

## CONDUCT AND COSTS – RELEVANT RULES

### Rule 44.3 - Court's discretion and circumstances to be taken into account when exercising its discretion as to costs

- (1) The court has discretion as to –
  - (a) whether costs are payable by one party to another;
  - (b) the amount of those costs; and
  - (c) when they are to be paid.
- (2) If the court decides to make an order about costs –
  - (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
  - (b) the court may make a different order.
- (4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –
  - (a) the conduct of all the parties;
  - (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
  - (c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36). (Part 36 contains further provisions about how the court's discretion is to be exercised where a payment into court or an offer to settle is made under that Part)
- (5) The conduct of the parties includes –
  - (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;
  - (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
  - (c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and
  - (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.
- (6) The orders which the court may make under this rule include an order that a party must pay –
  - (a) a proportion of another party's costs;
  - (b) a stated amount in respect of another party's costs;
  - (c) costs from or until a certain date only;
  - (d) costs incurred before proceedings have begun;
  - (e) costs relating to particular steps taken in the proceedings;
  - (f) costs relating only to a distinct part of the proceedings; and
  - (g) interest on costs from or until a certain date, including a date before judgment.
- (7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c).

### Rule 44.4 - Basis of Assessment

- (1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs -
  - (a) on the standard basis; or
  - (b) on the indemnity basis,but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

- (2) Where the amount of costs is to be assessed on the standard basis, the court will –
  - (a) only allow costs which are proportionate to the matters in issue; and
  - (b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.
- (3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.
- (4) Where –
  - (a) the court makes an order about costs without indicating the basis on which the costs are to be assessed; or
  - (b) the court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis, the costs will be assessed on the standard basis.

**Rule 44.5 - Factors to be taken into account in deciding the amount of costs**

- (1) The court is to have regard to all the circumstances in deciding whether costs were –
  - (a) if it is assessing costs on the standard basis –
    - (i) proportionately and reasonably incurred; or
    - (ii) were proportionate and reasonable in amount, or
  - (b) if it is assessing costs on the indemnity basis –
    - (i) unreasonably incurred; or
    - (ii) unreasonable in amount.
- (2) In particular the court must give effect to any orders which have already been made.
- (3) The court must also have regard to –
  - (a) the conduct of all the parties, including in particular –
    - (i) conduct before, as well as during, the proceedings; and (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
  - (b) the amount or value of any money or property involved;
  - (c) the importance of the matter to all the parties;
  - (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
  - (e) the skill, effort, specialised knowledge and responsibility involved;
  - (f) the time spent on the case; and
  - (g) the place where and the circumstances in which work or any part of it was done.

**Rule 44.14 - Court's powers in relation to misconduct**

- (1) The court may make an order under this rule where –
  - (a) a party or his legal representative, in connection with a summary or detailed assessment, fails to comply with a rule, practice direction or court order; or
  - (b) it appears to the court that the conduct of a party or his legal representative, before or during the proceedings which gave rise to the assessment proceedings, was unreasonable or improper.
- (2) Where paragraph (1) applies, the court may –
  - (a) disallow all or part of the costs which are being assessed; or
  - (b) order the party at fault or his legal representative to pay costs which he has caused any other party to incur.
- (3) Where –
  - (a) the court makes an order under paragraph (2) against a legally represented party; and

- (b) the party is not present when the order is made, the party's solicitor must notify his client in writing of the order no later than 7 days after the solicitor receives notice of the order.

### **Rule 36.14 - Costs Consequences Following Judgment**

- (1) This rule applies where upon judgment being entered-
  - (a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or
  - (b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.
- (2) Subject to paragraph (6), where rule 36.14(1)(a) applies, the court will, unless it considers it unjust to do so, order that the defendant is entitled to-
  - (a) his costs from the date on which the relevant period expired; and
  - (b) interest on those costs.
- (3) Subject to paragraph (6), where rule 36.14(1)(b) applies, the court will, unless it considers it unjust to do so, order that the claimant is entitled to-
  - (a) interest on the whole or part of any sum of money (excluding interest) awarded at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
  - (b) his costs on the indemnity basis from the date on which the relevant period expired; and
  - (c) interest on those costs at a rate not exceeding 10% above base rate.
- (4) In considering whether it would be unjust to make the orders referred to in paragraphs (2) and (3) above, the court will take into account all the circumstances of the case including-
  - (a) the terms of any Part 36 offer;
  - (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
  - (c) the information available to the parties at the time when the Part 36 offer was made; and
  - (d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated.
- (5) Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest may not exceed 10% above base rate.
- (6) Paragraphs (2) and (3) of this rule do not apply to a Part 36 offer-
  - (a) that has been withdrawn;
  - (b) that has been changed so that its terms are less advantageous to the offeree, and the offeree has beaten the less advantageous offer;
  - (c) made less than 21 days before trial, unless the court has abridged the relevant period.

### **Practice Direction - Protocols**

1.4 The objectives of pre-action protocols are:

1.4.1 to encourage the exchange of early and full information about the prospective legal claim,

1.4.2 to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings,

## Compliance with protocols

2.1 The Civil Procedure Rules enable the court to take into account compliance or non-compliance with an applicable protocol when ... making orders for costs

2.2 The court will expect all parties to have complied in substance with the terms of an approved protocol.

2.3 If, in the opinion of the court, non-compliance has led to the commencement of proceedings which might otherwise not have needed to be commenced, or has led to costs being incurred in the proceedings that might otherwise not have been incurred, the orders the court may make include:

- (1) an order that the party at fault pay the costs of the proceedings, or part of those costs, of the other party or parties;
- (2) an order that the party at fault pay those costs on an indemnity basis;
- (3) if the party at fault is a claimant in whose favour an order for the payment of damages or some specified sum is subsequently made, an order depriving that party of interest on such sum and in respect of such period as may be specified, and/or awarding interest at a lower rate than that at which interest would otherwise have been awarded;

2.4 The court will exercise its powers under paragraphs 2.1 and 2.3 with the object of placing the innocent party in no worse a position than he would have been in if the protocol had been complied with.

3.1 A claimant may be found to have failed to comply with a protocol by, for example:

- (a) not having provided sufficient information to the defendant, or
- (b) not having followed the procedure required by the protocol to be followed (e.g. not having followed the medical expert instruction procedure set out in the Personal Injury Protocol)

3.3 The court is likely to treat this practice direction as indicating the normal, reasonable way of dealing with disputes. If proceedings are issued and parties have not complied with this practice direction or a specific protocol, it will be for the court to decide whether sanctions should be applied.

3.4 The court is not likely to be concerned with minor infringements of the practice direction or protocols. The court is likely to look at the effect of non-compliance on the other party when deciding whether to impose sanctions.

## **Pre-action protocol for Personal Injury Claims**

1.2 The aims of pre-action protocols are:

- better and earlier exchange of information
- to put the parties in a position where they may be able to settle cases fairly and early without litigation.

1.4 The Courts will be able to treat the standards set in protocols as the normal reasonable approach to pre-action conduct. If proceedings are issued, it will be for the court to decide whether non-compliance with a protocol should merit adverse consequences. Guidance on the court's likely approach will be given from time to time in practice directions.

1.5 If the Court is to consider the question of compliance after proceedings have begun, it will not be concerned with minor infringements, e.g. failure by a short period to provide relevant information. One minor breach will not exempt the “innocent” party from following the protocol. The Court will look at the effect of non-compliance on the other party when deciding whether to impose sanctions.

#### Alternative Dispute Resolution

2.16 The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs.

#### Stocktake

2.20 Where a claim is not resolved when the protocol has been followed, the parties might wish to carry out a 'stocktake' of the issues in dispute, and the evidence that the court is likely to need to decide those issues, before proceedings are started...

#### Special damages

3.14 The claimant will send to the defendant as soon as practicable a Schedule of Special Damages with supporting documents, particularly where the defendant has admitted liability.

#### Experts

3.15 Before any party instructs an expert he should give the other party a list of the name(s) of one or more experts in the relevant speciality whom he considers are suitable to instruct.

3.16 Where a medical expert is to be instructed the claimant's solicitor will organise access to relevant medical records - see specimen letter of instruction at Annex C.

3.17 Within 14 days the other party may indicate an objection to one or more of the named experts. The first party should then instruct a mutually acceptable expert (which is not the same as a joint expert). It must be emphasised that if the Claimant nominates an expert in the original letter of claim, the defendant has 14 days to object to one or more of the named experts after expiration of the period of 21 days within which he has to reply to the letter of claim, as set out in paragraph 3.6.

3.18 If the second party objects to all the listed experts, the parties may then instruct experts of their own choice. It would be for the court to decide subsequently, if proceedings are issued, whether either party had acted unreasonably.

#### Resolution of Issues

5.1 Where the defendant admits liability in whole or in part, before proceedings are issued, any medical reports obtained under this protocol on which a party relies should be disclosed to the other party. The claimant should delay issuing proceedings for 21 days from disclosure of the report (unless such delay would cause his claim to become time-barred), to enable the parties to consider whether the claim is capable of settlement.

5.2 The Civil Procedure Rules Part 36 permit claimants and defendants to make offers to settle pre-proceedings. Parties should always consider before issuing if it is appropriate to make Part 36 Offer. If such an offer is made, the party making the offer must always supply sufficient evidence and/or information to enable the offer to be properly considered.

5.3 Where the defendant has admitted liability, the claimant should send to the defendant schedules of special damages and loss at least 21 days before proceedings are issued (unless that would cause the claimant's claim to become time-barred).