PRACTICE GUIDE TO THE ASSESSMENT OF COSTS

Introduction

Since the commencement of the Civil Proceedings Rules 1998 (CPR), Judges are, for the first time, required to assess costs –

(a) summarily at the end of every procedural application; and
(b) by detailed assessment at the end of certain claims where fixed, budgeted or prescribed costs do not apply.

Rules 67.11 and 67.12 provide the court's power to carry out assessment as a method for the quantification of costs.

With the implementation of this new regime of costs it has become clear that there exists a great measure of uncertainty among Judges and lawyers as to the proper approach to be adopted in carrying out an assessment of costs under the CPR.

This Practice Guide is therefore issued by the Acting Chief Justice pursuant to CPR Part 4.6(1) to guide Judges, other costs assessment officers and the legal profession as to the approach to the assessment of costs, the basis of assessment, the grades/bands of fee earner and the guideline figures for attorneys'-at-law hourly rates.

The grades/bands of fee earner and the guideline figures for attorneys'-at-law hourly rates, established by this Practice Guide, have been formulated after consultation with the Judges and Registrars of the Supreme Court, key members of the legal profession with long and established experience in taxation of costs, and after a survey was conducted by the Monitoring Committee of the CPR of a wide cross-section of the legal profession in relation to the hourly rates charged by attorneys-at-law.

The approach to the assessment of costs

1. The general approach to the summary and detailed assessment of costs should be the same. Where assessment of costs falls to be carried out by a Judge, the Judge should as far as practicable assess such costs in keeping with the overriding philosophy of the CPR and should not lightly refer such costs to be assessed before another costs assessment officer notwithstanding the discretion to do so.

2. For the assessment to be fair and reasonable the court must be informed about all previous assessments carried out in the case. This is particularly important where the court is assessing costs at the conclusion of a case.

3. 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 recording that the order is by consent;

(b) if the court is to make an order which is not by consent, it should, so far as possible, ensure that the final figure is not disproportionate and/or unreasonable having regard to the overriding objective of the CPR. The court should retain this responsibility notwithstanding the absence of challenge to the individual items comprised in the figure sought.

4. 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 to be done.

5. 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 court should intervene only if satisfied that the costs are so disproportionate and unreasonable that it is right to do so.

The basis of assessment

The standard basis

6. Where the court assesses the amount of costs on the standard basis, for example, on a party and party 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

7. Where the court assesses the amount of costs on the indemnity basis, for example, on an attorney-at-law and client basis, it will not allow costs which have been unreasonably incurred or are unreasonable in amount. The court 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 applicable to the indemnity basis.

Proportionality

8. The concept of proportionality was given paramountcy by the overriding objective in Part 1 and, therefore, in applying the test of proportionality the court must have regard to rule 1.1(2)(c) by dealing with the case, so far as practicable, in ways which are proportionate to –

(i) the amount of money involved;

(ii) the importance of the case;

(iii) the complexity of the issues; and

(iv) the financial position of each party.

9. The English Court of Appeal, in the case of ***Home Office v Lownds [2002] EWCA Civ 365; [2002] 1WLR 2450; [2002] 4 All ER 775 CA.,*** has given guidance on the correct approach to proportionality when assessing costs by introducing 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) (equivalent to Part 67.2(3) of the Trinidad and Tobago CPR) states are relevant. If the costs as a whole are not disproportionate according to the 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."

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

11 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*** (supra)).

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

12. Attention is drawn to Part 67.2 which sets out the factors the court must take into account when assessing costs. Those factors include the conduct of all the parties before as well as during the proceedings, the efforts made, if any, before and during the proceedings to try to resolve the dispute, and in particular, the extent to which the parties complied with any relevant pre-action protocol.

Grades of fee earner

13. It is hereby established that for the purposes of assessing costs the grades of fee earner shall be in the following categories:

Band A	Instructing under 5 years call
	Advocate under 5 years call
Band B	Instructing over 5 years but under 10 years call
	Advocating over 5 years but under 10 years call
Band C	Instructing over 10 years but under 20 years call
	Advocating over 10 years but under 20 years call
Band D	Instructing over 20 years call
	Advocate over 20 years call
Band E	Senior Counsel / Queen's Counsel

Guideline figures for fee earners on the basis of hourly rates

14. When considering what fee should be allowed for work done by instructing or advocate attorneys-at-law the court should calculate such fee on the basis of an hourly rate in accordance with the guideline figures set out in the table below:

Guideline figures for Instructing and Advocate Attorney's hourly rates

Band A	Instructing under 5 years call	$ 650.00 per hr
	Advocate under 5 years call	$ 800.00 per hr
Band B	Instructing over 5 years but under 10 years call	$1,000.00 per hr
	Advocating over 5 years but under 10 years call	$1,200.00 per hr
Band C	Instructing over 10 years but under 20 years call	$1,700.00 per hr
	Advocating over 10 years but under 20 years call	$2,000.00 per hr
Band D	Instructing over 20 years call	$2,250.00 per hr
	Advocate over 20 years call	$2,500.00 per hr
Band E	Senior Counsel / Queen's Counsel	$3,500.00 per hr

15. Refresher fees awarded to counsel should also be calculated on the basis of an hourly rate as set out in the table below:

Guideline figures for Counsel's Refreshers at hourly rates

Band A	Under 5 years call	$ 550.00 per hr
Band B	Over 5 years but under 10 years call	$ 800.00 per hr
Band C	Over 10 years but under 20 years call	$ 1,300.00 per hr
Band D	Over 20 years call	$ 1,650.00 per hr
Band E	Senior Counsel/Queen's Counsel	$ 2,300.00 per hr

16. The hourly rates suggested in the preceding paragraphs (paragraphs 14 and 15) are guideline figures and are intended as a starting point only to assist Judges and other costs assessment officers who are faced with the task of assessing costs. They are not intended to replace the court's discretion to allow appropriate fees to attorneys in particular cases. The court may, therefore, allow a higher or lower fee, where appropriate, having regard to all the relevant circumstances of the case. It is important to note, however, the need to attain a significant measure of consistency and predictability in the award of costs.

17. Since it is virtually impossible to give guidance as to whether the time claimed by attorneys has been reasonably spent, it is for the court in each case to consider the work properly undertaken by instructing and advocate attorneys and to arrive at a figure which is in all circumstances reasonable.

18. In calculating the hourly rate for attorneys and allowing fees at a multiple of that rate according to the number of hours reasonably spent, the court must be careful not to reward the indolent and less efficient lawyer and penalize the diligent and more efficient counterpart.

19. The basic guidelines laid down in ***Simpsons Motor Sales (London) Ltd. v Hendon Borough Council [1965] 1 W.L.R. 112 per Pennycuick J*** on the proper assessment of counsel's fee, remain sound law. Thus the proper measure of counsel's fees is to estimate what fee a hypothetical counsel capable of

conducting the particular case effectively but unable or unwilling to insist on the particularly high fee sometimes demanded by counsel of pre-eminent reputation, would be content to take on the brief: but there is, in the nature of things, no precise standard of measurement and the costs assessment officer must, employing his knowledge and experience, determine what he considers the proper figure.

Fees to senior counsel and junior counsel

20. In determining whether to allow costs for senior counsel the following factors are to be considered:

    (a) the nature of the case, including in personal injury cases –

        (i) the nature and severity of the plaintiff's injury;

        (ii) the likely duration of the trial;

        (iii) difficult questions regarding the quantum of damages, including medical evidence and questions of law;

        (iv) difficult questions of fact including expert engineering evidence, or issues as to causation;

    (b) its importance to the client;

    (c) the amount of damages likely to be recovered;

    (d) the general importance of the case, e.g. as affecting other cases;

    (e) any particular requirements of the case, e.g. the need for legal advice, or for special expertise, e.g. examining or cross-examining witnesses; and

    (f) other reasons why an experienced and senior advocate may be required.

21. The fact that the other side has instructed senior counsel is a relevant factor but not conclusive.

22. It is important to note that the two counsel rule has long ceased to be of relevance in this jurisdiction as senior counsel need not appear with a junior. It therefore

does not follow from the fact that a fee to senior counsel is allowed that a fee to junior counsel, if one is also instructed, should also be allowed. In determining whether a fee to junior counsel should be allowed, in addition to a fee to senior counsel, the test is one of reasonableness.

23. It has been suggested that the following particular reasons may justify the appointment of junior counsel:

    (a) to assist with the court proceedings either by taking an active part or by keeping a full note of the evidence, editing transcripts, etc;

    (b) dealing with documents generally, particularly when the same junior counsel has taken part in discovery;

    (c) to carry out legal or other research, e.g. on matters on which expert evidence is given; but a fee for preparation relating to the law will not normally be allowed save in unusual, or infrequent or cases or where the point arose unexpectedly at the beginning or during the course of the trial (see ***Perry v. The Lord Chancellor, The Times, May 26, 1994*****);**

    (d) to assist leading counsel in negotiations with the other party.

24. If it has been decided to allow costs to junior counsel he is entitled to a reasonable fee determined in accordance with the matters hereinbefore set out and not necessarily two-thirds of senior counsel's fee.

25. In assessing counsel's brief fee it is always relevant to take into account what work that fee, together with any refreshers, is intended to cover. The brief fee should cover all work done by way of preparation for representation at the trial and attendance at the first day of the trial. ***Loveday v Renton and The Wellcome Foundation Ltd (No.2) [1992] 3 All E.R. 184*** held that the preparation by counsel of his examinations in chief, cross-examinations and final submissions are an ordinary part of his conduct of a trial on behalf of a client and fall within the brief fee together with:

- preparation work before the delivery of the brief on the faith of a solicitor's (instructing attorney's) statement that it will be delivered;
- preparatory work in counsel satisfying himself that he should accept the brief;
- evening preparation;

- any consultations between members of the team of counsel (other than conferences or consultations at the behest of the client or instructing solicitor (attorney));

- advising experts at weekends;

- conferring with experts without separate instructions;

- lost opportunities;

- chronologies, etc.;

- skeleton arguments save for the Court of Appeal. See ***Hornsby v Clark Kenneth Leventhal (A Firm)*** **[2000] 4 All E.R. 567;**

- *dramatis personae*;

- opportunities to prepare further when the court is not sitting;

- preparation of draft terms of collateral arguments;

- where a case is sufficiently complex, a separate fee for final written submissions can be claimed, where it has been specifically agreed and not covered by the brief fee. See ***Chohan v Times Newspaper*** *unreported, September 17, 1998 per* Nelson J;

- note of judgment.

26. The guideline figures set out in the tables in paragraphs 14 and 15 shall be reviewed from time to time, as may be deemed necessary, after due survey and consultation with all relevant parties.

Dated this 20th day of December, 2007

Roger Hamel-Smith
Acting Chief Justice