable presumption that the unsuccessful party pays the costs of the successful party.

(2) It is only once the successful party is identified that the court considers the reasons to depart. In *Straker v Tudor Rose (a firm)* [2007] EWCA Civ 368, Walker LJ provided the following guidance:

(i) Is it appropriate to make an order?

(ii) If it is, the general rule is that costs follow the event

(iii) Identify the successful party

(iv) Are there any reasons for departing from the general rule, in whole or in part. If so, the court should make clear finding of the factors justifying departure.

Who is the successful party?

(3) *'In deciding who is the successful party the most important thing is to identify the party who is to pay money to the other. That is the surest indicator of success and failure.'* (*A L Barnes Ltd v Time Talk (UK) Ltd* [2003] EWCA Civ 402 at [28], approach endorsed in *Day v Day* [2006] EWCA Civ 415).

(4) *'For the purposes of the CPR success is not a technical term but a result in real life, and the question as to who has succeeded is a matter for the exercise of common sense.'* (*Bank of Credit and Commerce International SA v Ali* (No 3) [1999] NLJ 1734 Vol 149 at [17] – cited in *Day*).

(5) That approach applies to what is broadly termed commercial litigation (*Al Barnes above).* This point is controversial and approach seems to be mirrored in non-commercial cases (although see *Hullock v East Riding of Yorkshire County Council* [2009] EWCA Civ 1039 which suggests that things might be different in a personal injury quantum only claim).

(6) Often it will be appropriate for the loser to pay the winners costs, even where there had been issues on which the overall winner had lost (*Alternative Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 2807 (Ch)).

(7) In *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790 C made a personal injury claim for over £280,000. Only quantum was in issue and on disclosure of surveillance evidence C accepted an offer of £31,000 with the issue of costs outstanding. The Court concluded that from the date of an earlier offer

of £23,000 D had been the successful party based on C's conduct. In delivering the lead judgment Jackson LJ commented that:

(i) 'Where both parties are over optimistic with their Part 36 positions, C should normally be regarded as the 'successful party' because s/he has been forced to bring proceedings to recover ([46])

(ii) A D in possession of surveillance evidence should make a prompt and realistic Part 36 offer (Morgan v UPS [2008] EWCA Civ 1476 – failure to make modest Part 36 offer early prevented costs protection [58-60])

(iii) The fact that the successful party has won and lost some issues may be a good reason for modifying the usual order under CPR 44.2 AND this is commonly achieved by awarding the successful party a specified portion of his/her costs [47-49]

(iv) The growing tendancy of Courts at all levels (including the Court of Appeal) to depart from the starting point in CPR 44.2 too far and too often was an unwelcome trend which had itself increased costs by arguments at first instance and a 'swarm of appeals' [62]'

(Cook on Costs (2017), para 22.16, p341)

(8) Cases may be distinguishable from *Fox* where 'success' had been conceded by the time that the appeal. It did not therefore contradict the *Medway* line of cases on 'substantial success' (*Magical Marking Ltd & Phillis v Ware & Kay Ltd & 10 ors* [2013] EWHC 636 (Ch)).

(9) Following those cases, the Court of Appeal has restated the *Al Barnes* approach in *Northampton Regional Livestock Centre Company Ltd v Cowling and Lawrence* [2015] EWCA Civ 651, [2015] 4 Costs LO 477. C recovered for breach of fiduciary duty but failed on negligence. Court found that C was the successful party but then departed from the general rule and awarded a percentage costs order of 50%.

Reasons for departing from the general rule

a. Conduct of the parties

(10) CPR 44.2(4) and CPR 44.2(5) give a non-exhaustive list of factors.

(11) Where a C has been deliberately misleading in the course of the claim by intentionally and fraudulently exaggerating the claim, the Court will usually depart from the general rule (*Painting v University of Oxford* [2005] EWCA Civ 161 – C's was ordered to pay costs with result that she would have had very little left by way of damages).

(12) Reductions in cost are justified, at least partly, by the fact that they are likely to provide a disincentive to Cs who seek to make exaggerated claims (*Jackson v Ministry of Defence* [2006] EWCA Civ 46).

(13) Where a C is successful but dishonest s/he will often be penalised as a result. A failure to engage in negotiation will also be a factor (*Wildlake v BAA* [2009] EWCA Civ 1256- no order for costs on the basis of exaggeration and failure to negotiate, in spite of fact that C beat Part 36 offer).

(14) However, there is no general rule that a finding of dishonest conduct will replace the general starting point (*Neale v Hutchinson* [2012] EWCA Civ 345).

(15) In *Northstar Systems Ltd v Fielding* [2006] EWCA Civ 1660 (cited in *Neale* above), Waller LJ stated:

'There is no general rule that a losing party who can establish dishonesty must receive all his costs of establishing this dishonesty, however, disproportionate they may be.'

(16) Exaggeration for the purposes of CPR 44.2(5)(d) must consist in conduct meriting criticism. That is different from merely stating a best case (*Morton v Portal Ltd* [2010] EWHC 1804 (QB)).

(17) *'In my judgment it would be wrong to conclude, if there ever was a strict rule that pre-action conduct was relevant to costs only if causative of … an unsuccessful claim or of increased expense in subsequent litigation, that such a rule survives the introduction of the CPR.'* (*Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanaya Ve Pazarlama As* [2009] EWHC 1696 (Ch)).

(18) Conduct of the proceedings themselves may also lead to a departure from the general rule (*R (on the application of Scrinivasans Solicitors) v Croyden County Court* [2013] EWCA Civ 249 – abandoned submissions and failed to make right points at the right time; see also *Cooper v Thameside Constructions Co Ltd* unrep 4.7.16 (TCC)).

b. Partial success

(19) This is a separate question from the identification of the successful party.

(20) *'… [T]he fact that the claimant has won on some issues and lost on other issues along the way is not normally a reason for depriving the claimant of part of his costs'* (Jackson LJ in *Fox* above).

c. Calderbank offers

(21) *'… parties are quite entitled to make … offers outside the framework of part 36. Where a party makes such an offer and then achieves a more advantageous result, the court's discretion is wider. Nevertheless, it may well be appropriate to order that party which has optimistically rejected the offer to pay all costs since the date when that offer expired (see Jackson LJ in Fox above)'.*

(22) a case involving a departure from the general rule on the basis of a number of the above principles is *NJ Rickard Ltd v Holloway* unrep. 3.11.15 Court of Appeal Civ.

L. AGREEMENT EXCEPT AS TO COSTS

(7) In *M v Croydon Borough of London* [2012] EWCA Civ 595 the Court of appeal held that where a claim had been settled there was a difference between the following types of cases:

(i) Cases where C has been wholly successful whether following a contested hearing of pursuant to a settlement;

(ii) Cases where C has only succeeded in part following a contested hearing or pursuant to a settlement; and

(iii) Cases where there has been some compromise which does not actually reflect C's claims

(8) Re (7) above: in type (i) cases C will normally be entitled to costs absent some good reason to the contrary. In type (ii) cases the court will normally determine questions such as the reasonableness of C in pursuing the unsuccessful claim, how important the unsuccessful claim is relative to the successful claim, and how much the costs were increased by pursuit of the unsuccessful claim. In type (iii) cases the court is often unable to gauge whether there is a successful party (*Emezie v Secretary of State for the Home Department* [2013] EWCA Civ 733.

(9) Where detailed costs information and concessions are before a judge then an alternative approach under which the trial judge combines quantification and liability may be adopted (*The Bank of Tokyo-Mitsubishi UFJ, Ltd Baskan Gida Sanayi Ve Pazarlama AS above).*

M. NO WINNER OR LOSER

(1) A Court may find that there has been no 'successful party' which is to be distinguished from a set-off (*Phonographic Performance Ltd v AEI Rediffusion Music Ltd* [1992] 2 All ER 299, CA; *Verrechia (t/a Freightmaster Commercials) v Metropolitan Police Comr* above; *Cammertown Timber Merchants Ltd v Sidhu* [2011] EWCA Civ 1041).

(2) However, no order as to costs is not a fall back position and judges must still conduct the *Al Barnes* determination (*R(on the application of Mendes v Sowthwark London Borough Council* [2009] EWCA Civ 594; *Taylor v Burton* [2014] EWCA Civ 63).

PART 45 CPR – FIXED COSTS

PART 46 CPR – COSTS – SPECIAL CASES

PART 47 CPR – PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS

(1)On a detailed assessment, the court will not depart from an agreed or approved budget unless satisfied that there is good reason to do so (r.3.18(b); and see *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 3258 (Ch), 31 July 2014, unrep. (Birss J)).

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