



# COSTS SEMINAR

- Maximising your Costs Recovery – avoiding the pitfalls

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## MAXIMISING YOUR COSTS RECOVERY

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## BIOGRAPHIES

**Michael Heslin** graduated with a degree in law and has been a costs consultant for fifteen years. He previously managed the City office of one of the largest firms of costs consultants in the UK. Michael has prepared several of the most complex costs claims ever seen in the UK, and for some years has been retained by Kuwait Airways Corporation in relation to all aspects of their £40M costs claim arising out proceedings against Iraqi Airways Company and the Republic of Iraq, the longest running dispute in the history of the commercial court. Michael has given expert evidence in the High Court and has represented his clients on numerous occasions in the House of Lords. Michael devotes much of his spare time to further study and hopes to complete a Master of Laws degree in International Intellectual Property law in 2010.

**Afqar Dean** has worked at several major City law firms. He is a Fellow of the Association of Law Costs Draftsmen and in July 2007 became one of the first cost consultants to be granted rights of audience. Afqar is vastly experienced and has been a practicing costs consultant for nearly 20 years, gaining a considerable reputation for his work on many high profile cases, in particular in the areas of media and libel. Afqar has dealt with costs for many prominent MPs, sports stars and celebrities. More recently Afqar has advised on costs issues arising from so called "terrorist" cases and both he and Michael have worked on many leading intellectual property costs cases.

## 1. LORD JACKSON'S REPORT

The final report of the Civil Litigation Costs Review was published on 5 March 2010. It runs to some 584 pages, and it cross refers extensively to the interim report which was itself more than 600 pages long.

The main recommendations are:

- The abolition of the indemnity principle
- The abolition of recovery of success fees and ATE premiums, partially compensated by an increase of 10% in PI general damages
- A ban on referral fees in PI cases
- Qualified one way costs shifting
- Fixed costs for fast track PI and in the future for all fast track cases
- Legalisation of contingency fees
- The creation of a Costs Council to decide on guideline hourly rates and fast track fixed costs
- Stronger case management including costs management
- A 10% increase of damages where a Defendant fails to accept a Claimant's Part 36 offer which is beaten at trial.

Our comments on these suggestions are as follows will appear in the next edition of the DeNovo Costs Law Update.

## 2. TERMS OF BUSINESS – COMMON PROBLEMS INCLUDE:

- i. Failing to notify the client in writing of increases in expense rates (as happened in *Wong –v- Vizards*),
- ii. Failing to notify the client at the outset that rates will be reviewed annually,
- iii. Failing to advise of the rates for all fee earners whose time may be charged,
- iv. Failing to advise that petty disbursements will be charged - such as fax, telephone and courier charges. If these charges are not covered in the terms of engagement letter they are not recoverable,
- v. Failing to provide a costs estimate or failing to keep an estimate up to date,
- vi. Failing to provide sufficient information about the status of fee earners (as happened in *Pearless De Rougemont & Co –v- Pilbrow*<sup>1</sup>).
- vii. Failing to follow the Solicitors' Code of Conduct:

You should be familiar with the terms of the Solicitors' Code of Conduct ("the Code") which came into effect in July 2007. The Code sets out six core duties under Rule 1 (previously enshrined in Practice Rule 1). The core duties are:

- Justice and the rule of law
- Integrity
- Independence
- Best interest of clients
- Standard of service

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<sup>1</sup> [1999] 3 All E.R. 355 – the client did not have to pay for work done by an unqualified clerk where he had requested that the work be done by a solicitor.



- Public confidence

The Code is enforced by the Solicitors Regulation Authority (the "SRA"), which was set up in January 2007, and which replaces the Law Society as the body responsible for professional conduct. The SRA intends to give greater prominence to the core duties in its regulatory activity.

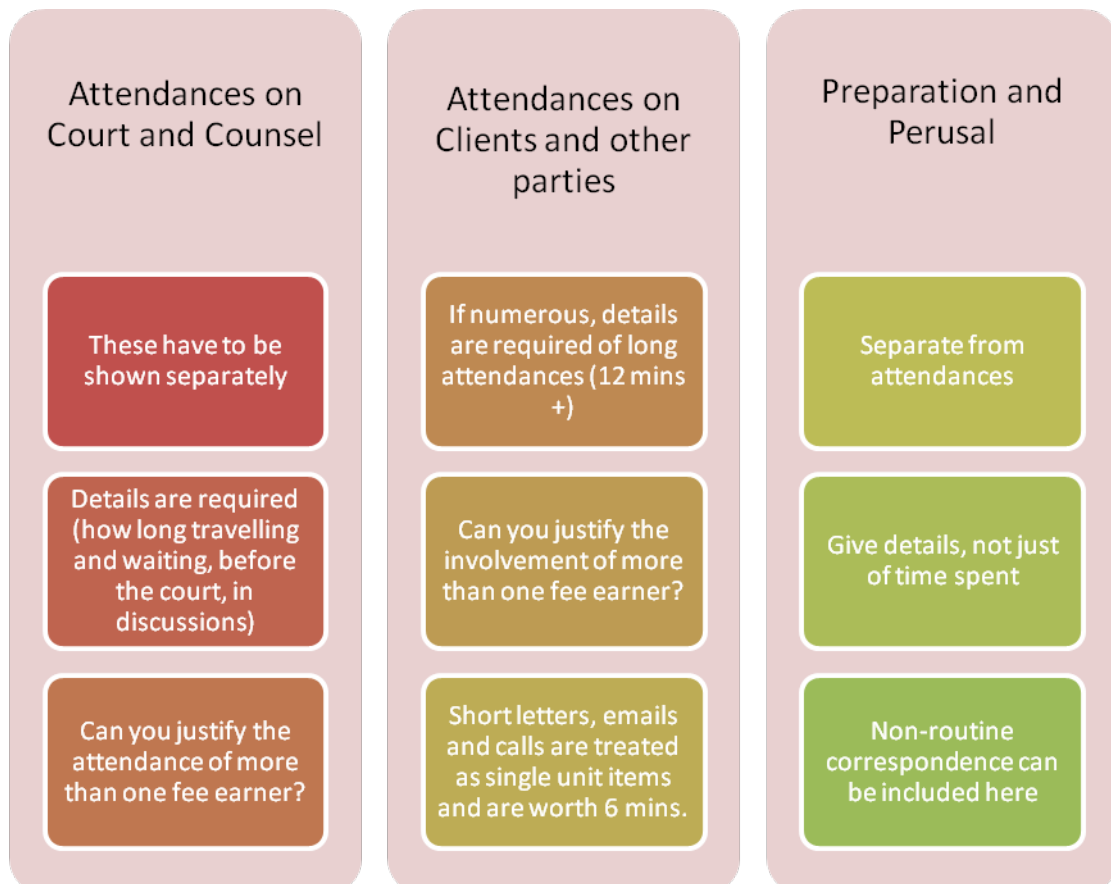
Client relations are covered by Rule 2 which requires solicitors to provide their clients with details of costs at the outset of a matter and as it progresses, when appropriate. This Rule groups together requirements previously found in the Solicitors Costs Information and Client Care Code, and other requirements relating to the solicitor's relationship with his client.

A material breach of Rule 2 may result in a complaint to the Legal Complaints Service and may provide evidence of inadequate professional service under section 37A of the Solicitors Act 1974. The powers of the Legal Complaints Service on a finding of an inadequate professional service include disallowing all or part of the solicitor's costs and directing the solicitor to pay compensation to the client. Negligence claims by clients may become more frequent because of the new requirements, however if solicitors can demonstrate that it was inappropriate in the circumstances to meet some or all of the requirements they will not be in breach of Rule 2.

### 3. WHAT TIME RECORDING PROTOCOLS SHOULD WE FOLLOW TO MAXIMISE RECOVERY?

Fee earners should ensure that they are familiar with the form and content of a bill of costs, before they commence work on any matter. Section 4 of the PD supplementing CPR 43 sets out the level of detail expected and you should bear this in mind when recording your time.

Note in particular:



It is essential at any assessment hearing that you can provide good evidence not only of the amount of time that you have spent but also to explain what you were doing and why. Properly kept detailed time records are the best evidence in support of a bill of costs, but they must do more than simply record the time involved. Whilst virtually every major solicitors' practice has a



computerised time keeping system it is worth keeping in mind the words of Payne J in *Re Kingsley* (1978) 122 Sol J O 457:

*"I ought to add that this case illustrates the dangers which are present if reliance is placed on the modern system of recording, without at the same time retaining the old and well tried practice of keeping attendance notes showing briefly the time taken and the purport of the work done day by day. It may be that this case will invite attention to the importance of appreciating the limits to which the computer system can be used in cases where taxation of costs must follow litigation and to the necessity of preserving as well the use of the traditional systems".*

Costs Judges treat unrecorded time circumspectly. It is much preferred to have a contemporaneous account prepared by the fee earner rather than relying on the costs draftsman to interpret and break down composite or inadequately detailed computer time entries.

#### 4. TAKE ADVANTAGE OF CPR 44.3(6) (G) AND SEEK AN ORDER BACKDATING INTEREST ON COSTS

A High Court order for costs carries interest at the Judgments Act rate: Judgments Act 1838, S.17. Relevant County Court Judgments (i.e. those for not less than £5,000) also carry interest: County Court (Interest on Judgment Debts) Order 1991. Interest runs from the date of the order for costs. The rate of interest on judgment debts since April 1993 has been 8%.

Until the CPR there was no jurisdiction to make any other award of interest on costs. The CPR made some key changes. Firstly, CPR 40.8 enables the court to vary the date from which Judgment Act interest runs:

*'(1) Where interest is payable on a judgment pursuant to section 17 of the Judgments Act 1838 or section 74 of the County Courts Act 1984, the interest shall begin to run from the date that judgment is given unless –*

*(a) a rule in another Part or a practice direction makes different provision;*  
*or*

*(b) the court orders otherwise.*

*(2) The court may order that interest shall begin to run from a date before the date that judgment is given.'*

Secondly, CPR 44.3(6) (g) empowers the court to award *'interest on costs from or until a certain date, including a date before judgment'*.

In *Nova Productions v Mazooma Games; Nova Productions v Bell Fruit Games*<sup>2</sup> the successful Defendant sought an order that the Claimant should pay interest on costs from the date of payment of those costs until judgment at the base rate from time to time plus 1%. The Claimant argued that such an order should only be made in exceptional circumstances. The court disagreed and held that there is no basis in the CPR for the contention that such an order

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<sup>2</sup> [2006] EWCH 189 (Ch).



should only be made in a case that is out of the norm. Discretion must be exercised in accordance with the principles set out in CPR 44.3 taking into account all the circumstances of the case including such matters as the conduct of the parties and the degree to which a party has succeeded.

In the *Nova* case the Defendant's costs were in the region of £800,000. We have recently dealt with costs issues on an IP matter where the successful party, whose costs were in the region of £2,000,000, obtained a similar order. In that case, the 'additional' claim for interest exceeded £100,000!

## 5.1 ISSUES BASED ORDERS – POTENTIAL FOR DISASTER

You should consider the practical consequences (preferably with your costs draftsman) of any proposed issues based order. Remember that CPR Rule 44.3(7) requires that an order under CPR 44.3(6) (f) (which allows or disallows costs by reference to issues won or lost) should only be made where other forms of order cannot be made which sufficiently reflect the justice of the case. In *Kuwait Airways Corporation –v Iraqi Airways Company*<sup>3</sup> Lord Justice Rix made the following observation:

*“The injunction of CPR 44.3(7) (“the court ... must ... if practicable ...”) reflects the truth of the insight that an order which leaves a costs judge trying to work out which costs relate to which parts of proceedings is an invidious order to make, and one that creates not only difficulties and expense for all concerned but places the burden of decision on a judge who, unlike the court which makes the costs order, lacks the experience of having tried or heard the case in question.”*

How true! A recent example of the unwelcome consequences of a dispute over the meaning of a by the issues costs order, is *Dyson –v- Strutt*<sup>4</sup>. This was a case that we dealt with as part of Dyson’s costs team and the dispute concerned the meaning and effect of an issues based type costs order. The claimant sought injunctions restraining the defendant (an engineer and former employee) from acting in breach of clause 18 of his employment contract (non-disclosure of confidential information) and clause 19 (non-compete) by joining a competing section of Black & Decker. At the beginning of the second day of the trial Dyson discontinued its claim under clause 18 but proceeded with its clause 19 claim on the basis that that was the only feasible way of protecting the confidential information to which the defendant was privy. Dyson succeeded at trial on the clause 19 claim and was awarded the costs of the action save for the costs of the clause 18 claim, which were awarded to the defendant. Both sides

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<sup>3</sup> Court of Appeal (Civil Division), 21 December 2000 - KAC sought an award for a percentage of the overall costs incurred in an action in conversion against IAC. IAC contended that costs should be assessed on an issue by issue basis and that it was unjust to make an award in terms of an overall percentage, especially given that KAC had lost part of its claim and an experienced costs judge would have no problems in categorising the issues and assessing the costs. The court of appeal held, that given that KAC had succeeded in its claim overall, it was practicable for a global award to be imposed.

<sup>4</sup> [2007] GWHC 1756 (Ch).



submitted bills of costs, and each claimed the substantial proportion of their costs overall. Dyson said that it should have all costs other than those solely related to the clause 18 claim; the defendant also said that he should have substantially all of the costs, as they were also related to the clause 19 claim on which he succeeded. Ultimately Dyson's position prevailed – the judge held that there could be no division of the costs that were common to both elements of the claim and so the defendant was only entitled to the extra costs generated by the issue on which Dyson had failed. The dispute over the order delayed the detailed assessment process by many months and cost Black & Decker hundreds of thousands of pounds more, all of which could have been avoided had the trial judge instead made an order under CPR 44.4(6) (a) and awarded Dyson alone a proportion of its costs.

## 5.2 ISSUES BASED ORDERS IN IP CASES

In recent years there has been a move towards a “by the issues” approach to costs.

In 2004 the court of appeal in *Apotex*<sup>5</sup> confirmed that in intellectual property matters the general rule is that the CPR and Practice Directions apply as much to patent actions as to any other actions, subject to the provisions of sections 63 and 65 of the Patents Act 1977. Jacob LJ confirmed that the provisions of CPR 44.3 apply as to how the court should exercise its discretion as to costs, and said:

*“An issue-by-issue approach is therefore one that should apply so far as it reasonably can. On the other hand such an approach is not the be-all and end-all. Whether or not “it was reasonable for a party to raise, pursue, or contest a particular application” remains a relevant factor to be taken into account as part of the conduct of the parties (see CPR 44 rule (3) (a) and (5) (b)).”*

The judge spoke of “The impossibility of great precision” and said:

*“Although an issue-by-issue approach is likely to produce a “fairer” answer and is likely to make parties consider carefully before advancing or disputing a particular issue, it should not be thought that it is capable of achieving a “precise” answer.”*

In *Activis Limited –v- Merk & Co Inc*<sup>6</sup>, the claimant had won its case on the basis of the method of treatment issue, but had lost on the issue of obviousness. The defendant submitted that it should recover all of its costs incurred in connection with the obviousness issue; however the claimant contended that the starting point had to be that it had won the case and that it had not been unreasonable or improper for it to have brought its case regarding obviousness. In this case Warren J said:

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<sup>5</sup> (1) *Smithkline Beecham Plc (2) Glaxosmithkline UK Limited –v- (1) Apotex Europe Limited (2) Neolab Limited (3) Waymade Healthcare Plc*: (1) *Apotex Europe Limited (2) Neolab Limited (3) Waymade Healthcare Plc –v- (1) Beecham Group Plc (2) Smithkline Beecham Plc* [2004] EWCA Civ 1703.

<sup>6</sup> [2007] EWHC 1625 (Pat)

*"It seems to me, therefore, that the CPR too recognises in the context of Rule 44.3 (7), which I have already mentioned, that issue-based orders are to be avoided. The idea behind them should be reflected instead in an overall adjustment of what otherwise would be payable.*

*If there exists two really distinct issues where one has been lost and one won, it might be appropriate to see the issues as separate from a costs perspective. Nonetheless, an issue-based order is to be avoided with the same result roughly being achieved by the percentage reduction. That is in contrast with the position where the winner under the old practice took all as a general rule but subject to the Elgindata exception".*

The judge concluded:

*"It is clear of course that costs issues are heavily fact-based and all at the discretion of the court. It is clear that the CPR represents a significant shift in approach, but having said that, the starting point, I am sorry to repeat, remains that the winner gets his costs even where there has been issues on which he loses. That must be the correct starting point, particularly in relation to a defendant who is a person brought to the court unwillingly, who is introduced into litigation which he did not wish to be involved in and defends himself and raises all proper points in his defence, although he must act reasonably and proportionally".*

Having concluded that a pure issue-based approach would not be appropriate the judge made a single order which broadly reflected that the claimant was to pay 75% of the defendant's costs on the obviousness issue. Overall, the judge made an order to reflect the defendant paying the claimant's costs of an amendment, the issues of method of treatment plus general costs, and the claimant paying 75% of the defendant's costs on the obviousness issue. (As a result the claimant was to receive 25% of its costs overall and the defendant 66.25% of its costs).

A similar approach was taken in *Monsanto Technology*<sup>7</sup>, where again the judge preferred a percentage approach.

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<sup>7</sup>Monsanto Technology LLC -V- (1) Cargill International SA, (2) Cargill PLC [2007] EWHC 3113 (Pat).

In *Monsanto* the court had to determine costs arising out of a patent action in which the claimants had been largely successful but had failed on the issue of validity on one of its claims and, in relation to infringement, had failed on a relatively short issue of construction (regarding the meaning of the word “isolated”). Monsanto’s costs were £2.2M; Cargill’s costs were £1.9M. Pumfrey LJ articulated the approach to be taken by the courts in relation to costs where the overall winner has been unsuccessful on a particular issue. The Judge made a number of points:

1. Until the CPR came into effect the court exercised general control on costs in patent litigation by the process of certification which prevented costs from being allowed unless the court had certified that the issues raised had been proved or were reasonable and proper. Since the requirement for certification was abolished by the CPR costs on patent actions are to be allowed or disallowed on the same basis as any other litigation.
2. The court is obliged to identify the overall winner and the overall winner is likely (save in exceptional circumstances) to be entitled to payment of all costs which cannot be allocated to a particular issue (referred to by the Judge as “general costs of the action”).
3. In relation to costs that can be allocated to issues on which the overall winner has nevertheless lost, two questions have to be asked – (1) Should the overall winner nonetheless recover his costs of that issue?, and (2) Should he pay the otherwise unsuccessful party part of the costs incurred in respect of that issue?
4. In relation to the second question (above) the court should have regard not only to the reasonableness or otherwise of raising the issue in the first place, but also whether there was something more than conduct justifying his being deprived of the costs of the issue in all the circumstances. The further one moves away from the general rule that the unsuccessful party will be ordered to pay the costs of the successful party, an increasingly strong justification will be required.

5. Where it is justified to order the overall winner to pay the costs of a particular issue it is often convenient to treat both parties' costs of that issue as being equal and to double the deduction. So if the costs of the issue are equal to 15% of the overall winner's total costs, he will be deducted 30% of his total costs if the court concluded that he should pay the costs of that issue to the other side.

The court's approach to cost, where the party which was unsuccessful overall has won on some issues, now appears to be settled. The court, following *Apotex & Monstanto*, will determine whether those issues were suitably circumscribed, and whether the case was sufficiently exceptional to justify making a costs order on those issues against the party which had won overall. That was the approach taken recently by Floyd J in *Qualcomm Inc –v- Nokia Corp*<sup>8</sup>.

It is not always possible to avoid a double assessment. In *Research In Motion UK Ltd –v- Visto Corporation*<sup>9</sup> Floyd J, although astonished at the level of RIM's costs (estimated at £6M, against Visto's costs of £1.5M), nonetheless declined Visto's invitation to apply a percentage set-off against RIM's costs. Whilst the judge was severely critical of RIM's costs and has directed the costs judge to treat RIM's costs as disproportionate, he nonetheless conceded that it would be unfair to RIM, on what would be an assumption only, to allow for Visto's costs on the basis that both parties should have expended approximately the same amounts on the litigation. In the circumstances the appropriate course was to award costs to both sides - 66% to RIM the overall 'winner' and 51% to Visto the overall 'loser'.

This does not mean that in all cases where there has been an unequal spend that the court will resile from making a single assessment order. In *Abbott Laboratories –v- Evysio Medical*

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<sup>8</sup> [2008] EWHC 777(Ch), although in that case the judge found that not all of the issues on which Qualcomm had won met those criteria. Taking into account the issues which did, he ordered that Nokia should receive 70% of its costs.

<sup>9</sup> [2008] EWHC 819 (Pat).



*Devices ULC*<sup>10</sup>, despite the significant disparity between the claimant's and defendant's costs, Kitchin J was content to make a single assessment order. The judge said:

*"I am extremely reluctant to make an order which would result in the assessment of the costs of both parties. That would seem to me to be highly undesirable in the circumstances of this case where, as I should explain, the issues between the parties are relatively limited and the disparity between the parties' costs is far less than it was in the RIM –v- Visto case."*

Having found that there were only two issues suitably circumscribed to require an issues based order, the judge went on to allow Abbott 75% of its overall costs of the action. Although rough and ready, and dependant as it is on the quality of information provided by the parties at the post judgment hearing, the policy appears to be that is that justice will be done if the court can arrive at a roughly proportionate and just figure whilst avoiding the need for a double assessment.

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<sup>10</sup> [2008] EWHC 1083 (Pat). The claimant's costs had run to £2.63M, significantly above the defendant's costs of £1.46M.

## 6.1 EXCEEDING AN ESTIMATE

Q. Is the costs estimate binding or taken into account in any way at a later stage?  
Can I exceed my estimate?

The Costs PD was amended following the case of *Leigh –V- Michelin Tyre PLC*<sup>11</sup> and adopts the guidance given by the court in that case. The claimant ('L') issued proceedings against his employer ('M') in respect of injuries sustained at work allegedly as a result of M's negligence or breach of statutory duty. Both parties completed and filed an allocation questionnaire ('AQ') and the claim was allocated to the multi-track. L's AQ estimated his costs to date at £3,000 plus VAT and the overall costs as likely to be £6,000 plus VAT. The estimates were never revised. Neither party filed or served on the other side an updated estimate of costs as required by Costs PD Para 6.4(2)<sup>12</sup> at the listing questionnaire ('LQ') stage. The case was settled before trial. L's bill of costs totalled £21,891.28. M submitted points of dispute arguing that L should not be entitled to recover more than the costs estimate contained in the AQ plus 15 per cent because M was entitled to rely on the costs estimate that had been given by L. The district judge assessed L's reasonable and proportionate costs at £20,488.83 and held that L should not be bound by the estimate in the absence of any evidence that M had relied on it. Judge Mitchell dismissed M's appeal. M appealed. The Court of Appeal held:

- It would not always be possible at the AQ stage to provide a reasonably accurate estimate of the likely overall costs but it should usually be possible to do so even at that stage especially in run of the mill cases. Where it became clear that the AQ estimate was inaccurate, it was all the more important to comply with the obligation to file an updated estimate at the LQ stage.
- The provisions in the Practice Direction as to the giving of estimates of costs at various stages of the litigation were made pursuant to the power of the court to regulate its own procedure within the limits set by the rules and to fill in gaps left by those rules. CPR 43 PD Para 6.6 did not introduce criteria for the assessment of costs which were

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<sup>11</sup> [2004] 1 WLR 846.

<sup>12</sup> The Rule is now found Costs PD 6.4(1)(b).

inconsistent with or additional to those contained in CPR 44.5 itself. It merely spelled out explicitly what was implicit in the broad power conferred on the court by CPR 44.5. CPR 43 PD Para 6.6 did not fetter the court's discretion in relation to the assessment of costs.

- The practice direction was expressed in clear mandatory terms: costs estimates must be provided.
- If, as in this case, there was a substantial difference between the estimated costs and the costs claimed, that difference called for an explanation. In the absence of a satisfactory explanation the court might conclude that the difference itself was evidence from which it could conclude that the costs claimed were unreasonable.
- The court might take the estimated costs into account if the other party showed that it relied on the estimate in a certain way.
- The court might take the estimate into account in cases where it decided that it would probably have given different case management directions if a realistic estimate had been given.
- It would not be a correct use of the power conferred by Para 6.6 to hold a party to its estimate simply to penalise it for providing an inadequate estimate.
- The costs judge should determine how, if at all, to reflect the costs estimate in the assessment before going on to decide whether, for reasons unrelated to the estimate, there were elements of the costs claimed which were unreasonably incurred or unreasonable in amount.

In this case the Court found that M did not rely on the estimate in the AQ and the court would not have managed the case differently if a more realistic estimate had been given. Therefore, L should not be penalised because the estimate was seriously inadequate.

In *Douglas Tribe –v- Southdown Gliding Club Limited*<sup>13</sup> the receiving party's costs were reduced from about £245,000 to no more than £70,000. As a consequence of the low estimate (£50,000 to include trial) given by his opponents in the allocation questionnaire the paying party had only purchased £100,000 of insurance cover against the risk of paying his own disbursements and his opponent's costs if he lost. The receiving party could not satisfactorily explain the difference between that estimate and the final costs claimed and although the costs estimate given by in the allocation questionnaire was obviously too low, it was not so low that it was unreasonable for the paying party to rely on it.

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<sup>13</sup> [2007] EWHC 90080 (Costs).



## 6.2 THE REQUIREMENT TO PROVIDE AN ESTIMATE

### Q. Do I have to provide an estimate in intellectual property litigation?

CPR 63.7(2) provides that in intellectual property claims the provisions of CPR Part 26 and any other rule that requires a party to file an allocation questionnaire do not apply. Nor do the provisions of CPR 29.6, requiring the completion of a pre-trial checklist, apply in intellectual property claims. In all other claims estimates of costs incurred and to be incurred are required at these stages.

However, it is important to note that in all claims the court can require the service of an estimate, and given the recent decision by Arnold J in the latest round of the RIM –v- Visto litigation, we anticipate that orders requiring estimates in IP cases will become more commonplace. In RIM –v- Visto the judge rejected Allen & Overy’s submissions that it would be burdensome to require the parties to provide estimates and that after the event control of costs in IP cases is adequate. He said:

*“In my judgment, none of those reasons is a sufficiently good reason not to order the provision of this information. The question of a costs capping order is not before me today, and I express no view whatsoever as to whether such an order is appropriate or even may be appropriate. That is an entirely separate question, as I see it, to the question of whether the provision of costs information is justified. In my view, it is justified in order that Visto can know what its potential exposure is even on the assumption that no capping order is made.*

*For the reasons I have given, I do not regard after the event control as a sufficient answer, particularly in the circumstances where, absent the order sought by Visto, the parties would be operating in the dark as to each other’s costs down to the costs argument after the trial. Nor do I accept the fact that RIM may be somewhat chastened as a result of Floyd J’s comments in the previous case is a sufficient reason to withhold information that in any other class of litigation would be provided automatically.”*

**Q** How detailed an estimate do I need to give: (a) when filing the allocation questionnaire, (b) when filing the pre-trial checklist?

Section 6 of the Practice Direction About Costs (the 'Costs PD') provides for detailed costs estimates to be provided to the court and other parties on the filing of the allocation questionnaire and any pre-trial check list, and it allows the court to require the service of an estimate 'at any stage of the case': Section 6 is set out in full below:

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

*6.2 (1) In this section an 'estimate of costs' means –*

*(a) an estimate of base costs (including disbursements) already incurred;  
and*

*(b) an estimate of base costs (including disbursements) to be incurred,  
  
which a party intends to seek to recover from any other party under an  
order for costs if he is successful in the case.*

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

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

*6.3 The court may at any stage in a case order any party to file an estimate of costs and to serve copies of the estimate on all other parties. The court may direct that the estimate be prepared in such a way as to demonstrate the likely effects of giving or not giving a particular case management direction which the court is considering, for example a direction for a split trial or for the trial of a preliminary issue. The court may specify a*

*time limit for filing and serving the estimate. However, if no time limit is specified the estimate should be filed and served within 28 days of the date of the order.*

6.4 (1) *When –*

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

(b) *a party to a claim which is being dealt with on the fast track or the multi track, or under Part 8, files a pre-trial check list (listing questionnaire),*

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

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

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

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

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

(2) *If a paying party –*

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

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

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

*(‘Relevant person’ is defined in paragraph 32.10(1) of the Costs Practice Direction)*

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

(2) *In particular, where –*

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

(b) *it appears to the court that –*

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

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

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



The clear objective of this rule is to promote settlement by enabling the parties to assess their total liability from an early stage.

When giving an estimate for the allocation questionnaire there is no need to do more than enter a figure on the questionnaire but care should be taken over how that figure is worked out. However, there is no reason why the costs estimate accompanying the pre-trial check list should not be accurate in respect of costs incurred to date. It should also be possible to predict future costs at this stage more accurately than at the allocation stage. A carelessly prepared estimate may provide an opponent with useful ammunition with which to attack the figures sought on any subsequent detailed assessment of costs. Note carefully the detail required (Costs Precedent H) and also the '20% Rule' introduced by Section 6.5A of the Costs PD.

## 7. COSTS CAPPING

In *King v Telegraph Group Ltd*<sup>14</sup> the court confirmed that it possessed the power to make a costs capping order, under of the Supreme Court Act 1981, s 51 and the Civil Procedure Rules 1998, Pt3.2(m). This case coincided with a consultation on the question of costs budgeting. Given the widely acknowledged failure of the CPR to deter litigants from incurring unreasonable or disproportionate costs through case management and detailed assessment after the event this looked set to become a live issue.

However, relatively few applications were made for costs capping orders, principally because there was a lack of guidance. The high court adopted a cautious approach by and large; whereas the court of appeal, whilst exhorting greater use of cost-capping powers and pre-emptive strikes, failed to lay down any test as to the approach to be taken regarding the making of such orders<sup>15</sup>.

The Rules Committee produced draft rules for consultation and these were laid before Parliament on 7 January 2009. The rules came into force on 6 April 2009. The rules have adopted the conservative test laid down in *Smart –v- East Cheshire National Health Service Trust*<sup>16</sup>.

We are aware of two patent actions in which the solicitors are considering an application for a cost capping order. We expect to see more.

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<sup>14</sup> [2004] EWCA Civ 613.

<sup>15</sup> In *Willis –v- Nicholson* [2007] EWCA Civ 199 although a member of the court had prepared detailed guidance to include in his judgment the court decided that future guidance should be formulated by the Civil Procedure Rule Committee after extensive consultation, rather than by the court.

<sup>16</sup> [2003] EWHC 2063. The high court judge said "In my judgment, the court should only consider making a costs cap order in such cases where the applicant shows by evidence that there is a real and substantial risk that without such an order costs would be disproportionately or unreasonably incurred; and that this risk may not be managed by conventional case management and a detailed assessment of costs after a trial and it is just to make the order."