

CHARTERED INSTITUTE OF ARBITRATORS (SOUTH EAST BRANCH)

COSTS BRIEFING

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1 SUMMARY ASSESSMENT

CIArb members' jurisdiction on costs is governed by different legislation depending upon whether the matter is undergoing an Arbitration "proper" in which case refer to the Arbitration Act 1996, (the Act) and particularly sections 59 to 65 thereof.

If the matter is the subject of adjudication, then reference must be had to Part II of the Housing Grants, Construction and Regeneration Act 1996, which states at section 108 that

108. - (1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section. For this purpose "dispute" includes any difference.

(2) The contract shall-

(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;

(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;

(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;

You may also wish to look at the provisions contained in the Scheme for Construction Contracts (England and Wales) Regulations 1998, which refers to the adjudicator's entitlement to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him, and to the parties' joint and several liability therefor. However, there is no statutory power for an adjudicator to award costs, so he can only do so if the parties agree or there is an appropriate term in the contract. Once he has been given this power the test is the same as in arbitration. As such, the remainder of these notes concentrate upon the 1996 Act.

Summary Assessment is ideally suited to the adjudication process, with its very brief timeframe.

1.1 SCCO Guide

The introduction of the Civil Procedure Rules 1998 (CPR) brought with it the introduction of summary assessment of costs in fast-track matters of modest value, or on interlocutory hearings. Pre-CPR, costs on interlocutory Applications were not calculated until the end of the matter, but now such costs are assessed on the day they are awarded. Judges up and down the UK were given considerable assistance in the exercise of their discretion by the Supreme Court Costs Office (SCCO) Guide to the Summary Assessment of Costs, available at http://www.hmcourts-service.gov.uk/publications/guidance/scco/summary_assessment_of_costs.htm

This is an excellent starting point for anyone assessing costs for the first time, as that was exactly the target audience for whom it was designed.

1.2 Form N260 – precedent bill for summary assessment

There is a prescribed format of a bill for summary assessment in the SCCO jurisdiction, which is in Form N260, itself available online at www.hmcourts-service.gov.uk/courtfinder/forms/n260.pdf.

1.3 Tailoring N260 to your requirements

Assuming that you do not wish to get bogged down in a full-scale detailed assessment, Form N260 is admirably suited to all but the very largest matters, and even in a substantial costs claim, a modified, rather more detailed version would be worth considering in place of a full-blown detailed assessment bill.

1.4 Rough Justice?

Whilst the principles enumerated more fully in the following sections also apply to summary assessment, as its name suggests summary assessment should be a swift procedure. To a certain extent it represents “rough justice” in that you need not give a breakdown of what is being allowed; simply hear (or read) brief submissions from both sides and then based upon those allow a global figure.

In the case of larger claims for costs, or where there is strong objection to items other than solicitors’ profit costs, e.g. counsel’s fees, or experts’ fees, it may be that a more detailed assessment is required, giving a breakdown as between the different elements of the bill. In particular, always be aware that the claim for legal costs subject to assessment may well exceed the sum at issue in the main action Nevertheless; it should still be possible to achieve a more detailed assessment in fairly short order and without the need for a drawn-out hearing, in all but the most complex of cases

2 DETAILED ASSESSMENT

When exercising the jurisdiction conferred by the 1996 Act, available online at www.opsi.gov.uk/acts/acts1996/1996023.htm section 59 of the Act states:

- 59.** - (1) References in this Part to the costs of the arbitration are to
- (a) the arbitrators' fees and expenses,
 - (b) the fees and expenses of any arbitral institution concerned, and
 - (c) the legal or other costs of the parties.
- (2) Any such reference includes the costs of or incidental to any proceedings to determine the amount of the recoverable costs of the arbitration (see section 63).

Section 63 (5) (a) of the Act refers to the recoverable costs of the arbitration being determined on the basis that there shall be allowed a reasonable amount in respect of all costs reasonably incurred, which is the same test as under the CPR.

This is a very broad definition (particularly “legal or other costs”) and it will be a matter for your discretion as to what to allow. The following notes give some background upon how such matters are addressed in the Supreme Court Costs Office (SCCO).

2.1 Bill format

Pursuant to the CPR, there are a number of useful precedents, contained within the Schedule of Costs Precedents annexed to the Practice Direction About Costs Supplementing Parts 43 to 48 of the Civil Procedure Rules, which can be accessed online at

http://www.dca.gov.uk/civil/procrules_fin/contents/practice_directions/pd_parts43-48.htm.

It should be noted that these forms are not mandatory, even in the SCCO; in that forum the need for a very detailed bill is of course considerable, as the parties go through an adversarial costs hearing process which can last many weeks, and scrutiny can attach to each and every item in a hotly-contested bill.

CI Arb members should avoid going to those extremes; whilst the above Schedule is well worth reviewing, a far better precedent for CI Arb purposes appears at form N260, as referred to above, modified if needs be.

2.2 Offers and costs of detailed assessment process.

In the SCCO jurisdiction, pursuant to the CPR, offers should normally be made within 14 days of receipt of the Notice of Commencement (47.19/PD 46). Offers made outside that period are likely to be given less weight by the costs officers. *RL Wills & Ors v GD Barrett & Ors [2003] EWHC 1718 (Ch) Peter-Smith J*. This clearly makes eminent sense: if the point of an offer is to avoid the costs of Detailed Assessment, then it should be made before those costs, or most of them, have been incurred.

2.3 Look at both sides?

It is often useful to compare the paying party's own fees first – consider **directing** that both sides must lodge bills of costs before handing down the final decision. You will then have both sides' hourly rates, time spent/work done, experts' and counsel's fees, and can make a direct comparison.

Do not forget that the party making a claim inevitably incurs greater costs than the party defending it, although for trial the costs should be more evenly matched.

2.4 Raising conduct on detailed assessment

Joseph Aaron v. Michael Shelton [2004] EWHC 1162 (QB)

Mr Aaron was a qualified solicitor and raised issues of misconduct as part of his action, but it failed quite spectacularly at trial and Mr Aaron consented to pay costs in the usual way without reference to the conduct point. At the subsequent detailed assessment of costs Mr Aaron tried to raise issues of conduct in relation to the litigation, in order to challenge the Defendant's costs on assessment. However the case had gone to trial and it was before the Trial Judge that these concerns should have been aired (which they had not been). Effectively, by waiting until assessment, the Claimant had missed the boat and was precluded from raising conduct at that later stage.

This was quite an extreme case (disciplinary proceedings apparently followed) but the principle has wide-ranging implications. For CI Arb purposes, the lesson is not to allow the parties to litigate the matter all over again in costs. The paying party has to pay all (or perhaps a percentage) of the costs as a result of the decision: if he can produce (for example) ten, one-line letters from his opponent on the same day you can consider that as tending to show the receiving party acted unreasonably in incurring unnecessary costs.

However, if he seeks to argue that the receiving party should never have sued (or never have won) then that is a matter for an Appeal if the paying party is correct, rather than a matter for you to consider in deciding what constitute reasonable costs. See also (1) *Northstar Systems Ltd* (2) *Sequest Systems Ltd* (3) *Ultraframe (UK) Ltd v. Fielding & Ors* (2006) in which it was held that, if the successful party had been found dishonest in the action, the fact that the unsuccessful (paying) party had not sought an order from the Trial Judge reflecting that dishonesty, did not preclude them, on assessment of costs, from referring to that finding of dishonesty in argument as to the reasonableness of the successful party's costs.

3 HOURLY RATES

Irrespective of the hourly charging rate agreed with a client the SCCO will only allow costs to be recovered from a Third Party (i.e. the losing party) at a reasonable market rate, and this is an excellent rule of thumb for CI Arb. The courts publish hourly rates surveys which take away some of the guesswork (see below for sources) but the variable factors are still as follows.

3.1 Grades of Fee Earner

After August 2001

Grade A - Solicitors of 8 years or more post qualification experience in litigation.

Grade B - Solicitors and FinstLX's of 4 years post qualification experience in litigation.

Grade C - Other Solicitors, Legal Executives and Fee Earners of equivalent experience.

Grade D - Trainee Solicitors, Para Legals and Fee Earners of equivalent experience.

The hourly rates data is collated and published in The Law Society's Gazette, Cook on Costs 200X, and the www.courtservice.gov.uk web site. See Appendix A for the current rates. It is important to note that these are guideline rates and should be treated as such; see Appendix A and the cases below. Indeed, Cook on Costs points out, the SCCO *Guide* is specifically limited to summary assessments of costs and is intended to provide a simple collation of hourly rates incorporating a 50% profit mark-up appropriate for routine costs to be assessed summarily at the end of a hearing which has lasted no more than a day. Strictly speaking, it has nothing to do with detailed assessments. However, it constitutes the best-available ready reckoner for hourly rates, which may be from parts of the country with which you are quite unfamiliar, so that it makes a very good starting place.

3.2 Location of Fee earner.

The most helpful summary of the factors to be considered before disallowing London rates is set out in *Truscott v. Truscott* [1998] Fam Law 74, CA where London hourly rates were allowed as opposed to the related appeal of *Wraith v. Sheffield Forgemasters* [1998] 1 All ER 82 where they were not.

City work is normally heavy commercial or corporate litigation; anything less than that is highly unlikely to warrant City rates, even if a City solicitor conducted the matter.

3.3 Unusual Circumstances

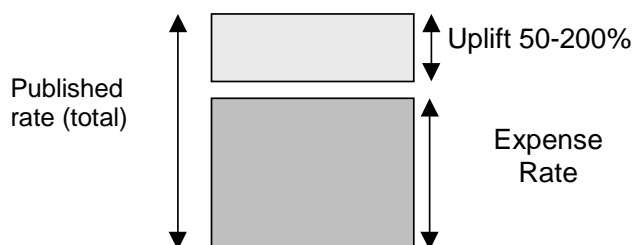
Providing the indemnity principle has not been breached (i.e. provided the solicitor is not seeking to recover from his opponent, more than his own client is liable to pay him) a higher hourly rate can be charged when the litigation undertaken is out of the ordinary.

CPR 44.5 indicates that there are 8 factors that can affect the amount of costs a solicitor can recover for his client and they include proportionality; conduct; value; complexity and skill.

The theory is that an able litigator who conducts complex and important cases will be rewarded with higher remuneration. The application of these factors is quite an art form and still requires a solicitor's hourly rate to be divided into two component parts: the expense rate - the "A" factor - together with the 'mark up' (otherwise known as 'care and conduct') - the "B" factor. The A factor equates to the cost to the solicitor of sitting in his office, i.e. "overhead" whilst the B factor represents his profit, varied according to the 8 factors listed above.

The 'B' factor used to vary between 50 and 200%. For background reading see *Johnson v Reed Corrugated Cases Ltd [1992] 1 ALL ER 169, QBD Evans J and Property and Reversionary Investment Corpn Ltd v Secretary of State for the Environment [1975] 2 All ER 436*. Although the two stage approach fell out of fashion with the arrival of CPR, on larger cases higher than the 'going rate' can still be sought.

Calculating the hourly rate



The case of *Anita Giambrone & Ors v. JMC Holidays Ltd, Nelson J (22nd March 2002) [2002] EWHC 495 (QB)* affirmed that the Courts will still look at the old style 'A' and 'B' factors when assessing hourly rates. The Partner's time for generic work was allowed at a mark-up of 120% and the Assistant's rate was allowed at a mark-up of 65%. As a footnote, mail merged routine letters out were allowed at two minutes each.

In *Higgs v. Camden & Islington Health Authority [2003] EWHC 15 QB* the claimant was awarded £3.5m for brain injuries suffered at birth. He was represented by Leigh Day & Co (EC1M) who were allowed £300 p.h. Proceedings commenced December 1999 and concluded in April 2001 when the guideline rates for the period were £260 p.h (City) and £215 p.h (Central). The SCCO Guideline to Summary Assessment of costs "had only limited significance in circumstances such as these".

In *Avantgo Ltd v. HMCE (No 17363) (2001) v. ADT (Miss J C Gort) (Ch) 17/8/01*. The Appellants had employed the accountants PriceWaterhouseCoopers to assist in a VAT appeal. That firm's hourly rates were for Partners £700 per hour, Managers £400 per

hour and Assistants £100-£200 per hour. The tribunal did not regard those rates as excessive or disproportionate.

In *Gazley v. Wade (1) News Group Newspapers [2005] Costs LR 129* a serious defamation case the claimant was mistakenly “named and shamed” as a serial paedophile. Local Norwich solicitors largely retrieved the position that very weekend, but he then went to London solicitors who succeeded in obtaining substantially increased damages. The judge upheld the costs judge’s decision to disallow London rates as large firms in East Anglia could have handled it equally well by using specialist defamation Counsel (which the London solicitors did in any event).

In *Adam Musa King v. Telegraph Group Ltd* Senior Costs Judge Hurst’s decision dated 2nd December 2005, dealt with the hourly rates sought. As claimed in the Bill of Costs they reflected: Grade A £375.00 per hour; Grade B £265.00 per hour; Grade D £150.00; Costs Draftsman £150.00 per hour. The defendant offered: Grade A £300.00 per hour; Grade B £175.00 per hour; Grade D £105.00 per hour; Costs Draftsman £125.00 per hour.

The defendant referred to *Wraith v Sheffield Forgemasters Limited* and *Truscott v Truscott* stating that the claimant was wrong to instruct City solicitors. The Senior Costs Judge considered this topic was “easily resolved” and stated

“City rates for City solicitors are recoverable where the City solicitor is undertaking City work, which is normally heavy commercial or corporate work. Defamation is not in that category and, particularly given the reduction in damages awards for libel, is never likely to be. A City firm which undertakes work, which could be competently handled by a number of Central London solicitors, is acting unreasonably and disproportionately if it seeks to charge City rates.”

Importantly, the Senior Costs Judge found favour with the point raised by the defendant, namely that newspapers and insurers control defendants’ lawyers’ fees and are not prepared to pay the level of fees which the lawyers may wish to charge. The clients apply real market forces. A claimant such as Mr King had no real prospect of ever being able to pay his Lawyer’s fees, his only hope being able to litigate by means of a CFA. The terms of the CFA being such that in reality the claimant would never have to pay anything. The claimant, therefore, has no real interest in the hourly rates being charged, still less can he bring market forces to bear.

Master Hurst was advised that the defendant’s rates were: Grade A £325.00 per hour; Grade B £195.00 per hour, rising to £210.00 per hour. No explanation had been given by the defendant’s representative as to why rates were being offered to the claimant at lower than the rates applied by the defendant.

Reflecting Master Hurst’s views of market forces and applying the best evidence available in respect of Central London solicitors conducting libel litigation he allowed: Grade A £325.00 per hour; Grade B £210.00 per hour; Grade D £105; Costs Draftsman £125.00 per hour. The last two rates being those put forward by the defendant.

Comment has been made that libel solicitors face a “strange new world”: certainly it is anticipated that far more scrutiny will be given to hourly rates claimed by City firms for any work undertaken that is not considered “heavy commercial or corporate work”. Obviously many CI Arb matters will fall into that category, but many others will not.

4 GENERAL PRINCIPLES OF CPR

As Michael Cook puts it in *Cook on Costs*, matters such as exaggeration, conduct, failure on particular issues, reasonableness, proportionality and sealed offers were relevant to the award of Arbitration costs long before these concepts were introduced into civil litigation by the CPR.

CPR Part 49 formerly applied the Rules to Arbitration and to this extent the practice had been codified in the CPR. However, in the current version of CPR Part 49 (which applies the CPR to various specialist proceedings) the reference to Arbitration has been revoked; there is reference to Arbitrations in Part 62 and the Practice Direction supplementary thereto, but these do not give guidance on costs matters.

In *Cook on Costs* 2007, the situation is given in précis as follows:

Section 63(3) of the Act permits the arbitrator to award costs on such basis “as he thinks fit”. Where costs awarded between the parties are to be determined by the court the effect of sections 63(4) and (5) is that they are assessed on the standard basis as it was defined before the introduction of the CPR unless the arbitrator orders otherwise, namely costs of a reasonable amount, reasonably incurred. However, CPR rule 43.2(2) requires the court to apply CPR rules 44 – 48 to arbitration proceedings and these include the principle of proportionality. **We therefore appear to have the unsatisfactory, and no doubt unintentional, position that the arbitrator may, if he thinks fit, ignore the test of proportionality but the court must apply it.**

Obviously therefore, an Arbitrator can ignore proportionality, but he would be advised to understand and consider it in making his decision. The following key points are, whilst not binding, an example of “best practice” which, again, an Arbitrator would be well advised to consider. They may already be familiar but hopefully the detail given will be of assistance to CIArb members in assessing costs, whether by way of summary or detailed assessment:

4.1 Basis of assessment. CPR44.4 retains the two bases of costs: the standard basis and the indemnity basis. On neither basis will the court allow costs which are unreasonably incurred or unreasonable in amount. The standard basis is the usual basis for an award of costs (hence its name), the indemnity basis is a punitive basis and generally more costs are recovered. On the indemnity basis the onus is upon the paying party to demonstrate that the costs are unreasonable and where there is a doubt about an item’s reasonableness, on the indemnity basis it will be resolved in favour of the receiving party. On the standard basis where there is a doubt about an item’s reasonableness it is resolved in favour of the paying party.

The like provisions appear in the Act at section 63 (5):

(5) Unless the tribunal or the court determines otherwise-

(a) the recoverable costs of the arbitration shall be determined on the basis that there shall be allowed a reasonable amount in respect of all costs reasonably incurred, and

(b) any doubt as to whether costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party.

Pursuant to the first line, it would appear that it is open to award indemnity basis costs, but CI Arb members should avoid making any order for costs other than on these two bases; for example, an order for “the utmost costs” is likely to result in satellite litigation and further costs.

Since CPR a further requirement has arisen; on the standard basis, for costs to be allowed they must also be proportionate. This may be something that you will want to consider when exercising your discretion on costs in an adjudication or Arbitration.

4.2 Proportionality. [See separate note].

4.3 Success. CPR requires that litigation costs closely track the real outcome of litigation; see “Degrees of Success” below.

4.4 Conduct. Claimants are to take a realistic approach to the value of their case and to seek settlement whenever reasonable. Rule 44.3(5) gives four factors, which affect conduct

- 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.

Parties who value their claim unduly optimistically or ignore settlement do so at their peril.

See also *Aaron v. Shelton* above as to when conduct should be raised if it is to be effective in challenging costs: the earlier the better.

5 MAXIMISING THE RECOVERY OF COSTS

Although these remarks often apply to solicitor-client costs, they are primarily aimed at inter partes costs; they provide useful guidance to CI Arb members as to what can and cannot be recovered in the SCCO jurisdiction.

5.1 Avoid the pitfalls

- i. For a private client, has any estimate given to them been exceeded? The client should have been notified in writing of the terms of retainer and a letter should also have been sent when hourly rates were increased *Wong v. Vizards* [1997 2 Costs LR 46] is authority for the position that, if the client only expected to pay £x per hour, or £y in total, then the losing party cannot be expected to pay significantly more (although in *Wong* a 15% margin for error was allowed).
- ii. If it is alleged that there is an unlawful ‘no win no fee’ or ‘no win reduced fee’ agreement which could have the salutary effect of disallowing all costs, you will be

getting into very technical territory (see *Awwad v. Geraghty & Co (a firm)* [2000] 1 All ER 608, CA). A new retainer (lawful CFA or otherwise) can be retrospective and cover the earlier costs as well, up to a point – see *Musa King*. Pursuant to the Act, section 63 (4), any party to the arbitral proceedings may apply to the court (upon notice to the other parties) and if you are involved in an assessment that strays into this kind of territory, you may well prefer to see it transferred to the SCCO, albeit this will inevitably lead to delay and increased costs.

- iii. Time should be recorded on both the computer and the file. For attendances of any substance, a few moments to produce a proper note is reasonable –even a paragraph or two may preserve the five hours spent rewriting a Statement if it explains why this was necessary.
- iv. Do consider whether unusual circumstances apply if the receiving party seeks higher than normal hourly rates. They need to justify that claim, so ask them why this case was so extraordinary.

5.2 Know what can be charged for:

- i. Preparing Attendance Notes (see above) BUT within reason: having a six-minute call, then drafting a note that says, “Attending client – 6 mins” then another that says “Preparing note of telephone attendance on client – 6 mins” will NOT do.
- ii. Secretaries as Fee Earners.
- iii. *Exceptional* photocopying. A 'Rule of Thumb' used to be that black and white copying can be recovered if the cost exceeds 2.5% of the net profit costs. The Courts allow the cost at a 'Commercial Rate' usually 4-6p a page, although may go to 10p. The old County Court Rule 38 used to allow 25p per page. Did the paying party provide any documents during the case? What rate per page did THEY charge? There is usually little difficulty in allowing the costs of either plans or colour copying. The odd sheet of A4 attached to a letter should not, however, be allowed.
- iv. Counsel's Fees - for a proper recovery details of Counsel's time spent must be stated on the fee note. For a large case an explanatory note from Counsel is helpful. However, it is wrong in law to hold Counsel to an hourly rate/hours worked calculation on a Brief fee as the same also covers such factors as the weight of the case, the seniority of Counsel, his degree of specialisation, the extra curricular work he will be expected to do during the case, and the effect on his practice of having his diary tied up for so long. It is always worth asking what the paying party's barrister received on the same Hearing as it may well compare unfavourably. Also, see Appendix C for guidelines.
- v. Expert's Fees - These can generally be recovered, even when a report was not disclosed. The test is whether it was reasonable to obtain that expert's Report. Hindsight is not something that should be applied; what would a reasonable solicitor, in the state of his then knowledge, have done?

Having said that, unfavourable reports, or especially reports not relied upon at the client's insistence, may well be irrecoverable. A proper breakdown of the expert's fee is necessary stating: Date, Work Done, Fee Earner, Time Spent. Cancellation fees are recoverable but must be reasonable – an expert may recover 100% of his fee if the Trial settles 24 hours before, but not if it settles with a month in hand.

It is permissible to use an agency to obtain an expert's report. Whilst experience suggests that a "split" fee note showing their fee separately will be seen by the paying party as an invitation to attack the agents' fees, His Honour Judge Michael Cook (of Cook on Costs fame) held in *Stringer v. Copley Kingston-upon-Thames County Court*, 17 May 2002 that the expert's fees and the agency's charges should be shown separately, and the latter particularised sufficiently to enable the costs Judge to decide whether they represent no more than a reasonable and proportionate sum, had a solicitor done the work.

- vi. Travelling and waiting time - now allowed at the full solicitor's hourly rate. PROVIDED that that is what he agreed with his own client.
- vii. VAT at 17.5% - If the client is not VAT registered and is in the UK/EU jurisdiction. Watch for oddities, e.g. if the client is outside the UK/EU but the matter involves land within the UK VAT will be chargeable. If a dispute arises over whether or not VAT is recoverable, the receiving party must certify that it is, and if needs be, ask HM Customs and Excise for a ruling – and do so early on as they are very slow to respond!

5.3 What cannot be recovered:

- i. Letters in. The rules of Court (Part 43 Practice Direction 4.16(1)) prohibit a fee for the perusal of routine letters received. HOWEVER "thinking time" on letters of substance may be recoverable – many solicitors undermine their overall claim by trying to recover for straightforward incoming letters, when only substantial ones should be sought.
- ii. Supervision. Partners supervising Assistants or Trainees in straightforward matters is not recoverable. See the unreported case of *R v. Sandhu* (Cook on Costs) which gives several types of supervisory work.
- iii. Research. The Courts will not allow parties to pay for a Solicitor's 'learning curve' *Perry v. Lord Chancellor* (1994) *Times* 26 May.
- iv. Outdoor Clerk work. Attending at Court to issue a claim or Summons is not chargeable. Very rarely in a genuine emergency (e.g. up against a primary Limitation period) but then the paying party will argue their opponents should have been instructed/drafted the Pleading sooner in any event.
- v. Preparing solicitor-client bills. This is part of the administrative cost of running a business.
- vi. Cost of amending pleadings. A party that amends its own pleadings does so at its own expense unless the Court allows that amendment and/or awards costs. (This does of course not alter the liability for the client to pay these costs). Amending a Pleading BEFORE it is served for good cause (e.g. the property suddenly caves in and a fresh expert report is obtained in order to plead a rather more gloomy outcome) may be recovered dependent upon circumstances.

6 PROPORTIONALITY

6.1 Rules

Costs incurred prior to CPR i.e. 26th April 1999, and indemnity costs after that date, cannot have proportionality applied to them. The overriding objective referred to under CPR 1 makes clear that in order to deal with cases 'justly' the case must be dealt with in ways, which are proportionate to:

- i) The amount of money involved
- ii) The importance of the case
- iii) The complexity of the issues
- iv) The financial position of each party.

This has naturally caused concern for litigators, particularly for those conducting smaller cases where costs are a much higher proportion of damages recovered. Costs Practice Direction to 44.5 does provide some comfort.

For larger cases the application of proportionality turns on the facts of individual cases and the principal case law has now settled down. The Court's approach to proportionality will be to apply the relevant sections of the CPR and Practice Direction and the decided case law relevant thereto; the most significant case being that of *Lownds* (see below) which sets out the two-stage process by which proportionality is judged. Before that case, there was a tendency to miss the fact that, "Proportionality is a more complex exercise than simply comparing the amount of the costs with the amount that was recovered and scaling down the costs accordingly." *Contractreal Ltd v. Davies* [2001] EWCA Civ 928.

6.2 Case law

i. Jefferson v. National Freight Carriers plc CA [2001] 2 Costs LR 313.

The claimant suffered a minor back injury and at a fast track trial his general damages were assessed at £1,750 with special damages agreed at £525.74. The medical evidence had also been agreed. The total schedule of costs sought amounted to £6,905.49 including VAT, profit costs and disbursements and the district judge allowed £3,500 (after wrongly deducting VAT). The court of appeal commented that the costs "were clearly disproportionate" and for this case "far too high" and the decision of the judge was upheld.

ii. Lownds v. Secretary of State for the Home Department CA, TLR 5th April 2002

This was a clinical negligence claim on behalf of a prisoner who received delayed dental treatment and suffered from gallstones, whose case settled for £3,000. His solicitors originally presented a bill for costs in the sum of £19,405.38 and were eventually allowed £16,784. Most of the work was undertaken prior to the CPR and the appeal was dismissed but 'general guidance' was given on the application of proportionality.

Before the Court considers a claim for costs in detail it must consider whether the overall claim is proportionate. If the claim is proportionate then the item-by-item approach need only consider the reasonableness of the items. If the overall costs claim appears disproportionate, the necessity of each item will be considered. "The threshold required to meet necessity is higher than that of reasonableness".

Had the costs in this matter not been protected by the CPR transitional provisions, the senior Costs Judge would have expected to see costs in the region of £6,500 to £7,000.

In any case where proportionality is seriously at issue, this case will have to be propounded by the paying party in order to succeed; the receiving party will in turn attempt to distinguish *Lownds* in order to avoid the much tougher "necessity" test propounded therein.

iii. *Devine & Franklin [2002] EWHC 1846 (QB) HHJ Gray, 28/5/02*

The above was an appeal concerning costs awarded in an unusual personal injury claim. Special Damages were agreed at £195 with General Damages assessed at £500. Costs were claimed in the sum of £10,396 and at a Detailed Assessment were reduced to £7,023.59 to reflect the question of proportionality.

On Appeal Mr Justice Gray considered the award of costs "over generous" and ordered that the Defendant pay fixed costs permitted under Part 27.14 for a Small Claims Track case and awarded the Claimant an additional £1,000 to reflect the "*unreasonable behaviour of the Defendant*".

iv. *Nutrinova v. Scanchem [2001] FSR 43 (Pumfrey J).*

In this patent action the Claimant's costs were £1.1 million, the Defendant's £300,000. However the value of the action was very substantial and therefore "It would not be right to say that ... the Claimant's expenditure had been so disproportionate that a special order was required over and above the normal scrutiny which the costs would receive on a Detailed Assessment".

v. *Giambrone v. JMC Holidays Ltd [2003] 1 All ER 982* applies and adds to *Lownds*;

(a) Even with a large bill, an experienced Costs Judge supplied with skeleton arguments should be able to determine overall proportionality in one hour or less.

(b) Pre CPR costs should be taken into account in forming a global view (but need not in themselves be proportionate)

(c) VAT must be excluded from the equation (as are success fees – CPD s.11.5)

(d) Even if the overall bill is proportionate the Costs Judge can still conclude that certain items appear disproportionate, and applying the dual test to them.

(e) If the Costs Judge at the initial stage is unable to state whether or not the bill is proportionate, he must carry out the assessment using the dual *Lownds* test.

- v. *Re: Michaelides [2003] EWHC 3029 (Ch)* If costs, after assessment, are still disproportionate, it is wrong to reduce the global figure further – the Costs Judge must go back over each item in turn.
- vi. *Campbell v MGN Limited (No.2) [2005] UK HL 61*. Mirror Group Newspapers sought a ruling that the success fee was so disproportionate as to constitute a penalty in breach of article 6 (right to a fair trial) and article 10 (right to free speech) of the European Convention on Human Rights. The success fee was some £279,981.35, in a case where the damages were a mere fraction of that amount. It was specifically argued that it was wrong to have a situation whereby the costs Judge ruled upon the maximum amount that was reasonable and proportionate in respect of costs, and then another (up to) 100% was allowed on top of that by way of success fee. In addition, it was argued that Naomi Campbell could have afforded to fund this litigation privately, so that it was unnecessary to have entered into a CFA, effectively doubling the newspaper's costs liability at a stroke. Their Lordships held that the receiving party's means are irrelevant to the question of whether she needed/was entitled to a CFA; Naomi Campbell despite her financial means was perfectly entitled to pursue litigation by such means. The full Judgment expresses considerable sympathy with the newspapers' plight – it refers, for example, to the "blackmailing" effect of litigation under CFA by impecunious litigants who do not take out ATE insurance. However, the CFA regime and the "loser pays" system arising therefrom in respect of success fees are matters of legislative policy that the House of Lords had to accept.

vii. *Adam Musa King v. Telegraph Group Ltd*

The senior costs judge reviewed, at length, the position regarding proportionality, and addressed the questions of *what does proportionality cover?* also *what is the amount at stake?* and *what is the value of vindication of reputation?*

The defendant objected to the claimant's solicitors' team approach, and to their conduct of the litigation particularly in light of the comments made when the matter was before the Court of Appeal. The defendant relied, in particular, upon paragraph 104 of the Judgment whereat Brooke LJ stated that he thought the defendant was right to complain as to the way the conduct had been litigated, and continued:

"It will be sufficient only to say that the claimant's lawyers appear to have advanced their client's claim from time to time in a manner that is wholly incompatible with the philosophy of the Civil Procedure Rules, and that I would expect a Costs Judge to take an axe to certain elements of their charges if the matter ever proceeds to an Assessment. If the action goes to Trial, the Trial Judge should express his views on matters of this kind and direct that they be transcribed for the benefit of the Costs Judge, since the Trial Judge will be much better able than the Costs Judge to identify those parts of the case in which costs have been wastefully or extravagantly incurred."

The claimant suggested that a number of these criticisms were unfair or misconceived, but for obvious reasons the defendant relied on those criticisms.

The defendant also objected to the claimant's Witness Statement produced for (as claimed in the bill) 20 hours of Partner's work, together with a further 30 hours for an Assistant. Counsel's fees in respect of the Statement equated to a further 30 hours, i.e. 80 hours claimed in respect of producing the Statement resulting in a claim for base costs of £23,260.00 or £46,000.00 including the success fee just for this item.

On considering proportionality the senior costs judge stated that his experience was that defamation actions were conducted in an unnecessarily confrontational and aggressive manner contravening the overriding objective. Having considered this matter the costs judge agreed with the remarks of the Court of Appeal severely criticising the claimant's conduct of the action.

The costs judge stated that one way of testing proportionality of costs is to ask whether a Litigant, paying the costs out of his own pocket, would have been prepared to pay that level of costs in order to achieve success. For the purpose of the test the claimant must be deemed to be a person of adequate means. If such a person were informed by his solicitors that the costs of bringing the case to a satisfactory conclusion with an award of damages of £130,000.00 plus a Judgment in his favour was likely to be £317,523.00 (the actual base costs in this case) "It is inconceivable that the claimant would wish to go ahead".

The costs judge therefore held that the test of necessity would be applied throughout this bill, on an item-by-item basis.

This is again quite a technical area, and if it is to be argued in any detail on a bill of significant size, it may be that an application to transfer to the SCCO is in order.

7 DEGREES OF SUCCESS

CPR requires litigation costs to closely track the real outcome of litigation. The old "winner takes all" approach of *Elgindata Ltd (No 2) [1992] 1 WLR 1207* has been abolished. Although costs still follow the event, R 44.3(4) states that the court must have regard to the parties' conduct, degree of success and offers made. If any of these additional factors come into play, then 44.3(6) gives a menu of costs orders, by far the most popular of which has been the use of fractional costs orders 44.3(6)(a). For example, if the Claimant was 80% successful and the Defendant 20% successful, rather than make cross-orders, justice might be achieved by awarding the Claimant 60 or 70% of his costs. Hence, if faced with a case where there was merit/demerit on both sides, consider reflecting this in the costs order by way of a fractional order.

There are other ways; for example an order that claimant wins his costs of the claim, and defendant wins his costs of the counterclaim, but this leads to a nightmarish costs assessment. Better by far for CI Arb members to make a fractional costs order when handing down the decision; the facts will be fresh in your mind and you should have a very good idea of where the balance of blame lies. Your specific authority for this lies in section 61 of the Act:

61. - (1) The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties.

(2) Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.

When a successful party has raised a head of claim unsuccessfully they will not be allowed of the unsuccessful head. The simplest way of reflecting this is to ask the trial judge to specify a percentage reduction in the costs sought. To leave that work to a detailed assessment hearing is to invite complexity and disappointment. Lord Woolf explains the approach in *Phonographic Performance Ltd v. AEI [1998] Ch 187*. This

does however appear to conflict with *Shirley and Good Park Ltd v. Matthew Caswell CA 14/6/00* where the matter was left over to Detailed Assessment.

The following table illustrates the range of costs awarded since the introduction of CPR.

Date	Case	% awarded	Comment
08.07.99	Mars UK Ltd v. Teknowledge Ltd (Jacob J) TLR 8.7.99.	67% but due to conduct 40%	The Claimant had won on the major issue and was awarded 67%. However the Claimant's conduct had been 'heavy handed' and the percentage was further reduced.
17.02.00	DEG-Deutsche Investitions v. Koshy [2000] LTL	70%	The Claimant successfully defeated a strike out application but although it had not pursued issues unreasonably, unsuccessful arguments had increased the overall costs.
29.11.00	Antonelli & Ors v. Allen & Ors [2001] Chd Neuberger J 29.11.00.	75%	A successful defendant who had the action against him dismissed was awarded three quarters of his costs. A deduction was justified because two of the issues in his defence failed.
16.02.01	Kinetics Technology v. Cross Seas Shipping Corp [2001] All ER (D) 391 (Feb)	D awarded 66% from PIC	The Claimant only just beat a payment into Court (PIC) and lost on an important issue. The Judge held the C should not have pursued the action following the PIC and awarded the D most of its costs.
08.05.01	Stocznia Gdanska SA v. Latvian Shipping Co [2001] LTL May 25	Small percentage	The Claimant won by a small margin and was unsuccessful in arguing it should recover all costs because it had not been unreasonable in pursuing issues. The biggest factors were conduct and success.
25.06.01	Firle Investments v. Datapoint International [2001] All ER (D) 258 (Jun) CA	100% to second PIC thereafter 70%	The Claimant sought £300,000 but at trial only just beat a second PIC totalling £50,000. Although the C had recovered more, the final award was much closer to the Defendant's valuation. The C had also unnecessarily pursued various matters.
09.11.01	Van Dijk v. Wilkinson [2001] All ER (D) 153 (Nov) CA	C's issue 67% D balance	The C was awarded 2/3 of the successful argument of a repudiation issue, but the D was awarded the costs of the balance of the action.
19.11.01	Summit Property v. Pitmans [2001] All ER (D) 270 (Nov) CA	Unsuccessful C awarded 65% successful D awarded 30%	When apportioning costs it was no longer necessary to show a party had unreasonably pursued an issue before depriving it of costs, or award costs of that issue to the unsuccessful party. The appeal against the Order was refused. In an exceptional case a successful party could be ordered to pay part of an unsuccessful party's costs.
21.11.01	Professional Technology Information Consultants v. Elizabeth Jones [2001] All ER (D) 30V (Nov)	67%	The Court of Appeal here made clear that that Court would only interfere on a costs decision if the Judge below was plainly wrong. Costs were always in the trial Judge's discretion.
08.04.05	Birchell v. Bullard & Others (SCCO website)	60%	Claimant won its claim but lost the counterclaim and was liable on a Part 20 claim; Defendant had refused ADR claiming too complex a matter. CA commented "The profession could no longer with impunity shrug aside responsible requests to mediate. The parties could not ignore a proper request to mediate simply because it had been made before the claim had been issued." ORDERED D to pay 60% of C's costs (even though D's counterclaim was successful) AND D to pay 60% of C's liability in costs to the Part 20 Defendant.
22.04.05	Emmanuel Sanju Allison v. Brighton & Hove City Council (2005)	25%	Where the appellant had failed to beat a payment into court made by the respondent the judge had

Date	Case	% awarded	Comment
	CA (Civ Div)		been fully entitled in the circumstances of the case to make an order that the appellant should only receive 25 per cent of his costs up to the offer made.

Other situations to watch include exaggeration: *Booth v. Britannia Hotels Limited [2003] 1 Costs LR 43* the Claimant was pursuing a claim in excess of £600,000 due to injuries received making a bed on the Defendant's premises, when video evidence established that she was in fact barely affected and she accepted a payment into Court of £2,500. Her lawyers had been unaware that she was malingering and had run up substantial costs, but on Detailed Assessment they recovered only the costs that would have been incurred had there been no exaggeration (hence no rehabilitation reports, psychiatric evidence et cetera). In other words, although the Order was for all of her costs of the action, only a minute fraction was actually recoverable.

Some of the cases referred to above on success fees (e.g. *Begum v. Klarit*) may seem to have a similar effect, inasmuch as a reduction in Success Fee from 100% to 15% as in that case all but halves the Solicitors' fees.

8 PRIVILEGE AND DISCLOSURE

If the paying party is not satisfied by the receiving party's explanations as to solicitor's retainer, can you look at the retainer documents?

- i. Although generally regarded as privileged documents, the decision in *Anita Giambrone & Ors v JMC Holidays Ltd (2001) by C J Campbell (26/10/01) on Appeal Nelson J (22/3/02)[2002] EWH C 495 QB* may have far reaching implications on retainer questions. This was a group action on behalf of 652 disgruntled holidaymakers. Their bills for roughly £1.3 million were challenged under the indemnity principle. This item was left unresolved and the CJ regarded this as "a rare situation where it was appropriate to order disclosure of the privileged retainer. A partner of Irwin Mitchell should make a Witness Statement setting out full details of how Irwin Mitchell was to be remunerated by the Claimants, exhibiting client care letters and interim bills". This decision was overturned on Appeal and it was held that the Witness Statement should only have been served on the Costs Judge.
- ii. *John Dickinson v. Duncan Rushmer ChD (Rimer J) 21/12/01*. In order to justify their charges the receiving party disclosed to the Costs Judge only a copy of the client care letter, copies of Solicitor Client bills delivered and a Schedule of monies paid on account.
- iii. *South Coast Shipping Company Ltd v. Havant Borough Council. HCJ Pumfrey J 21/12/01* The Defendant argued that there had been a breach of the indemnity principle. CJ Campbell rejected the argument on the basis that i) the Bill had been signed and ii) the onus lay upon Havant to prove there had been a breach and they had not done this. He had also seen privileged documents which he refused to disclose. On Appeal Pumfrey J maintained that legal professional privilege was "strong" and could not be overridden by the Court.
- iv. *Hollins v. Russell [2003] EWCA Civ 718*, the Court of Appeal signalled its intent to end the "trench warfare" between parties over Conditional Fee Agreements ('CFAs') and held that CFAs are to be disclosed. The decision has not stripped claimants of all their privilege and two important safeguards remain:
 - a) The costs judge must put the receiving party to its election whether or

not to disclose a document (pa.80). If it does not wish that disclosure then in exceptional circumstances a costs judge may allow oral evidence to be given. Alternatively a costs judge may allow sensitive material to be redacted.

- b) Attendance notes and correspondence ordinarily need not be disclosed.

To keep matters in perspective the Court concurred with Pumfrey J's comments in *South Coast Shipping* that he had "*not intended to suggest the costs judge may potentially put the receiving party to its election in respect of every document relied on*".

The above cases collectively indicate the current approach to be adopted in relation to the indemnity principle and disclosure generally on Detailed Assessment.

- When a factual dispute arises the Costs Judge may direct production to him of a relevant document.
- Where the document is of sufficient importance to be relevant, the CJ must put the receiving party to its election (subject to proportionality and reliance) as to whether to rely upon that document or seek to adduce evidence by other means such as oral evidence.
- If the receiving party seeks to prove the fact by other means, the paying party is not automatically entitled to see relevant documents.

Appendix A – Form N260

Appendix B – Solicitor’s Hourly Rates to 2007

BAND ONE Grade *	A**	B	C	D
GUIDELINE RATES 2007	195	173	145	106
GUIDELINE RATES 2005	184	163	137	100
GUIDELINE RATES 2004, 2003, 2002	175	155	130	95
GUIDELINE RATES 2001 (pre Band One):		1	2	3
Aldershot, Farnham, Bournemouth (including Poole)				
Birmingham Inner 22.01.01		158	123	80
Bristol 01.12.00		145	125	80
Cambridge City, Harlow 21.11.00		130	125	90
Canterbury, Maidstone, Medway & Tunbridge Wells 01.02.01		150	140	85
Cardiff (Inner) 30.11.00		145	120	85
Chelmsford South, Essex & East Suffolk 01.11.00		135	115	90
Fareham, Winchester 07.11.00		145	110	90
Hampshire, Dorset, Wiltshire, Isle of Wight				
Kingston, Guildford, Reigate, Epsom		135	120	75
Leeds Inner (within 2 kilometres radius of the City Art Gallery)		140	120	90
Lewes 01.12.00		150	130	85
Liverpool 25.10.00, Birkenhead 03.11.00		145	125	95
Manchester Central 25.10.00 *		155-123	97	77
Newcastle - City Centre (within a 2 mile radius of St Nicholas Cathedral) 31.10.00		135	110	85
Norwich City 21.11.00		130	105	70
Nottingham City 30.10.00		135	100	78
Oxford, Thames Valley 11.11.00		140-125	115	80
Southampton, Portsmouth				
Swindon, Basingstoke				
Watford		135	112.50	85

BAND TWO Grade *	A**	B	C	D
GUIDELINE RATES 2007	183	161	133	101
GUIDELINE RATES 2005	173	152	126	95
GUIDELINE RATES 2004, 2003, 2002	165	145	120	90
GUIDELINE RATES 2001 (pre Band Two):		1	2	3
Bath, Cheltenham and Gloucester, Taunton, Yeovil 01.12.00		145	125	80
Bury		140	112.50	90
Chelmsford North, Cambridge County, Peterborough, Bury St E, Norfolk, Lowestoft 21.11.00		125	120	86.50
Chester & North Wales		110-140	86-108	55-97.5
Coventry, Rugby, Nuneaton, Stratford and Warwick 13.11.00		135	114	80
Exeter, Plymouth		120	100	75
Hull (City) 30.10.00		140-150	120-130	80-90
Leeds Outer, Wakefield & Pontefract		140	120	90
Leigh 01.01.01		145	125	95
Lincoln 27.11.00		130	100	78
Luton, Bedford, St Albans, Hitchin, Hertford		125	110	80
Manchester Outer, Oldham, 25.10.00*, Bolton, Tameside		155-123 140	97 112.50	77 90
Newcastle (other than City Centre) 31.10.00		122	102	80
Nottingham & Derbyshire 30.10.00		135	100	78
Sheffield, Doncaster and South Yorkshire 25.10.00		120-140	105	75
Southport 03.11.00		140	120	90
St Helens 03.11.00		145	125	95
Stockport, Altrincham, Salford 25.10.00		155-123	97	77
Swansea, Newport, Cardiff (Outer) 30.11.00		125	115	80
Wigan 01.01.01		145	125	95
Wolverhampton, Walsall, Dudley & Stourbridge				
York, Harrogate				

BAND THREE Grade *	A**	B	C	D
GUIDELINE RATES 2007	167	150	128	95
GUIDELINE RATES 2005	158	142	121	90
GUIDELINE RATES 2004, 2003, 2002	150	135	115	85
GUIDELINE RATES 2001 (pre Band Three):		1	2	3
Birmingham Outer 22.01.01		131	103	73
Bradford (Dewsbury, Halifax, Huddersfield, Keighley & Skipton) 01.01.01		125	110	80
Cumbria 01.01.01		140	125	81
Devon, Cornwall		120	100	75
Grimsby, Skegness 03.01.01		135	100	78
Hull Outer 30.10.00		140-150	120-130	80-90
Kidderminster				
Northampton 11.11.00		145	112	80
& Leicester 30.10.00		124	96	74
Preston* , Lancaster, Blackpool, Chorley 01.01.01, Accrington, Burnley, Blackburn, Rawtenstall & Nelson		130	115	85
Scarborough & Ripon				
Stafford, Stoke, Tamworth 16.11.00		125	100	78
Teesside 23.11.00		122	105	80
Worcester, Hereford, Evesham and Redditch				
Shrewsbury, Telford, Ludlow, Oswestry				
South & West Wales				

* So, for a 10 years' qualified Litigation Partner in Preston, in

2005 - he would be Grade A, Band 3 or £158, in
 2004/2003/2002 - he would still be Grade A, Band 3 or £150, and in
 2001 - he would be Grade 1, Preston (which had not yet been put into a Band) or £130.

It is clear that there were large gaps in the 2001 Guideline (South Wales? York?) where localities, which have now been put into the three Bands, were formerly overlooked.

If you are faced with a bill in these "missing" areas with costs on/after 2002 they are covered by the relevant Band; pre-2002, any Costs Draftsman should have access to the local Practice Direction which will give an indication of the rate being awarded in the relevant Court at the relevant time.

LONDON BANDS

Grade *	A**	B	C	D
City of London: EC1, EC2, EC3, EC4				
2007	380	274	210	129
2005	359	259	198	122
2004/2003/2002	342	247	189	116
2001		1	2	3
City of London RCJ 01.01.01		265	175	95
City of London CC 17.11.00		180-335	135-180	85-100
Central London: W1, WC1, WC2, SW1	A**	B	C	D
2007	292	222	181	116
2005	276	210	171	110
2004/2003/2002	263	200	163	105
2001		1	2	3
Central London RCJ 01.01.01		215	155	95
Central London CC 17.11.00		150-280	105-150	80-90
Outer London: (All other London post codes: W, NW, N, E, SE, SW and Bromley, Croydon, Dartford, Gravesend and Uxbridge)	A**	B	C	D
2007	210-246	158-210	152	111
2005	198-232	149-198	144	105
2004/2003/2002	189-221	142-189	137	100
2001		1	2	3
Outer London RCJ 01.01.01		170	125	90
Outer London CC 17.11.00		125-200	90-125	60-85
Croydon 01.11.00		150	130	90
Dartford, Gravesend 01.02.01		150	140	85

Again, pre-2002, Bromley and Uxbridge were not specifically covered in the Guidelines: check with your Costs Draftsman.

The most up to date version of these figures appear in the current SCCO Guide at APPENDIX 2: GUIDELINE FIGURES FOR THE SUMMARY ASSESSMENT OF COSTS which also gives the following explanatory notes:

Solicitor's hourly rates. The guideline rates for solicitors provided here are broad approximations only. In any particular area the Designated Civil Judge may supply more exact guidelines for rates in that area. Also the costs estimate provided by the paying party may give further guidance if the solicitors for both parties are based in the same locality.

The [above] diagram shows guideline figures for each of three bands outside the London area, and a further three bands within the London area (post 2002) with a statement of the localities included in each band. In each band there are four columns specifying figures for different grades of fee earner.

Localities. The guideline figures have been grouped according to locality by way of general guidance only. Although many firms may be comparable with others in the same locality, some of them will not be. For example, a firm located in the City of London which specialises in fast track personal injury claims may not be comparable with other firms in that locality and vice versa.

In any particular case the hourly rate it is reasonable to allow should be determined by reference to the rates charged by comparable firms. For this purpose the costs estimate supplied by the paying party may be of assistance. The rate to allow should not be determined by reference to locality or postcode alone.

Grades of fee earner. The grades of fee earner have been agreed between representatives of the Supreme Court Costs Office, the Association of District Judges and the Law Society. The categories are as follows:

- a. Solicitors with over eight years post qualification experience including at least eight years litigation experience.
- b. Solicitors and legal executives with over four years post qualification experience including at least four years litigation experience.
- c. Other solicitors and legal executives and fee earners of equivalent experience.
- d. Trainee solicitors, para legal and other fee earners.

"Legal Executive" means a Fellow of the Institute of Legal Executives. Those who are not Fellows of the Institute are not entitled to call themselves legal executives and in principle are therefore not entitled to the same hourly rate as a legal executive.

Unqualified clerks who are fee earners of equivalent experience may be entitled to similar rates and in this regard it should be borne in mind that Fellows of the Institute of Legal Executives generally spend two years in a solicitor's office before passing their Part 1 general examinations, spend a further two years before passing the Part 2 specialist examinations and then complete a further two years in practice before being able to become Fellows. Fellows have therefore possessed considerable practical experience and academic achievement. Clerks without the equivalent experience of legal executives will be treated as being in the bottom grade of fee earner i.e. trainee solicitors and fee earners of equivalent experience. Whether or not a fee earner has equivalent experience is ultimately a matter for the discretion of the court.

The Appendix adds that an hourly rate in excess of the guideline figures may be appropriate for Grade A fee earners in substantial and complex litigation where other factors, including the value of the litigation, the level of 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.

Before 2002, instead of four grades a, b, c and d, there were three grades 1, 2 and 3:

1. Solicitors with over 4 years post qualification experience
2. Other solicitors and legal executives and fee earners of equivalent experience
3. Trainee solicitors and fee earners of equivalent experience

(By “legal executive” they meant a Fellow of the Institute of Legal Executives).

Of course, nothing was that straightforward – the **Manchester** rates (* above) spread over four grades, but not four grades corresponding to a,b,c and d.

- | | |
|---------------------------------|--|
| 1. Partner | 2. Solicitor 3+ years/experienced legal exec |
| 3. Other solicitors/legal execs | 4. Trainee solicitors/paralegals |

The pre-2002 rates specifically reminded practitioners that the wide range of rates given for each grade in the London County Courts accommodate the fact that many sole practitioners practise in those areas as well as very large firms and that this was relevant in choosing the rate to allow.

If you have a bill with time going back pre-2000, check with a Costs Draftsman as, prior to that date there was no centralised Guide. However, District Registries up and down the country issued their own Practice Directions which should still be capable of checking. And remember, these Guidelines are **JUST GUIDELINES!**

APPENDIX C - Counsel's Fees

The following table sets out figures based on Supreme Court Costs Office statistics dealing with run of the mill proceedings in the Queens Bench and Chancery Division and in the Administrative Court. The table gives figures for cases lasting up to an hour and up to half a day, in respect of counsel up to five years call, up to ten years call and over ten years call. It is emphasised that these figures are not recommended rates but it is hoped that they may provide a helpful starting point for judges when assessing counsel's fees. The appropriate fee in any particular case may be more or less than the figures appearing in the table, depending upon the circumstances.

The table does not include any figures in respect of leading counsel's fees since such cases would self evidently be exceptional. Similarly, no figures are included for the Commercial Court or the Technology & Construction Court.

Table of Counsel's Fees

QUEENS BENCH	1 hour hearing	½ day hearing
Junior up to 5 years call	£259	£450
Junior 5 - 10 years call	£386	£767
Junior 10+ years call	£582	£1,164

CHANCERY DIVISION	1 hour hearing	½ day hearing
Junior up to 5 years call	£291	£556
Junior 5 - 10 years call	£497	£931
Junior 10+ years call	£757	£1,397

ADMINISTRATIVE COURT	1 hour hearing	½ day hearing
Junior up to 5 years call	£381	£582
Junior 5 - 10 years call	£698	£1,164
Junior 10+ years call	£989	£1,746

If the paying parties were represented by counsel, the fee paid to their counsel is an important factor but not a conclusive one on the question of fees payable to the receiving party's counsel.

In deciding upon the appropriate fee for counsel the question is not simply one of counsel's experience and seniority but also of the level of counsel which the particular case merits.

Counsel's fees should not be allowed in cases in which it was not reasonable to have instructed counsel, but it must be borne in mind that, especially in substantial hearings, it may be more economical if the advocacy is conducted by counsel rather than a solicitor. In all cases the court should consider whether or not the decision to instruct counsel has led to an increase in costs and whether that increase is justifiable.