REVIEW OF
CIVIL LITIGATION COSTS

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PART 8: CONTROLLING THE COSTS OF LITIGATION

CHAPTER 40. E-DISCLOSURE

1. INTRODUCTION

1.1 Disclosure and the electronic age. In larger actions, disclosure of documents is one of the principal drivers of costs. It is not only the initial disclosure exercise which can be massively expensive, but also the sequelae. Witnesses, experts, solicitors and counsel all feel the need to read the documents disclosed on both sides and then to comment upon them or to deal with their implications. The arrival of the electronic age has multiplied all of these problems. Communication has become much easier and cheaper than before and is therefore far more extensive. Electronic communications are more readily preserved and retrieved, even after deletion. Embarrassing documents are no longer consigned to oblivion in the waste paper basket. Not only is electronic communication more extensive than written correspondence. It is also, at least sometimes, more candid.[1] Therefore the existence of a vast mass of electronic documents presents an acute dilemma for the civil justice system. On the one hand, full disclosure of all electronic material may be of even greater assistance to the court in arriving at the truth than old style discovery of documents. On the other hand, the process of retrieving, reviewing and disclosing electronic material can be prodigiously expensive. Certain short cuts are available, such as the use of keyword searches. However, the sheer volume of potentially disclosable electronic material which is now generated in the course of a project means that disclosure is now becoming an even more expensive process than formerly.

1.2 E-disclosure. E-disclosure is a general term to describe the processes involved in giving disclosure of electronic material. In this chapter I shall give a general description of e-disclosure, some of the benefits and pitfalls of using it and the rules which currently govern the use of e-disclosure in litigation. I shall also refer to some changes which have been suggested to improve the manner in which e-disclosure is carried out. This chapter is essentially concerned with the technical process of e-disclosure, what costs are involved and how they might be controlled.

[1] "*It is well known that people say things in e-mails which they would not dream of putting into a letter or a minute or a formal note. Further, in litigation involving allegations of conspiracy or similar allegations, it may only take one revealing statement, perhaps in an e-mail, to show clearly what people really thought…*" Per Morgan J in *Digicel (St Lucia) Ltd v Cable & Wireless PLC* [2008] EWHC 2522 (Ch).

The more general issues concerning disclosure are addressed in the following chapter.

1.3 Glossary. In this chapter I use the following abbreviations and terms.

- "EDRM" means Electronic Disclosure Reference Model.
- "Gb" means gigabite. 1Gb of data represents about 10,000 emails, or about 30 bankers boxes of papers or in the region of 100 lever arch files (there is some variance in the figures used in the industry, this is a workable example given by one service provider but there are others as used in section 6 below).
- "Service provider" is the term used to describe an IT company providing document management and electronic disclosure services.
- "Terabyte" means 1,000 gigabytes.

2. RULES

2.1 Rules. CPR Part 31 deals with disclosure. Electronic documents and electronic disclosure are not mentioned in the body of Part 31, but the Practice Direction to Part 31 (which I shall refer to in this chapter as the "PD") does deal with electronic disclosure.

2.2 Practice Direction. The PD in summary provides as follows. Paragraph 2A.1 of the PD extends the definition of "document" in rule 31.4 in this way:

> "This extends to electronic documents, including e-mail and other electronic communications, word processed documents and databases. In addition to documents that are readily accessible from computer systems and other electronic devices and media, the definition covers those documents that are stored on servers and back-up systems and electronic documents that have been 'deleted'. It also extends to additional information stored and associated with electronic documents known as metadata".

2.3 Paragraph 2A.2 of the PD directs that the parties should communicate and co-operate about electronic disclosure. It states that they should, prior to the first CMC:

> "discuss any issues that may arise regarding searches for and the preservation of electronic documents. This may involve the parties providing information about the categories of electronic documents within their control, the computer systems, electronic devices and media on which any relevant documents may be held, the storage systems maintained by the parties and their document retention policies".

If they cannot agree, they are directed to refer the matter to the judge for directions at the earliest possible date, if possible at the CMC.

2.4 Paragraph 2A.3 of the PD directs that parties should co-operate at an early stage as to the format in which electronic copy documents are to be provided on inspection. Again in the case of difficulty or disagreement, the matter should be referred to the judge, if possible at the first CMC.

2.5 Paragraphs 2A.4 and 2A.5 of the PD recognise the difficulties that arise with documents in electronic form, namely that they are voluminous, possibly widely scattered and may not be easy to search for disclosable material.

2.6 Paragraph 2A.4 of the PD provides: "*The existence of electronic documents impacts upon the extent of the reasonable search required by Rule 31.7 for the purposes of standard disclosure*" and sets out the factors which "*may be relevant in deciding the reasonableness of a search for electronic documents*" to include:

> "(a) number of documents involved;
>
> (b) nature and complexity of proceedings;
>
> (c) ease and expense of retrieval, including:
>
> (i) accessibility of documents on computer systems, servers, back up systems etc,
>
> (ii) location of relevant electronic documents, computer systems, servers, back-up systems etc,
>
> (iii) likelihood of locating relevant data,
>
> (iv) cost of recovering any electronic documents,
>
> (vi) the likelihood that electronic documents will be materially altered in the course of recovery, disclosure or inspection;
>
> (d) the significance of any document which is likely to be located during the search."

2.7 Paragraph 2A.5 provides that it may be reasonable to search some or all of the parties' electronic storage systems. In some circumstances, it may be reasonable to search for electronic documents by means of keyword searches (agreed as far as possible between the parties) even where a full review of the documents would be unreasonable. There may be other forms of electronic search that may be appropriate in particular circumstances.

2.8 Summary. In essence, the practice direction requires appropriate steps to be taken to encourage the use of e-disclosure: electronic documents of all types, including metadata, and from all sources are captured; the parties are required to discuss a sensible approach to the disclosure of electronic documents; the idea of proportionality of search is introduced and parties are invited to take any disputes to the court at the first case management conference ("CMC").

2.9 Comment. The steps required by section 2A of the PD have not become widespread practices or expectations. The PD is often ignored. This may be because parties are unaware of it. Alternatively, the parties may be apprehensive about electronic disclosure or its cost.

2.10 New rules. There is currently a working party, led by Senior Master Whitaker, drafting a new practice direction and a questionnaire for parties to litigation to complete. It is anticipated that these will come into effect in about October 2009.

2.11 E-disclosure questionnaire. The purpose of the questionnaire is twofold. First, to provide information to assist the parties to identify the scope of the disclosure of electronically stored information required in the action; to discuss and agree with each other the extent of a "reasonable search" under CPR rule 31.7 and to

discuss and agree the format in which disclosure should be given to the other party(ies). Secondly to give the court sufficient information about the architecture of the parties' electronic storage systems and the identity of the electronic media that may contain relevant information in the event that an application has to be made to the court on disclosure.

2.12 It will be required that the questionnaire is signed by a solicitor, client representative or IT consultant and that the person signing the questionnaire should attend each CMC at which electronic disclosure is likely to be considered.

3. WHAT E-DISCLOSURE OFFERS – HOW IT WORKS

(i) What e-disclosure is

3.1 A general definition/description of e-disclosure is the search for electronically stored documents and information and organisation of that material for litigation.

3.2 E-disclosure is necessary in cases where the vast majority of documents and information are created and stored electronically, and particularly where there is a large amount of such documents and information.

3.3 The process of e-disclosure will enable solicitors to do to electronic information what solicitors have always done in relation to the disclosure, or discovery, of paper documents:

(i) identify the extent of the relevant documentation or information, where it is and in what form;

(ii) collect that documentation and information, removing duplicates or irrelevant material; categorise it for ease of review by the legal team and place it where the legal team can review it;

(iii) if the parties proceed with litigation, review the reduced amount of documentation and information for privileged material, decide what is suitable and necessary for disclosure; list it and disclose the list to the other parties;

(iv) provide the other parties with access to the disclosed documentation and information;

(v) review and organise the documentation and information disclosed by other parties, in order to facilitate the more detailed review by the legal team.

3.4 In the "paper" age, the above steps involved visiting rooms containing documents, copying and reading the documents. Now that documents are stored electronically on individual computers, servers, hard drives and back up tapes or other systems, that "visiting" has to take another form.

3.5 Litigants must now choose from a much larger potential range of options, where they must search and for what; which servers, computers, back up devices, mobile phone records etc must be searched. Litigants must also decide what the search should be for. Possibilities are a date range; certain people who were involved in the relevant project; types of documents; types of issues; particular words or concepts.

3.6 There is now a range of electronic devices and software tools to assist the litigant in accomplishing the tasks described above. Also there are specialist

companies who will provide their services to carry out those tasks (see section 4 below).

3.7 Unless every potentially relevant document is already on paper, or is printed at the outset, then some electronic disclosure techniques will inevitably be used in any case involving electronic documents or information. This will be so for disputes ranging from large commercial claims down to a litigant in person with documents stored on a laptop.

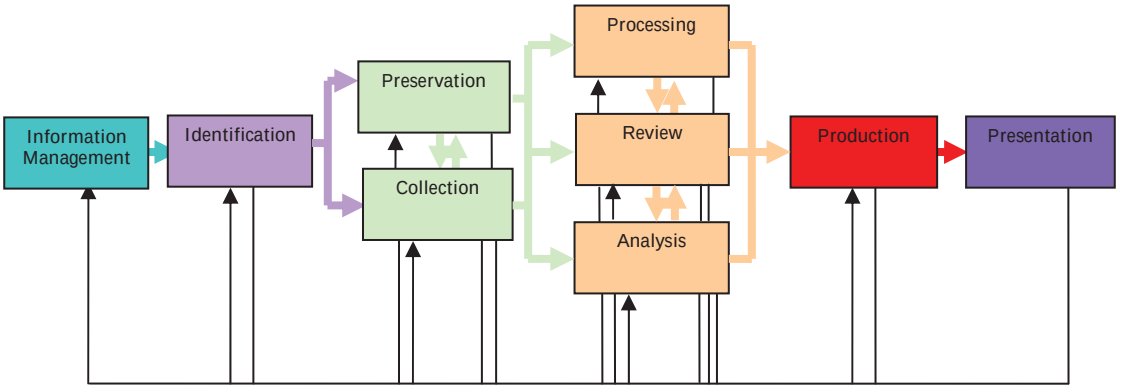
3.8 There are potential difficulties as well as advantages for litigants in using e-disclosure and both are discussed below.

(ii) How e-disclosure works

3.9 This is a brief description of the techniques used to achieve the disclosure of electronic material.

3.10 The "classic" model used by e-disclosure specialists is the Electronic Discovery Reference Model (the "EDRM") (set out immediately below). It is useful as it identifies the steps which have to be taken and how they are related.

Diagram 40.1: Pictorial representation of the EDRM



3.11 Information management. The first step in the EDRM is information management. This is the organisation by potential litigants of their electronic information, so that the relevant categories can easily be found. The equivalent traditional approach is a good filing system, as opposed to a room full of unlabelled boxes of papers. In relation to electronic disclosure, the management can for example take the form of "filing" or labelling documents, so that they are easy to search for and organise.

3.12 The obvious result of good information management is that the savings can be huge for a potential litigant, as the pool of potential information is already smaller and better organised. The first stage is obviously prior to any litigation and cannot be regulated in the litigation process.

3.13 Companies are increasingly aware of the benefits of putting document management systems into place, in case litigation should arise. This has become an increasing point of focus in the US. There are specialist service providers who deal specifically with this area of the EDRM.

3.14 Identification. Identification is the precursor to giving disclosure in the course of litigation. At this stage the documents/information which will have to be searched are identified, as are the places that will have to be searched. Solicitors or service providers who are involved at this point will have to interview the client, and often the client's IT department, to find out what kinds of documents are relevant to the litigation and where they might be.

3.15 Preservation/Collection. It is at this and the previous stage that decisions must be made about the places which should be searched and the extent of the search. Should back up tapes for example be included? This can be a very time consuming and costly exercise. In large organisations back up tapes may well be stored off site at specialist storage facilities or abroad. They may contain a vast amount of material, much of which has nothing to do with the litigation.

3.16 Collection is the process of taking information off the computers or other places where it is stored. That information is then transferred to another computer, where it can be processed and reviewed.

3.17 Preservation raises the question whether the data have to be "preserved" in the state they were in before the collection process. Metadata are the electronically stored information which record how the document was treated – how, when and by whom it was created/amended/sent etc. As soon as the collection process is started metadata will change and for some litigation the preservation of the original metadata can be critical. This is a further step to be taken, involving more time and expense. Therefore decisions must be made at an early stage as to whether forensic preservation is necessary and proportionate or not.

3.18 Processing/Review/Analysis. Processing is the loading of the data onto the system where they can be reviewed. This involves a number of technical issues, which will vary according to the state and type of the data to be loaded. At this stage the huge pool of material is reduced to the potentially relevant information, which should be reviewed by the lawyers. There are many techniques that can be employed to achieve the "cull" which is the equivalent of the junior lawyer sitting in a room of files turning pages and flagging those for selection.

3.19 Some of the more common and obvious techniques that can be used in the electronic disclosure process are as follows: de-duplication (which can itself be done at various levels, e.g. whether different metadata are to be taken into account or different computer versions of the same document); identifying email chains to avoid masses of versions of the same email; keyword searches, clustering and concept searches.

3.20 What search is good enough? One substantial issue at this stage is the idea of the "good enough" search. What will satisfy the requirement of a "*reasonable search*" under CPR rule 31.7? Traditionally it might have been expected that every potentially relevant page would be looked at by someone. Now there is the question of whether that is either possible, given the potential volumes, or desirable in terms of proportionality of cost. Many professionals in this field are hoping for further guidance from the courts as to the extent of their professional obligation to search.

3.21 Production. This is the disclosure of the information. It can be done in the traditional way by printing out and sending to the other side (increasingly rare in large cases). Alternatively, it can be done electronically by transfer onto a disk (or similar) or by means of a hosted website.

3.22 Presentation. This is the stage when the bundles are presented in court, after each side has made its selection from the documents disclosed. The documents may be presented either as electronic bundles or in paper form. Even if the trial bundle is electronic, there is may be advantage in having a core bundle in paper form.

4. HOW TO CARRY OUT ELECTRONIC DISCLOSURE IN PRACTICE

4.1 Specialist service providers. Most litigation involving electronic disclosure requires specialists in the electronic disclosure field. This has become a discipline in its own right. There are specialist companies, who will provide the services required to do one or all of the stages set out in the EDRM.

4.2 In-house teams. Many large solicitors firms have their own litigation support team which will include specialists in electronic disclosure. Often these are litigation support professionals who grew up with paper but have become expert in electronic disclosure, as that has been the inevitable direction of their work.

4.3 LiST. The litigation support specialists have set up their own body called LiST. This was formed in 2003, with the aim of encouraging and developing uniformity of approach to the use of technology in litigation and alternative dispute resolution.

4.4 The larger solicitors firms may well have software which will enable them to deal with electronic disclosure in house, but many still find it more cost efficient to out source parts of the process to specialist service provider companies.

4.5 Smaller solicitors firms will usually use a specialist provider to organise and host the whole process. The set up costs for having their own software would be high and it is an area of rapid change.

4.6 The smallest firms, and indeed litigants in person, may also need to use a specialist company to organise electronic disclosure. Even the most technologically aware may find it difficult to organise this process for themselves.

5. PITFALLS AND HOW TO AVOID THEM

5.1 Some of the main and well rehearsed complaints about electronic disclosure are that the costs can be enormous; that the processes do not necessarily lead a party to the relevant or key documents and that it can be easy for an unco-operative litigant to bury relevant material in a mass of material which is too difficult or too expensive to search effectively.

5.2 *Digicel*. The first reported case to deal with electronic disclosure, identifying some of the problems that can be encountered and offering guidance is the judgment of Morgan J in *Digicel (St Lucia) Ltd v Cable & Wireless* [2008] EWHC 2522 (Ch), which was given on 23rd October 2008.

(i) The first pitfall – lack of liaison before EDRM commences

5.3 *Digicel* concerned the claimants' application for specific disclosure in a case where the defendants had already spent some £2.175 million on the disclosure process as follows. They had carried out keyword searches in each of seven

jurisdictions in the Caribbean *in situ* and had searched the email accounts of 85 individuals. The documents had been stored on a database for a review for relevance, which took 6,700 hours of lawyers' time. By this process some 1.1 million documents were reduced to 5,200 documents comprising 83 lever arch files. Achieving this had cost some £2 million in legal fees together with disbursements of about £175,000.

5.4 At the earlier hearing at which standard disclosure by list was ordered, there had been no discussion of any particular points relating to disclosure. The parties had held no discussions as to how electronic disclosure would proceed, and the defendants had made their own decisions about how to carry out the search, and the extent of it. The result, as Morgan J pointed out, was that the unilateral decisions made by the defendants' solicitors were under challenge and needed to be scrutinised by the Court.

5.5 Importantly, the judge did state that the rules required only a "*reasonable*" search for relevant documents. "*Thus, the rules do not require that no stone be left unturned. This may mean that a relevant document, even a "smoking gun" is not found. This attitude is justified by considerations of proportionality. This point is well made by Jacob LJ in Nichia Corporation v Argos Ltd [2007] EWCA Civ 741 at [50] to [52].*" (*Digicel* judgment at [46]). The court considered what was required by a reasonable search and confirmed that it would not necessarily order the defaulting party to carry out the search which it should initially have carried out. It was open to the court to conclude that a further search would be disproportionate as regards cost and the likelihood of revealing anything worthwhile.

5.6 The result in the *Digicel* case was that the defendants' solicitors were required to meet the claimants' solicitors to discuss how the restoration of back up tapes for the purpose of searching email accounts of seven individuals could best be done. Once underway, progress should be reported by the defendants' solicitors to the claimants' solicitors on a regular basis. The court expected full co-operation between the parties and granted express liberty to apply for appropriate directions from the court if there was a dispute. Morgan J also decided that eight further keywords ought to have been included in a reasonable search. Accordingly, he ordered that further keyword searches should be carried out. He also ordered that the email accounts of 16 additional individuals should be searched. The impact of this order on the defendants was that much of the expensive work already undertaken would have to be repeated. This was largely because the parties had not paid heed to the advice in the PD that there should be (a) early discussion of issues that might arise regarding searches for electronic documents and (b) agreement in respect of keyword searches to be used.

(ii) Other pitfalls and how to avoid them

5.7 This report cannot list every potential problem or solution in e-disclosure, but the main problems regularly encountered and proposals for improvement appear to be as follows.

5.8 Case management generally. The view has been frequently expressed during Phase 1 of the Costs Review that proper case management will avoid the pitfalls of e-disclosure. One very experienced litigation support specialist has put the matter in this way: "The runaway train (in terms of costs) that is e-disclosure, can be controlled by case-management judges, with the sensible application of existing rules and by making the relevant solicitors (and the parties they represent) accountable for both the methodology to be followed during the disclosure process and, also responsible for the education of the judge on a particular matter or point. The forthcoming e-

disclosure questionnaire and the proposed new practice direction will aid the process, by clarifying the issues and flushing out potential conflicts at an early stage. Despite some of the scaremongering of certain commentators and service providers, parties to litigation in our courts will not suffer the exorbitant costs of e-disclosure that our US cousins endure, as long as our judges enforce the rules and keep an open mind as to the role technology could and should play in the process."

5.9 Other frequently expressed views are that more judicial training is required to inform the judges on this subject and to promote consistency in decisions. Further that more time, effort and costs should be expended on the early stages of EDRM (identification, collection, culling) in order to save costs overall. Parties should be encouraged to quantify what is involved at an early stage. There should be recognition that the aim is not to force electronic disclosure upon reluctant parties, but to ensure that the cost *vs* benefit analysis is made, even in small cases

5.10 Format of disclosure. Parties sometimes make disclosure in a format which is unhelpful to the other side and which requires duplication of work already carried out by the disclosing party. This causes duplication of costs. It has been suggested that this could be avoided by the parties being required to make disclosure in a suitable format. One example is for disclosure to be of PST files in native format rather than disclosure of the image of the document (TIFFS or individual message files). Much valuable information in the PST file is lost in the process of conversion to TIFFs or message files.

5.11 It has been emphasised by practitioners that it is vital to preserve the context of a document, for example by preserving the folder structure of the data, or the file hierarchy (and making disclosure in native format), rather than disclosing documents separately and not within their original folders. The paper equivalent would be to disclose files of papers which are labelled by subject or by person (showing their place in the relevant transactions), rather than to disclose an enormous box of papers in unlabelled files with, for example, meeting minutes scattered throughout. One experienced practitioner has suggested that parties should be required to produce disclosure in a manner that is cost effective for both parties, in the event that a specific format cannot be agreed upon.

5.12 Planning how to proceed. If there is no plan as to how to conduct disclosure, particularly in large cases, then costs are reported to escalate very quickly. Many practitioners urge the need for the involvement of senior lawyers at an early stage. Those senior lawyers should make the strategic decisions[2] as to how to proceed from an informed position, rather than leaving early decisions to junior lawyers, who may not be fully appraised of the issues or who may lack the necessary experience. This objective might be achieved by requiring the e-disclosure questionnaire to be signed by the solicitor in charge, and/or by requiring that solicitor to attend the CMC dealing with e-disclosure.

5.13 Practitioners and judges familiar with e-disclosure also recommend that parties obtain estimates of the potential e-disclosure costs at an early stage. Such estimates can be discussed between the parties and produced to the court if necessary. Indeed, the production of such estimates would be an essential step if the court is going to undertake "costs management" of business litigation, as discussed in chapter 48 below.

[2] After due discussion with the solicitors for other parties.

5.14 Solicitors also emphasise the need for parties to be able to take disclosure disputes to the court for resolution at early stage rather than after lengthy debate in correspondence. For this to be the norm, however, practitioners need to have the confidence that the judge will understand the issues and be prepared to make definitive orders which will clarify the way forward.

5.15 Other more specific problems. I am told that on occasions solicitors have redacted electronically sections of documents which were privileged, but that the other side's software has removed the redactions. Quite how this risk could be avoided I am not sure, but I simply draw attention to it. Another specific problem relates to key word searching when the relevant documents are in a foreign language, indeed possibly written in Cyrillic or Han characters or similar. These more exotic problems are, no doubt, fearsome when they arise, but the solution lies more in the hands of software designers than lawyers. Considerations such as these indicate just how substantial an exercise disclosure may become in the electronic era. They make it even more important to undertake a proper cost benefit analysis, when the parties are discussing or the court is determining the scope of disclosure.

5.16 Smaller cases. E-disclosure is at the moment generally only relevant in large cases with substantial sums in dispute. However, as the use of electronic documents and media becomes greater, possibly to the exclusion of paper, there is a need for more service providers to provide a service at a proportionate cost for those smaller disputes, which will still involve an unwieldy amount of electronic documents and information. Some service providers are addressing this issue: see section 6. However, it is not known how widely used these services are in smaller disputes or whether legal advisors in smaller disputes are fully aware of the options.

5.17 Education. It is understood that there is currently no inclusion of e-disclosure in the professional courses to train solicitors or barristers. There is also no generally available education for judges on the subject. The lack of effective training for all involved in e-disclosure was perhaps the most frequent complaint raised during the meetings with professionals in connection with this chapter. There is clearly a need for better education of all participants in e-disclosure, so that they are aware of the most effective tools available for e-disclosure[3] and how they should be used.

6. COSTS

6.1 The expense of disclosure, electronic or traditional, has long been a source of concern. This section will seek to set out the costs involved in e-disclosure. What is notable from the examples given is that there is a massive variation in such costs.

6.2 Smaller cases. One of the service providers offers a low cost model for smaller cases. They offer a service for processing and hosting 1Gb of data (the equivalent of 10,000 emails or 30 banker's boxes of paper) for £465 per Gb per month. This covers de-duplication and keyword searching of the documents in question; loading the resulting potentially relevant data onto a website and hosting the website for up to five users.

6.3 Typical charges in larger cases. Typical charges given as examples by a multinational service provider are: electronic document processing (extracting metadata, text, attachment relationships etc. for use on a document review system) : £250 - £1,000 per Gb of data. Document hosting on a review system : £20 - £150 per

[3] It is widely reported that some tools are better than others.

Gb per month often plus a user access fee varying between £10-100 per user. Set up fees: project or database set up fees are charged and can vary significantly from £0 to £5000.

6.4 In relation to both the examples quoted above, there are other fees which will be incurred. However, those mentioned are the main headings.

6.5. Cost models. Cost models for three hypothetical examples covering small, medium and huge cases have been helpfully provided by a City firm of solicitors, who are regularly engaged in heavy commercial litigation. These three cost models are set out in Appendix 19. The terms "small", "medium" and "huge" are applied by that firm in the context of the type of litigation in which it is regularly involved.

6.6 The cost models show that the potentially massive cost escalation comes at the point of review. This suggests that, if electronic review tools are not used to reduce the data before lawyers start to read the documents, then the costs become disproportionately large because of the sheer volume of data.

6.7 Small case. The figures provided for the "small" case are based on a starting point of 1Gb of data (note that this firm uses a slightly different model for the typical number of documents included in 1 Gb from the glossary above). It is assumed that this is hosted for eight months and that there are 52,500 pages (or 15,000 documents) after de-duplication. The estimate on standard pricing is £665 to process, and £532 to host for eight months. In addition it is assumed that there would be five lever arch files of hard documents for scanning and coding at a cost of £735. The figures in Appendix 19 do not include any assessment of, or allowance for, the cost of reviewing those documents which are selected for review by the legal team.[4]

6.8 Medium sized case. The figures provided for the "medium" example are based on a starting point of 500 Gb of data. It is assumed that this is hosted for eight months and that there are 26.25 million pages (or 7.5 million documents) after de-duplication. The estimate on standard pricing is £332,500 to process, and £266,000 to host for eight months. In addition it is assumed that there would be 100 lever arch files of hard documents for scanning and coding at a cost of £14,700. The figures in Appendix 19 do not include any assessment of, or allowance for, the cost of reviewing those documents which are selected for review by the legal team.[5]

6.9 Huge case. The "huge" example is rare but cases of this order of magnitude have been experienced by the firm in question. This is based on a starting point of five terabytes of data; 262.5 million pages (or 75 million documents). The estimate on standard pricing is £3.3 million to process; £2.6 million to host for eight months. In addition it is assumed that there would be 1,000 lever arch files of hard documents to scan and code at a cost of £147,000. The figures in Appendix 19 do not include any assessment of, or allowance for, the cost of reviewing those documents which are selected for review by the legal team.[6]

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[4] However, if all the documents in the "small" case were reviewed individually by lawyers, it is estimated that the cost of that exercise would be £62,000, as set out in Appendix 19.

[5] However, if all the documents in the "medium" case were reviewed individually by lawyers, it is estimated that the cost of that exercise would be £30 million, as set out in Appendix 19. This calculation seems to me somewhat artificial, in that assumes that one lawyer spends 7 years reading the documents and is charged out at £30 million.

[6] However, if all the documents in the "large" case were reviewed individually by lawyers, it is estimated that the cost of that exercise would be £300 million, as set out in Appendix 19. This

6.10 Case studies/cost examples. Three examples of services provided and costs incurred in actual cases were helpfully provided by a large service provider. This company focuses on a swift turn around, and a service for smaller value matters as well as the large high value matters.

6.11 The first example involved a requirement to search eight Gb of emails to identify potentially relevant documents in a case which was "time and cost sensitive". The inboxes of five custodians were searched using keyword phrase and date parameters provided by the solicitors. Over 200,000 emails and attachments were processed and searches were performed. The result was three lever arch files of paper. The task was completed between 6pm and 9am the next day. The cost was £1,800 (£200 per Gb to process and search, 10p per page to print the documents).

6.12 The second example was a requirement to search the hard drives from lap tops of 5 individuals in a claim with a value of £500,000. The irrelevant system files were removed and the remaining documents processed. There were 2.5 million documents to trawl with a focus on email, Excel and Word documents. The results were delivered on a laptop back to the solicitor who received training and support to operate the software used to manage the documents. The solicitor was able to identify potentially relevant documents within three hours of receiving the data. The entire exercise was completed within 48 hours and a fixed price of £8,000 was agreed, in order to reflect the low value of the claim. The normal pricing would have been £175 per hour to strip system files, say £500 per hard drive, and £200 per Gb to process the resulting data (typically about five Gb). The fixed price included the provision of a laptop for review and the use of the document management software which included search tools.

6.13 The third example was a dispute worth about $100 million which involved searching for all documents sent, received and created by 18 people in relation to a large project running over a two year period. The firm involved had 220 or so staff. There were 1.7 terabytes to process and search, representing 27 million documents. There were three rounds of searches which started with 220 keywords and phrases and resulted in 85,000 documents for review by experienced paralegals. Using the service provider's software and methods, the paralegals were able to perform a fast review to remove obviously irrelevant documents at the rate of 5,000 – 10,000 documents per person per day. The resulting 30,000 documents were loaded onto a litigation support database for detailed issue coding and review for privilege. The review throughput at this stage was about 500 documents per person per day. After elimination of "near duplicate" documents, the result was 12,000 documents for disclosure, mainly emails and attachments. The cost was £85,000 to process, search and cull the 1.7 terabytes of data; £2,500 per month to host the data in an online review database and £15,000 in additional services dealing with the paper documents.

6.14 The above examples may well be the product of commercial negotiations between experienced solicitors and experienced service providers. The costs which will be involved in e-disclosure must be the subject of thorough investigation and consideration at the outset of any case.

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calculation seems to me somewhat theoretical. It assumes that one lawyer spends 24 years (i.e. most of his working life) reading the documents and is charged out at £300 million.

7. E-DISCLOSURE IN OTHER JURISDICTIONS

(i) The USA

7.1 The jurisdiction with the greatest experience of electronic disclosure is the USA. Although e-discovery has been in use for some time in US litigation, rules to govern its use were only introduced in 2006, when appropriate amendments were made to the Federal Rules of Civil Procedure ("FRCP"). The rules require early attention to be given to electronic discovery in litigation. This encourages companies to understand and organise their electronic data systems. At the compulsory initial discovery conference, litigants are required to discuss issues relating to preserving discoverable information and discovery of electronically stored information ("ESI"), including the forms in which it should be produced as well as privilege issues.[7] The parties' initial disclosures following the discovery conference must include descriptions of ESI by category and location, and results of the conference are to be reported to the court. The rules pay particular attention to the forms in which ESI is produced which enables parties to request that ESI be produced in native format with metadata included. The rules also require a balancing test as to ESI that is difficult or costly to locate or produce, such as data stored on back up tapes.[8] There are sanctions for non-compliance with e-discovery requirements, which can be imposed on the clients and the lawyers. These have proved highly controversial.

7.2 Sedona principles. Recommendations as to how to approach the rules are set out in "*The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production*", produced by the Sedona Conference Working Group which can be found on the Sedona Conference website.[9] The Sedona principles emphasise the importance of co-operation in relation to e-disclosure. The importance of co-operation is also emphasised in the "Co-operation Proclamation" produced by the Sedona Conference.

7.3 Costs. The costs of e-discovery, like the costs of discovery generally, fall upon the party who is disclosing. However, the Sedona principles recognise that on occasions it is appropriate to shift this costs burden. Principle 12 states:

> "The reasonable costs of preserving, collecting and reviewing electronically stored information will generally be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order."

I understand that certain US judges (both state and federal) do on occasions make orders for e-discovery on condition that the requesting party meets the costs. This has a marked effect in restricting the demands which are made for e-disclosure. See further chapter 41, paragraph 6.12.

7.4 Concept searching. I am told by one Federal Court magistrate judge, who has great experience of e-disclosure, that keyword searching is not proving as effective as was hoped. Concept searching is more effective. Concept searching involves linkage of words.

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[7] FRCP rule 26 (f).
[8] FRCP rule 26 (b)(2)(B).
[9] www.thesedonaconference.org.

7.5 Accidental disclosure of privileged material. It is recognised that privileged material is liable to be disclosed accidentally during e-discovery and that this may not amount to waiver of privilege. FRCP rule 26(f)(3) provides:

> "A discovery plan must state the parties views and proposals on: (D) any issues about claims of privilege or of protection as trial-preparation materials, including – if the parties agree on a procedure to assert these claims after production – whether to ask the court to include their agreement in an order."

(ii) Australia

7.6 In Australia, a new Practice Note (No. 17) came into effect on 29 January 2009 for the Federal Court. Paragraph 1.2 provides that the code set out in the Practice Note is to be used in "*any proceeding in which the Court has ordered that:*

> *(a) discovery be given of documents in an electronic format; or*
>
> *(b) a hearing be conducted using documents in an electronic format.*

7.7 The Practice Note provides in paragraph 1.3 that:

> "It may be expected that an order of the nature mentioned in paragraph 1.2 will be made in any proceeding in which:
>
> (a) a significant number (in most cases, 200 or more) of the documents relevant to the proceeding have been created or are stored in an electronic format; and
>
> (b) the use of technology in the management of documents and conduct of the proceeding will help facilitate the quick, inexpensive and efficient resolution of the matter."

7.8 The Practice Note goes on to set out a code to govern all aspects of disclosure including the requirement to have a disclosure meeting at an early stage and to agree a procedure in accordance with the schedule set out.

7.9 I understand from discussion with Australian Federal judges at the end of March 2009 that the Practice Note proved satisfactory during the first two months. It is hoped that there will be further feedback as to the operation of and reaction to this new Practice Note during the course of the present Costs Review.

8. CONCLUSION

8.1 Need to consider e-disclosure. In every substantial case where documentation is held electronically, consideration must be given to the problems involved with and the costs of e-disclosure. The electronic material may be so extensive that it is impracticable to print all documents out and then to proceed with conventional disclosure. In that event there is no alternative to e-disclosure.

8.2 Request for feedback. It would be helpful to hear from recent users concerning their experience of e-disclosure. In particular it would be helpful to hear from users whether and to what extent (a) any particular approach to e-disclosure has saved costs in particular cases and (b) conversely any approach to e-disclosure has caused wastage of costs in particular cases.

8.3 I have indicated in section 5 above some methods by which the costs of e-disclosure might be controlled. During Phase 2 I should be pleased to receive any comments on those issues. I should also welcome any other proposals for controlling disclosure costs in cases where the underlying project or transaction generated extensive electronic material. For example, if we introduce into our CPR some similar provision to FRCP rule 26(f)(3), might that help to reduce both the risks and the costs of e-disclosure (because the lawyers would be at less risk of accidentally waiving privilege)?

8.4 It would also be helpful to hear whether the costs figures supplied to me, and set out in section 6 above, accord with the experience of court users.

CHAPTER 41. DISCLOSURE GENERALLY

1. INTRODUCTION

1.1 It is generally thought that the best way to achieve justice between the parties is if all of the relevant information is before the court and the "*cards are on the table*" (per Sir Lord Donaldson MR, *Davies v Eli Lilly* [1987] 1 WLR 428). It is often said that one of the main draws for multinational commercial disputes to our Royal Courts of Justice is the thorough and probing disclosure process. However, several practitioners have suggested that radical reform is required.[10] I am fully aware of the grave concerns expressed by some that it would be fundamentally wrong to restrict the scope of disclosure. However, given that limited/no disclosure is proven to work satisfactorily in other jurisdictions, these approaches must at least be considered a possibility at this stage.

1.2 After weighing up the pros and cons of all approaches it may well be that the expansive approach is preferable for many categories of litigation. However, that may not prove to be the most appropriate approach in all circumstances, particularly once the considerations of the overriding objective have been properly considered and applied to any specific case. Possibly the rules should be more flexible. Alternatively, it may be that the existing provisions are fit for purpose but they should be applied with more consideration. It may be that different procedures (or at least different default positions) should be adopted in the various courts or for different types of cases. These are matters that must be grappled with over the remainder of the review.

1.3 Reining in the costs of disclosure is and will be a controversial issue, as demonstrated by the disparate arguments for reform that have been proffered to date by practitioners and interest groups. As yet, I have not formed any conclusion as to the best way to proceed and I look forward to discussing these issues further in Phase 2.

1.4 References in this chapter to views expressed by practitioners are references to (a) views expressed in submissions for Phase 1; (b) views expressed at public meetings which I have attended during Phase 1; (c) views expressed at meetings which I have had with specific interest groups during Phase 1; and (d) views expressed to my judicial assistant during her discussions with solicitors concerning disclosure issues.

2. CURRENT RULES AND THEIR OPERATION IN PRACTICE

2.1 The rules. The rules for disclosure are in CPR Part 31 and the accompanying practice direction (which I shall refer to in this chapter as the "the PD").

2.2 There is no automatic right to disclosure. A party (or non-party) is only obliged to provide disclosure if, and to the extent, directed to by the court. The general rule is that an order to give disclosure is an order to give standard disclosure[11] unless the court directs otherwise.[12] The court has the power to dispense with or to limit standard disclosure[13] and such power should be exercised in accordance with

[10] See, for instance, my discussion with the commercial litigators in chapter 10.
[11] See paragraph 2.14.
[12] CPR rule 31.5(1).
[13] CPR rule 31.5(2).

the overriding objective. Currently, it seems that the utilisation of this power to restrict disclosure is not often given serious consideration. Additionally the parties may agree to dispense with or to limit disclosure; this should be evidenced in writing.[14]

2.3 Application of the rules to the various tracks. CPR Part 31 does not apply to the small claims track.[15] Instead a direction is usually given for each of the parties to serve upon the other parties copies of the documents that it intends to rely upon at the hearing (typically 14 days in advance).[16] In fast-track and multi-track cases directions are usually given at the first case management conference ("CMC") immediately after the completion of the allocation questionnaire. Prior to the CMC the parties should consider and try to agree what sources will be searched, how any e-disclosure will be dealt with and how the documents should ultimately be provided to the other party. The Commercial Court has recently trialled a new approach. This is discussed below.

2.4 Standard disclosure. Standard disclosure, pursuant to CPR rule 31.6, requires a party to conduct a reasonable search and to disclose (a) the documents on which he relies; (b) the documents which – (i) adversely affect his own case; (ii) adversely affect another party's case; or (iii) support another party's case; and (c) the documents which he is required to disclose by a relevant practice direction. The extent of this obligation is referred to in paragraph 2.12 below. A "document" includes all media on which information is recorded including electronic information. It can in principle extend to metadata and deleted data.

2.5 Reasonable search. The current disclosure test is based on proportionality, and it seeks to balance probative usefulness relative to cost and effort. The parties must carry out reasonable searches for documents bearing in mind all of the circumstances of the case, the value of the dispute and the overriding objective of dealing with the case justly. CPR rule 31.7(2) explains that the relevant factors include: (a) the number of documents; (b) the nature and complexity of the proceedings; (c) the ease and expense of retrieval of any particular document; and (d) the significance of any document which is likely to be located during the search.

2.6 List of documents. Disclosure is fundamentally as simple as "*stating that a document exists or has existed*"[17] and it is given by providing a list of documents. It is a separate procedural step to "inspection" (see paragraph 2.13 below).[18] The list is usually provided on Form N265. This is split into three main sections: (a) documents in a party's control which can be produced for inspection; (b) documents in a party's control which it objects to producing for inspection; and (c) documents which are no longer in a party's control. Under the current rules each document should be numbered and individually listed in one section of the list. The list must also include a disclosure statement.[19]

2.7 Part of the reason that a party's solicitors will thoroughly review all of the documents before providing disclosure, over and beyond the necessity to understand the documents, is the desire to identify any documents that could be listed in part (b) of the list because they are privileged. If this is not done and a privileged document is

[14] CPR rule 31.5(3).
[15] CPR rule 27.2(1)(b).
[16] CPR Part 27 PD paragraph 2.2 and Appendix B thereto.
[17] CPR rule 1.2.
[18] However, generally, "disclose" is used to include "inspection" as well.
[19] See the PD paragraph 4 and the Annex thereto.

handed over to the other party as part of the disclosure process, the privilege will be deemed waived and the other party may rely upon it in court.

2.8 If a party compiles its list thoroughly, it will save the other parties time and costs. Conversely, if a party compiles the list inadequately it is likely to cause the other parties to incur additional costs working out what documents the list actually contains. Practitioners indicate that it is only in extreme circumstances that sanctions for a defective list are imposed and even then it is likely to be a rebuke rather than anything more substantive.

2.9 Disclosure statement. Each party is obliged to explain the extent of the searches conducted - what it has done, what it has not done and the reasons why any search has been limited. This open approach facilitates challenges to the reasonableness of the search by way of threatened or actual specific disclosure applications.

2.10 Specific disclosure. Sometimes there are grounds to doubt whether all necessary searches have been made and disclosable documents located. The court therefore has the power to order specific disclosure.[20] This can entail an order (a) to disclose specific documents or classes of documents; (b) to carry out searches; and (c) to disclose documents located as a result of the searches. If it is to be successful the application should clearly define the class of documents sought and explain why the documents are *relevant* and why it is *proportionate* in the circumstances of the case to obtain disclosure of/search for the documents.

2.11 The rules do not stipulate the circumstances in which specific disclosure orders may be made or their purpose. Rather, following the overriding objective, the court's discretion is used. Usually, such an order is made when a party has failed to comply adequately with its disclosure obligations, so that the documents which the court orders to be disclosed effectively amount to standard disclosure. However, in some cases, the power is exercised more broadly to order very wide disclosure (up to *Peruvian Guano* level: see paragraph 2.12 below). This can be a useful tool in fraud cases or where a party is suspected of questionable practices. Unless otherwise directed by the court, there is no limit to the number of specific disclosure applications that can be made. As there are no criteria to be met before an application can be brought, it is thought by many that this process is abused by parties on "fishing expeditions" who are simply hoping that useful documents will be uncovered and by those who wish to use the process as a diversionary tactic so that the other party's resources are diverted.

2.12 What standard disclosure entails. Standard disclosure[21] is narrower than the pre-1999 "discovery" obligation. Discovery included not only documents which supported or were adverse to any party's case, but also any documents which had an indirect bearing on the issues in that they could lead to a "train of inquiry" that could produce relevant information (*Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 Q.B.D. 55). Further, standard disclosure does not include "relevant" documents – these are documents that are relevant to the issues in the proceedings but that do not obviously support or undermine either side's case. However, in practice, it seems that parties continue to disclose this broader category of documents. Reasons for this include a desire (a) to avoid being subject to specific disclosure applications; (b) to avoid having to repeat the disclosure process if the case being met or run is amended slightly; (c) to avoid judicial criticism for not having disclosed documents sooner; (d) to avoid difficulties in assessing whether a

[20] CPR rule 31.12.
[21] See paragraph 2.4 above.

document assists the other party's case (in circumstances where it is unclear from the pleadings); and (e) to enable the disclosure process to be completed by more junior staff (which is consequently cheaper).

2.13 Limiting standard disclosure: having consideration for the overriding objective. The court should be willing to exercise its discretion to refuse or limit disclosure on the basis that the disclosure sought would be unduly expensive, inconvenient or troublesome in comparison to the potential forensic benefits to be gained. The Technology and Construction Court Guide identifies circumstances in which standard disclosure may not be appropriate:

(i) The amount of documentation may be considerable, given the complexity of the dispute and the underlying contract or contracts, and the process of giving standard disclosure may consequently be disproportionate to the issues and sums in dispute.

(ii) The parties may have many of the documents in common from their previous dealings so that disclosure is not necessary or desirable.

(iii) The parties may have provided informal disclosure and inspection of the majority of these documents, for example when complying with the pre-action Protocol.

(iv) The cost of providing standard disclosure may be disproportionate.

(v) In such cases, the parties should seek to agree upon a more limited form of disclosure or to dispense with formal disclosure altogether. Such an agreement could limit disclosure to specified categories of documents or to such documents as may be specifically applied for.

2.14 Inspection. The other parties can ask to inspect the documents listed unless (a) the first party is entitled or has a duty to withhold inspection; (b) the document is no longer within the party's control; or (c) it would be disproportionate to permit inspection. Often inspection is done by way of exchange of copy documents. Save in a few limited and well-defined circumstances, no person has a right to withhold from the court information that is relevant to an issue before the court.[22] A specific inspection application can be brought if one party wishes to challenge another party's assertion that a document cannot be inspected.[23] It seems to be general practice to request inspection of all the documents that the other party is willing to produce. It has been noted that when giving electronic disclosure a party may simply provide a copy of the document in a "TIFF" format rather than in its native format on the basis that privileged information may be contained in the metadata. However, the file conversion process may be expensive and specific disclosure applications may in any case be made to obtain the documents in their original format.

2.15 Non-party disclosure.[24] Documents can be sought from non-parties where they are likely to support the case of the applicant or adversely affect the case of another party to the proceedings. An applicant must also show that the requested disclosure is *necessary* to (a) dispose fairly of the claim; or (b) save costs. In such applications a balance must be sought between (a) the litigant's interest in obtaining disclosure and the case being brought to an end more quickly and cost effectively and (b) the non-party's interest in protecting its privacy, confidentiality or other interest.

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[22] The reasons documents may be withheld from inspection are privilege, the interests of others and commercial sensitivity.
[23] CPR rule 31.12(3).
[24] CPR rule 31.17.

2.16 Pre-action disclosure and costs burden. Disclosure can be sought before proceedings are commenced where:

(i) the party whose control the document is likely to be in is likely to become a party to proceedings with the party bringing the application;

(ii) if proceedings had been commenced the documents would fall within the ambit of disclosure; and

(iii) disclosure of those documents is desirable in order to (a) dispose fairly of the proceedings; (b) assist the resolution of the dispute without proceedings or (c) save costs.

Even if the court is minded to grant any order, the party applying for the order is very likely to bear the costs of the application including the other party's costs of complying with any order.[25] I am told by personal injury defence solicitors that pre-action disclosure has become a "cottage industry", in which claimant solicitors frequently pursue applications and claim costs on the basis of minor protocol breaches; such applications are even made in weak cases that are not pursued further. The complaint by defence solicitors is that these applications generate costs to no useful purpose. The position of claimant solicitors is that defence solicitors frequently withhold information or documents that are necessary for the claim to be assessed or progressed. Without going into the rights and wrongs of this issue, I very much hope it will be overtaken by the "new process" which is being developed (see chapter 26).

2.17 The disclosure process. The process of reviewing and preparing disclosure is much more pervasive to the litigation process than simply an exchange of lists and documents between the parties, and there are various stages at which costs will be incurred (see paragraph 3.3 of chapter 40). This is particularly true if vast sources of information need to be re-searched following a successful application for specific disclosure. I address this further below.

3. DO THE RULES OPERATE EFFECTIVELY?

(i) Litigation where disclosure does not involve substantial resources and expense

3.1 In the majority of cases disclosure appears to work reasonably well:

- Small claims. The dis-application of CPR Part 31 and the simplified directions suggested in the Annex to the Practice Direction in Part 29 are generally sufficient to deal with these cases.
- Fast track. In cases where the factual disputes fall within a defined area, disclosure rarely seems to become a disproportionate issue.
- Personal injury. The Pre-Action Protocol for Personal Injury Claims sets out fairly prescriptive lists of the documents that must disclosed. This has given rise to the issues mentioned in paragraph 2.16 above. However, once litigation is under way, I am not aware of the disclosure rules giving rise to problems. Personal injury litigation does not usually require large scale disclosure or give rise to the substantial problems discussed later in this chapter.

[25] CPR rule 48.1.

- Judicial review. Disclosure orders are not normally made in judicial review cases. However, in such proceedings both public bodies and claimants are under a general duty to place before the court all material facts known to them.[26] Therefore each party produces the documents that it considers relevant. This is usually done when the claim or summary or detailed grounds of defence are filed. The current regime appears to work satisfactorily.

Research carried out for the Department of Constitutional Affairs in 2005 has confirmed that, in the general run of county court litigation, the disclosure regime under CPR Part 31 is working satisfactorily.[27]

(ii) Litigation where disclosure involves substantial resources and expense

3.2 Multi-track. Disclosure appears to cause the most problems in the larger multi-track cases. The facts are often the subject of extensive dispute, and may be complicated or technical. In *Digicel*,[28] the oft cited case illustrating the disastrous cost consequences of a mismanaged disclosure process, the cost of the initial disclosure exercise (before it was ordered to be re-done) was over £2 million. I am told that this is by no means a large amount to be spent on disclosure.

3.3 The parties in such cases tend to be companies, often multinational corporations. This creates further challenges:

- It is likely that many people within the organisation (potentially including those individuals who have left the company) will need to be contacted to determine where potentially relevant documents may be kept.[29]
- The documents may be located in various places around the world.
- Even with a desire to keep costs low, it is more likely that a budget will be available that can absorb large costs. A client may therefore instruct his solicitor to leave "no stone unturned". This can lead to numerous specific disclosure applications being made to exhaust all possible sources of documents, sometimes on a "fishing expedition" in the hope, rather than expectation, that useful documents will be disclosed.
- Documents are likely to be held electronically and in different forms on various back-up systems. The starting position will usually be that these documents should be searched, or at the very least collected. This in itself is time (and therefore cost) consuming. It also has the knock-on effect of requiring a de-duplication exercise to be undertaken. The costs of, and problems associated with, e-disclosure are discussed further in chapter 40 and need not be repeated here. They are nonetheless central to the issues that must be grappled with if the costs of disclosure are to be controlled.

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[26] See *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All E.R. 941 and *R. (Tshikangu) v London Borough of Newham* [2001] EWHC 92 Admin at [23]. Stanley Burnton J in the latter case was addressing the duty of a party on a without notice application for permission. However, it is difficult to see that parties would be under any lesser duty in relation to the main hearing.

[27] Peysner and Seneviratne, "*The management of civil cases: the courts and post-Woolf landscape*", DCA research series 9/05, November 2005.

[28] Referred to in chapter 40.

[29] Although Lord Woolf recognised this potential problem in his Final Report and stressed that there is a limit to the lengths that a party must go to in order to contact ex-employees.

3.4 Patent cases. The Practice Direction to CPR Part 63 contains specific provisions[30] in relation to validity and infringement cases in patent litigation. In infringement cases disclosure can be avoided if a full description of the product or process is provided. Some praise this simplified approach. Others express concerns, as these descriptions are usually seen to be drafted by the lawyers and tailored to fit their client's case (as the document will be drafted once the statements of case have been exchanged). To date I have not had the opportunity to discuss this with interested parties nor was this matter addressed in the Phase 1 submissions. I would welcome comments during Phase 2.

3.5 Possible extension of the "full description" procedure beyond patent cases. If the "full description" procedure is generally regarded as satisfactory in patent infringement cases, then the question arises whether a similar procedure might save costs in any other discrete areas of litigation. This is another issue upon which I would welcome assistance from specialist Bar associations and specialist solicitors associations during Phase 2.

4. PERCEIVED DIFFICULTIES WITH THE CURRENT PROCESS

4.1 As mentioned above, the process of providing and reviewing disclosure can be a very time consuming and costly exercise. Lord Woolf's reforms were aimed at limiting the scope and consequently the costs of disclosure. However, if anything, this cost centre has spiralled over the last ten years. Why is this? Several possible explanations have been suggested to my judicial assistant and myself over the past four months, which I would summarise as follows:

4.2 Growth of electronic communications. The amount of business conducted and recorded electronically has grown exponentially. Employees and individuals are quick to send emails. All documents created electronically can be tracked. Businesses have more sophisticated methods of retaining documents and computer specialists also have the capability to reconstruct deleted documents. These additional backup documents are arguably disclosable. Even when a party does not initially provide such documents for inspection, it may often be required to do so as a result of a specific disclosure order – usually at vast expense and sometimes with no discernable benefit at the end. Also, as discussed in the previous chapter, in order to deal with the vast scale of electronic communications, active management of e-disclosure is becoming a necessary tool in some cases. Practitioners and the judiciary alike are (often) not sufficiently well trained or experienced to determine the best way to deal with these vast amounts of data. Further, and perhaps more importantly, the parties do not enter into meaningful dialogue at an early enough stage. A large amount of costs can therefore be wasted if the disclosure exercise is not done with sufficient forethought, *Digicel* being a prime example.

4.3 Consequential costs. The costs incurred as a result of the disclosure process are not limited to those incurred in the initial review by the disclosing party and a review by the other side. The number of documents disclosed has a consequential effect on the rest of the process. Witness statements and cross-examination are longer as the witnesses feel the need to comment on the documents. The same applies to the experts. Counsel also look at the additional documents and deal with them in their written submissions. The trial bundle may become gargantuan. Indeed, last year I tried a case where the bundle occupied more than 500 ring files. The vast majority of the documents were never referred to.

[30] Although there are plans to amend the wording of these provisions with effect from 1st October 2009, the substance will remain the same.

4.4 The obligation to search for and identify disclosable documents remains ostensibly the same as the pre-1999 procedure. Standard disclosure reduces the amount of documents disclosed, in comparison with the "train of inquiry" discovery required pre-Woolf. However, the current test does not reduce the extent of the documents which the solicitors on each side are initially required to review.

4.5 Duplicative disclosure. Parties often provide multiple copies of one document. This is time saving for the providing party, but adds substantial cost for the receiving party as they may need to undertake a thorough review of each document to determine whether (a) it is simply a duplicate document or (b) it is different in a way that is material to the case. This can be a particular problem in fraud cases.

4.6 Lack of co-operation. The cost problems associated with disclosure seem to occur more frequently in cases where the parties do not take a constructive approach to the process. Notwithstanding the acknowledged deterrent of summary assessment, specific disclosure applications are still deployed tactically and the court will often indulge them. This approach to litigation (it is said) is sometimes taken by large commercial players who have the resources to throw at such "distractions". The parties' duty to co-operate, introduced by the Woolf reforms, was seen as a fundamental and welcome cultural shift in the litigation process. However, in the larger more complex cases, this practice of co-operation is not invariably apparent. Furthermore, it has been suggested that (a) the judiciary are slow to sanction parties which fail to co-operate and (b) often judges are seen only to step in once it becomes clear that the parties are failing to make progress. By this point, significant costs may already have been incurred.

4.7 Failure to follow agreed procedures. It is said that even when the parties can agree a manner in which to provide documents including, where applicable, disclosure reference numbers so that documents can be easily identified, a substantial number of parties still default or renege on these agreements. It is said that the court does not impose sufficiently strong, if any, sanctions against defaulting parties.

4.8 Specific disclosure applications. There is a perception by some that the court is too willing to entertain requests for specific disclosure in circumstances in which a vaguely tenable explanation is put forward as to why some documents that may be found could be relevant. This in turn informs advice given to clients as to what they must disclose: i.e. it is better to provide *Peruvian Guano* disclosure than to face specific disclosure applications. This has the knock-on effect that significant numbers of documents will be disclosed, which the other party feels obliged to review.

4.9 In some cases, lack of adequate and continuous case management by an informed master/judge. The disclosure process can be long and protracted and in large cases there may be staged disclosure. Sometimes the parties revert to the court when disclosure directions have purportedly been breached. Sometimes there are numerous specific disclosure applications. Although there may be repeated interim disclosure hearings throughout a case, these are not necessarily heard by the same master/judge. The effect is that the basic facts and issues of the case are repeated at the start of each application, ultimately lengthening the court time taken to hear each application. More pertinently, this means that the master/judge may not be able adequately to assess whether, given the history and surrounding circumstances, the particular disclosure order sought is reasonable. It has been suggested that the use of

different masters/judges throughout the pre-trial stage not only decreases the value added by the court, but it more readily allows a party to use interim applications tactically. Others suggest that the masters/judges are allowed insufficient reading in time.

5. OTHER APPROACHES TO DISCLOSURE

5.1 The IBA rules. In international arbitration, some use the IBA Rules on the Taking of Evidence in International Commercial Arbitration[31] as guidance for the document production process (the arbitration term for "disclosure"). In summary, the IBA process is as follows:

(i) Each party submits the documents upon which it relies (unless already submitted by another party).

(ii) Each party has the right to submit a "Request to Produce". This must: (a) either be a request for specific identified documents or narrow categories of documents; (b) describe how each requested document is relevant and material to the outcome of the case; and (c) include a statement that each document is not within the possession or control of the requesting party and explain why it is assumed to be in the control of the other party.

(iii) The other party must then provide all documents from the list within its possession or control, unless it provides a written objection to the tribunal. Objections may be raised on the grounds that the document is (a) insufficiently relevant or material; (b) privileged; (c) unreasonable to search for; (d) lost or destroyed; (e) confidential; or (f) politically sensitive.

(iv) The tribunal will rule upon whether the documents which each party objects to providing should be produced.

(v) Each party may subsequently submit any additional documents which become relevant and material as a result of issues raised by the other party in its documents, witness statements, expert reports or submissions.

5.2 The ability to seek, what is effectively, specific disclosure ensures that documents which are material yet may not have been disclosed initially (either inadvertently or for darker reasons) can still be obtained. One point that users of the IBA guidelines note is that the rules can be applied very differently depending upon the constitution of the tribunal. Tribunals comprised of members of the English judiciary and Bar or from North America tend to be fairly receptive to requests for additional documents. However, their European counterparts are very resistant to such requests, requiring very good evidence that the documents requested are material to the issues. Further, strong tribunals will set one single deadline for all document requests (save for the exception in (v) above), thus allowing the proceedings to flow smoothly and eliminating the additional costs and delays associated with multiple disclosure applications. Interestingly, clients seem to be generally more pleased about having a tribunal which controls the process and continues to push it forward than they are concerned about the extent to which a tribunal entertains requests for document production.[32]

5.3 Some of the submissions sent to me during Phase 1 have mooted the idea of moving to a system similar to the IBA Rules. Others have specifically warned against

[31] These are published by the International Bar Association. See in particular articles 3 and 9.
[32] Anecdotal evidence from an experienced practitioner.

such an approach. One issue for consideration in Phase 2 is whether such a regime should be the default position in any, and if so what, categories of litigation.

5.4 The approach trialled in the Commercial Court. Following the Report and Recommendations of the Commercial Court Long Trials Working Party, the approach currently being trialled in the Commercial Court is that disclosure should not take place until the scope of such disclosure has been addressed at the first CMC. The starting point will still be standard disclosure. However, in complex or very large cases the court may ask the parties to produce a schedule (in a specified format) to help the court to decide whether disclosure should be restricted or extended beyond standard disclosure. By reference to the list of issues, the schedule should set out whether standard or other disclosure is required and, so far as possible, the documents which each party wishes to be produced by the other parties and the stage or stages at which it is said the documents should be disclosed.

5.5 As recorded in section 11 of chapter 10 above, certain London litigation solicitors have concerns about this approach. They do not disagree with the reform in principle, but find it difficult to see how the change will be implemented effectively without further judicial resources.

5.6 Disclosure in Continental legal systems. As explained in chapter 55, the standard position in German litigation is that no disclosure is required. Only if facts are controverted will relevant documents need to be lodged at court. Following this, the court may order disclosure of specific documents if they seem likely to be pertinent. In France, again, there is generally no disclosure although a party may make a request to the court for a specific document if the request is legitimate and necessary.[33] The position is similar in the Netherlands.[34] This approach seems to be regarded as satisfactory by court users and lawyers in those jurisdictions.

5.7 Australia. As set out in chapter 58 below, a number of courts in Australia are now restricting discovery with signal success. This appears to be reducing litigation costs and generally meeting with the approval of court users.

5.8 USA. Discovery is now emerging as a major, indeed the major, problem and driver of costs in civil litigation. Attempts to rein this back, including modest amendments to the Federal rules of Civil Procedure, have not yet proved effective. It may possibly be that more radical reforms are on the horizon. See chapter 60 below.

6. REVIEW

6.1 The issues to be considered during Phase 2 include:

- Is the current scope of standard disclosure the right benchmark?
- How can the desire to do justice in all cases be balanced against the need to keep costs proportionate and reasonable?
- How can the cost centres be reduced, and not merely shifted from one party to another?
- Can "justice" be achieved even with a more restrictive scope of disclosure?

[33] See chapter 56 below.
[34] See chapter 57 below.

- Should there be sanctions for those who provide too much and/or duplicative disclosure?
- In relation to cases with a substantial amount of e-disclosure, how can parties be made to co-operate from the outset in determining how the information should be assimilated and what searches should be run?
- Is there a way to condense the various processes so that the documents are not reviewed *en masse* so many times?

In this regard, I set out below a number of proposals which merit consideration.

6.2 Option 1: Make no change. It is considered by many that one of the strengths of English litigation is that parties must disclose documents that are adverse to its case. Indeed, it is often cited as one of the attractions of the English courts as a forum for international disputes. Unless a genuine and implementable improvement can be made to the regime, it may be worth leaving the current system in place. The current system allows for standard disclosure to be dispensed with in favour of restricted or expanded disclosure. The problem may lie in the implementation of the rules rather than the rules themselves.

6.3 Option 2: Abolish standard disclosure and limit disclosure to documents relied upon, with the ability to seek specific disclosure. This would be akin to the IBA rules approach. It would drastically reduce the number of documents disclosed in "heavy" cases and the ensuing costs which result. The parties would remain under a general duty to place before the court all material facts know to them. However, they would not be under a duty to spend thousands (or in some cases millions) of pounds in searching out documents which may, just possibly, assist their opponents. If option 2 is adopted, careful consideration will need to be given to the extent to which specific disclosure applications will be permitted. Furthermore, if option 2 is adopted, it could either be adopted generally or, alternatively, adopted for specific categories of litigation.

6.4 Option 3: "Issues based" disclosure. This approach would be akin to that being trialled by the Commercial Court.

6.5 Option 4: Revert to the old "discovery" test. On the basis that this appears to be the test applied by many practitioners anyway, it may be worth considering the re-introduction of the "trail of enquiry" test.

6.6 Option 5: No default position. Another possibility is that the various breadths of disclosure could be set out in the relevant practice direction. With no default position, at the first CMC the parties and the court would be forced to turn their mind to what would be the most appropriate process to adopt in those proceedings.

6.7 Option 6: More rigorous case management. One school of thought is that the current problems stem from the way that the present rules are applied. The general position could remain the same, but the rules could be applied more effectively, including:

(i) Greater use of sanctions against parties that provide disclosure in a haphazard manner or who are late in providing disclosure (see chapter 43 for further discussion regarding delay);

(ii) Ordering the parties to meet before the production of their disclosure lists to determine a constructive and agreed process and scope; or

(iii) (On the basis that parties usually ask for inspection of all documents on the list) Allow the disclosure list to be completed by categories of documents, rather than require that each document be listed individually.

If option 6 is adopted, some further steer should be given in the rules as to how the court's discretion should be exercised.

6.8 Option 7: Use of disclosure assessors. One option which merits consideration for "heavy" cases only is the use of disclosure assessors. A disclosure assessor would be an experienced lawyer appointed to assist the court in relation to disclosure. He/she could immerse himself/herself in the issues and the primary documents and identify which categories of documents on both sides truly merit disclosure. Such a person would have far more time to master the details of the case at an early stage than any case managing judge or master would have. Experienced or retired solicitors[35] or retired judges may be suitable for appointment as disclosure assessors. The costs would have to be shared between the parties in the first instance, but could form part of the costs in the case at the end of the day. Obviously, this would add another layer of costs, running to thousands or tens of thousands of pounds. However, in a major case where the parties are investing millions of pounds in the disclosure process, the costs of a disclosure assessor may be a drop in the ocean and may achieve substantial savings overall.

6.9 The possible use of disclosure assessors was canvassed by myself at the meeting with commercial litigators on 29th January 2009 and was regarded as being worthy of further consideration.[36] I have subsequently discovered that a broadly comparable scheme has been used with some success in certain US courts.[37]

6.10 Option 8: Restrict the number of specific disclosure applications and/or raise the standard to be met. One solution to the numerous disclosure applications that are made is for there to be a more stringent test for when specific disclosure applications can be made, and how often they can be made. Possibilities include:

- Allow only one specific disclosure application per party, to be made within a specified timeframe ordered by the judge/master; or
- Make it necessary to show that a document is *material* to the issues in dispute, by reference to the list of issues or pleadings;
- Adopt the "necessity" test used in non-party disclosure applications.

6.11 One potential caveat to the above would be for fraud cases. Here it seems desirable, and almost necessary, to ensure there is the ability to probe for further documents if, as the case continues, it becomes apparent that documents have been withheld. In such cases it is often only as particular documents are disclosed that it becomes apparent that there are other categories of documents, not yet identified, which are material to the issues.

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[35] Possibly commercial solicitors in their 50's recently retired from City firms.
[36] See chapter 10, section 11.
[37] See chapter 60, paragraph 1.9 and Scheindlin and Redgrave: "*Special masters and e-discovery: the intersection of two recent revisions to the Federal rules of Civil Procedure*" (2008) 30 Cardozo Law Review 347.

6.12 Option 9: Reverse the burden of proof in specific disclosure applications. One solution which has been suggested is that the costs burden of specific disclosure requests should be shifted. If a specific disclosure application is successful, the costs of the resulting disclosure exercise should be met by the requesting party unless documents of real value[38] emerge. I understand that this is a technique which has on occasion been used.[39] Given that such flexibility already exists within the rules, this may be an approach which should be considered by judges, but which need not be entrenched by rule changes. However, if it is agreed that option 9 merits wider adoption, it may be helpful to practitioners and the court for this option to be set out in the rules, so that it is given more prominent consideration.

6.13 Option 10: Allocate a single judge. This is discussed further in chapter 43. Where possible, the consensus seems to be that it is beneficial for one judge/master to be allocated at the outset of any substantial case.

6.14 Request for comments. I look forward to receiving the comments of judges, court users and others upon all of the issues canvassed in this chapter, during the course of Phase 2.

[38] As agreed by the parties or determined by the court in the event of dispute.
[39] See also chapter 40, paragraph 7.3

CHAPTER 42. WITNESS STATEMENTS AND EXPERT REPORTS

1. INTRODUCTION

(i) Witness statements

1.1 The transition from oral to written evidence-in-chief. The use of written witness statements in substitution for oral evidence was a procedural reform progressively introduced (to the best of my recollection) in or about the 1980s and subsequently embodied in the rules. The purpose of this reform was essentially twofold, namely (a) to save the time and cost of oral evidence-in-chief and (b) to enable each party to know what evidence it would have to meet. Such a "cards on the table" approach would in some cases promote settlement and in other cases make for a fairer trial.

1.2 Shorter and less substantial cases. Written witness statements have generally achieved their objective in shorter and less substantial cases. It is certainly my impression that in such cases witness statements lead to a saving of time and costs. Indeed the submissions made during Phase 1 do not suggest otherwise. It is true that sometimes, even in the shorter and less substantial cases, witness statements are unduly prolix. Also there is sometimes a problem where witness statements are taken over the telephone or taken by inexperienced staff. However, these are matters that can be addressed without any need for rule changes.

1.3 Larger and more substantial cases. The real problem concerning witness statements arises in larger and more substantial cases. There is a real concern here that sometimes the use of written witness statements, instead of saving costs and promoting fairness, has the opposite effect. Therefore in this chapter, when dealing with witness statements, I shall concentrate upon their use in the larger and more substantial cases.

(ii) Expert reports

1.4 Use of expert evidence. The use of expert reports effectively as the evidence-in-chief of expert witnesses is long established. Indeed in cases of any technical complexity, no other means would be practical of placing each party's expert evidence before the court. In cases which settle (the vast majority) the content and quality of the expert evidence often exerts a major, or even decisive, influence over the nature of the settlement.

1.5 Concerns about expert evidence. Concerns have been expressed about the cost of expert evidence, relative to the amount at stake in the litigation. These concerns arise in cases of all size – low value, medium value and high value. Therefore, in relation to expert evidence (unlike witness statements) this chapter will be looking at cases of all sizes.

1.6 Expert evidence is a subject which has generated a vast literature. Indeed, at the present time both the Civil Justice Council ("CJC") and the Civil Procedure Rule Committee are reviewing CPR Part 35 in depth and are considering what amendments should be made with effect from 1st October 2009. I cannot undertake a review of expert evidence on anything like that scale. My concern is focused upon the costs of expert evidence and how those costs might be mitigated, without impairing the quality of such evidence.

2. THE RULES RE WITNESS STATEMENTS

2.1 The general rules are found in CPR Part 32 and the accompanying practice direction (which I refer to in this chapter as "the PD"). Specific rules for the various courts are set out in the Chancery Guide (Appendix 9), the Admiralty and Commercial Court Guide (section H1), the Technology and Construction Court ("TCC") Guide (section 12) and Queen's Bench Guide (section 7.10).

2.2 The general rule is that any fact which needs to be proved by the evidence of a witness is proved (a) by written evidence at an interim application; or (b) by oral evidence at trial.[40] Witness statements will be prepared and they must be served within the time stipulations imposed by the court. At trial the witness statement stands as the evidence-in-chief and the witness will give oral evidence when cross-examined by the other party.

2.3 The witness statement is in effect a full proof of evidence in which the witness sets out the relevant facts (in relation to the issues in dispute) within his knowledge. Collectively all of the witness statements served for a party should include all facts which must be proved at the interlocutory hearing or trial. However, it is by no means required (nor is it desirable) for each witness to address all of the facts in issue. In oral evidence a witness cannot speak about matters not referred to in his statement without permission of the court. Such permission will not be given unless there is a good reason why the evidence was not dealt with in the statement.[41] A witness statement is usually drafted by solicitors but it should be expressed in the witness' own words[42] and it must contain a statement of truth.[43]

2.4 Witness summary. This is used when a party has been granted permission to serve a witness statement, but is unable to obtain one.[44] It identifies the witness and contains a summary of any evidence he would give on the issues in dispute. It does not need to contain a statement of truth. Permission from the court[45] is required before it can be served. Witness summaries are most commonly used where the witness is reluctant to give evidence. Witness summaries are sometimes used where a witness feels unable to sign any statement because of other duties which he owes (e.g. to his current employer). A witness summary might also be used when a witness cannot sign the draft witness statement in time. In that last situation, the summary may even have a copy of the draft witness statement attached.

2.5 Exhibits. Exhibits are documents that a witness refers to in his statement. These documents are compiled in a bundle which accompanies the statement and the bundle is cross-referenced to the statement so that the reader of the statement can easily locate the relevant document as the evidence is reviewed. The PD contains requirements about how an exhibit must be compiled. Additional rules are found in the various court guides.

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[40] CPR rule 32.2(1).
[41] CPR rules 32.5(3) & (4).
[42] PD paragraph 18.1.
[43] CPR rule 22.1(1).
[44] CPR rule 32.9.
[45] Which can be obtained without notice.

3. DO WITNESS STATEMENTS SERVE THEIR PURPOSE?

(i) Why do we have witness statements?

3.1 Historically there were no witness statements. Only pleadings and documents were exchanged in advance of trial. Witness statements were introduced with the aim of reducing the length (and therefore costs) of trial. Colman J[46] explained that this is achieved by (a) making examination-in-chief unnecessary; (b) enabling the parties to know in advance what the remaining factual issues are; (c) enabling opposing parties to prepare cross-examination in advance; and (d) encouraging settlement of actions.

(ii) Are these aims fulfilled?

3.2 It is acknowledged that the "cards on the table" approach enforced by the exchange of witness statements helps to prevent "trial by ambush". The submissions received in Phase 1 endorse this. Following exchange of witness statements it should become more apparent where the relative strengths and weaknesses of each party's case lie. This should help to facilitate settlement and to narrow the remaining issues between the parties. There are also far fewer adjournments of trials now on the grounds that a party is ambushed by unexpected evidence.

3.3 It appears from the recent research conducted by King's College that, at least in Technology and Construction Court ("TCC") cases, exchange of witness statements is not often the catalyst for settlement (see chapter 34). It may be, however, that this finding is peculiar to the types of cases heard in the TCC, where the principal issues tend to be of a technical nature and thus addressed in the expert evidence.

3.4 As noted in several of the submissions during Phase 1, the fact that many cases settle between service of witness statements and trial means that many of the benefits said to be derived from exchange of witness statements are not realised. The question arises, therefore, whether the extensive costs of preparing full witness statements are justified, given that in the majority of cases the main benefit of "reducing the length of trial" is not realised.

3.5 To prepare an effective witness statement in a complex case, substantial input is required from the witness. The lawyer must spend sufficient time with a witness so that he understands what the witness is trying to say. This in itself can rack up costs and this is before several iterations of the statements have been drafted and comments from the witness, counsel and the rest of the solicitor team have been taken into account. Often what appears to happen is that a witness statement simply repeats what is already in the documents and it ends up being a carefully crafted court document more akin to submissions than the story of a lay person.

3.6 Particularly in large cases with multiple witnesses and witness statements (for instance, where there have been many interlocutory statements made), minor errors and inconsistencies can appear in or between witness statements. These may not be because a witness is trying to misrepresent any facts, but it is simply a consequence of the lawyer's drafting or even a nuance that is lost in translation (if the witness' first language is not English). One large commercial law firm pointed out that these inconsistencies can have severe consequences in cross-examination: counsel for the other party will have scrutinised the witness statements for inconsistencies and

[46] *Nederlandse Reassurantie Groep Holding NV v Bacon & Woodrow Ernst & Young and Swiss Bank Corporation (No.2)* [1995] 2 Lloyd's Rep. 404, QB, 408.

potential avenues of attack. The inconsistencies will then be used to discredit a witness, even if they only relate to peripheral issues or have simply occurred because of the lawyers' drafting.

3.7 One contributor to Phase 1 challenged the proposition that court time has been saved by the introduction of witness statements: a judge simply spends time reading an enormous witness statement rather than listening to examination-in-chief. It has also been suggested that cross-examination is now longer than it was before the development of witness statements, often expanding to fill the void left by the lack of examination-in-chief.

3.8 In a departure from the benefits outlined by Colman J, there is now a school of thought which suggests that it is actually detrimental to the trial process for there to be no examination-in-chief. It is suggested by some that oral evidence-in-chief gives the judge a better opportunity of seeing the witness' demeanour than if the witness is only cross-examined. This is particularly pertinent in relation to fraud cases.

3.9 The coaching of witnesses is always to be deplored. One Phase 1 submission suggested that the lack of examination-in-chief may be a contributory factor in the growth in witness training.

4. OTHER CONSIDERATIONS RE WITNESS STATEMENTS

4.1 Lord Woolf recommended that witness statements (a) should, so far as possible, be in the witness' own words; (b) should not discuss legal propositions; (c) should not comment on documents; (d) should conclude with a statement, signed by the witness, that the evidence is a true statement and that it is in his own words; and (e) in relation to hearsay statements, should give an indication, where appropriate, of the sources of knowledge, belief or information on which the witness himself is relying.[47] Further, he said:

> "...In the interim report, I recommended that courts should disallow costs where they thought the drafting of witness statements had been disproportionate. Trial judges, and to some extent procedural judges, will need to make a real effort, especially in the early phase of the new system, to scrutinise witness statements rigorously. This is the only way in which they will be able to pinpoint repetitious or inappropriate material, such as purported legal argument or analysis of documents. This is a fault which must in the main be attributed to the legal profession and not to its clients; wasted costs orders may therefore be appropriate in some instance of grossly overdone drafting. Only if the legal profession is convinced by demonstration that it has an active judicial critic over its shoulder will it be persuaded to change its drafting habits..." [48]

4.2 Ten years after the adoption of Lord Woolf's proposals it seems that, despite being embodied in the CPR, his reforms have not been fully implemented. Many Phase 1 submissions recognise that the costs of preparing witness statements have got out of control. One went so far as to say that the current approach to witness statements is "*one of the worst features of the CPR*". However, it was notable that those criticising the current regime were solicitors and barristers whose usual

[47] See Final Report, chapter 12, paragraphs 59 and 60.
[48] See Final Report, chapter 12, paragraph 58.

practise is large commercial and negligence cases rather than users of the fast track or those who deal with more routine cases (such as personal injury). The sorts of witness statements which are the subject of this criticism are carefully crafted lawyers' documents, which at times stray dangerously close to dealing with legal propositions (particularly those given by solicitors in interim applications). They can be long, rambling narratives taking the reader through most, if not all, of the facts in the case. This will often include much hearsay evidence such as "*witness X told me about the meeting that he attended on date Y*", even when witness X has addressed this meeting himself. Exhibits run to many volumes.

4.3 Several contributors to Phase 1 justified these exhaustive statements on the basis that they are necessary to meet the concern that the witness will not be able to amplify his or her evidence at trial. As witness statements are exchanged months before trial, when it is not always clear what case each party will be putting forward, they also tend to cover anything that could feasibly become relevant.

4.4 The argument that witness statements must be extensive because of a lack of opportunity to amplify the evidence may not be regarded as compelling. A party puts its case (a) in its opening submissions; (b) in its own witness statements; (c) (most importantly) through the cross-examination of the other party's witnesses and (d) in its closing submissions, by drawing together all of the above. The witness statements really need only to amplify facts that are not apparent from the documents in evidence. A document can be put in evidence without having been discussed by one's own witness. Very often the most important points on the documents emerge when they are put in cross-examination.

4.5 There is also a question, in some cases, as to the necessity for reply statements. These now seem to be accepted as normal practice. However, unless some important new point emerges from the opposing witness statements, it is questionable how much reply evidence actually assists the court to resolve the issues.

4.6 Other factors identified as contributing to the witness statement "costs factory" are:

(i) Translations. Where a witness does not speak English, the witness statement will be drafted in his native language and translated into English for the benefit of the court. Alternatively, it may be drafted in English by the lawyers and then translated into his native language for amendment and approval. There does not seem to be a way around this, but it must be recognised that this is another step which adds to the costs burden. Firms may also expend time and costs trying to identify translators who are of a suitably high quality and have the necessary legal and technical expertise to translate the document adequately.

(ii) Numerous interim applications. In large cases where there are a substantial number of applications, significant time and effort will be put into drafting witness statements in support of these applications. There may be serial interim applications, each supported by a witness statement from the applicant, and in most instances a witness statement in response is filed by the respondent. Furthermore, when a witness statement is given by a solicitor on behalf of his client (as is usually the case on interim applications), rarely is it more than an extended submission. There are two ways in which this can be seen to be a waste of costs: First, the majority of the applications will be agreed by consent order or will fall away completely before they are brought before the court. Secondly, if the application is to be heard, counsel's skeleton may amount to little more than a summary of the information contained in the witness statement.

(iii) Excessive exhibits. It can take a sizeable amount of time and resources to prepare, cross-reference, index (where necessary) and copy exhibits. In my experience, a substantial number of exhibited documents are never referred to in an application or at trial (as applicable). Additionally there are a number of exhibits which never reach the courtroom, because the relevant application falls away.

5. COMMERCIAL COURT REFORMS RE WITNESS STATEMENTS

5.1 The Commercial Court Long Trials Working Party ("LTWP") identified a number of problems with the current regime which are broadly in line with those set out above. The LTWP's main concerns are twofold. First, witness statements address many more matters than they need to, leading to lengthy unfocused statements. They often take the reader through the documents and the party's case rather than recording the witness' memories of the relevant events. Secondly, exhibits lead to vast duplication of hard copy documents.

5.2 Over the past year several reforms have been trialled by the Commercial Court:

- Witness statements must be as short as possible and only cover issues on which the witness can give relevant evidence. There must be headings in the witness statement to correspond with the relevant issue in the list of issues.
- Documents referred to should be given a reference (usually a disclosure number) and there should be no hard copy exhibit. If disclosure has been given electronically, the documents should be hyperlinked within the witness statement (if the technology allows).
- At the CMC the judge should consider whether to impose a limit on the length of witness statements.
- Costs sanctions may be imposed if statements are lengthy or contain irrelevant material.
- The parties and judge should consider at the pre-trial review whether it will be of assistance to the court to hear a witness give evidence in chief (e.g. in fraud cases).
- The court should dispense with witness statements if the time and expense involved in the preparation would be disproportionate. In such (rare) circumstances, the court may order the party wishing to call the witness to serve a short summary of the evidence he is expected to give.

6. REVIEW RE WITNESS STATEMENTS

6.1 I shall set out in this section a number of possible actions or reforms, directed towards reducing the costs of and incidental to witness statements, which may merit consideration during Phase 2.

6.2 Enforce compliance with the Woolf reforms. The starting point may be to ensure that Lord Woolf's recommendations are finally implemented. Possibly, more specific guidance should be given in order to ensure that the evidence is focused. It may also be, however, (as suggested by Lord Woolf ten years ago) that the judiciary must, at least in the first instance, stimulate the cultural shift to concise witness

statements on the relevant facts by a more robust use of sanctions. This view is backed up by submissions received during Phase 1. This may mean imposing costs sanctions on any party that adduces evidence that is irrelevant or that does not go to the facts in issue. In particular, in appropriate circumstances, it may mean the use of wasted costs orders against the legal profession where the rules have not been adhered to. If such an approach were adopted (unpalatable though that may be for both judges and lawyers), it would not take long for a significant reduction in irrelevant content to be effected.

6.3 Evidence focused on the issues. The LTWP has proposed that a judicially settled list of issues should become the keystone to proper management of all cases in the Commercial Court[49] and that witness statements should be cross-referenced to those issues. That approach may make eminently good sense for cases in the Commercial Court. However, subject to any comments which may be made during Phase 2, I would hesitate before commending this approach for complex cases outside the Commercial Court. Any detailed list of issues is expensive to prepare (involving many hypothetical sub-issues, contingent upon possible findings by the court) and may be subject to change as the case develops. I do, however, accept that something needs to be done to ensure that witness statements put before the court (a) only address issues in dispute; and (b) are in the witness' own words.[50] It is also desirable to reduce the amount of time and expense put into preparing witness statements that are never seen by the court. Beyond the use of cost sanctions (mentioned above) there seem to be a number of potential options:

(i) *Make witness summaries the norm.* If this approach is adopted, each witness would briefly outline the facts within his/her knowledge that are relevant to the issues in dispute, but would not go into extensive detail and would not refer to all of the documents (although it may be difficult for the witness to tell his/her story without reference to the key documents). Such an approach would mean that evidence-in-chief would need to be restored, in order that the witness can supplement his/her summary.[51]

(ii) *Confine witness statements to matters that are not within the documents.* If this approach is adopted, there would need to be an express rule to the effect that witness statements should be limited to (a) brief confirmation that identified documents are accurate (if that is indeed the witness' assertion) (b) such further matters as are not apparent from or are contrary to the documents relied upon.

(iii) *Stipulate a maximum length.* The Commercial Court reforms provide that in some cases there should be a guillotine on the length of witness statements. One Phase 1 submission suggested that a maximum word count should always be imposed. It could be that a default length could be set out in the rules (to be determined) and the parties would have to apply to the court, with reasons, to vary this. If that proposal is regarded as unrealistic, an alternative approach could be implemented whereby parties apply at the first CMC if they consider it would be reasonable and proportionate, bearing in mind the overriding objective, for limits to be imposed on the length of witness statements.

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[49] Report and Recommendations of the LTWP, paragraph 51.

[50] I acknowledge that, as set out in one submission, this is not a factor that directly affects the cost of the preparation of the witness statement. It is nonetheless an important one, and one of the reforms instigated by Lord Woolf which has been embodied in paragraph 18.1 of the PD.

[51] On the few occasions that I have heard oral evidence-in-chief supplementing a witness summary under the present rules, I have found such evidence to be helpful, well focused and not unduly time consuming.

6.4 Exhibits. There is a need to reduce the amount of work that goes into cross-referencing documents. There is also a need to keep the duplication of documents to a minimum. Although the Commercial Court reform of allocating a number to a document once it has been put before the court has much to recommend it, some more specific guidance may be required if such a reform is to be implemented across the board (including cases where it seems unlikely that documents will be available in electronic format). An ideal arrangement (which may be unacceptable to litigation solicitors) would be for parties to collaborate, at the time when they are preparing witness statements, and to agree a paginated bundle containing key documents which witnesses wish to refer to. The witnesses on both sides could then refer to documents by reference to the page numbers in that exhibits bundle. That same bundle could then, in due course, become the nucleus of the trial bundle. In those few cases which proceed to trial the solicitors could prepare further bundles for trial, containing only material which is not in the original exhibits bundle.52 No-one would be prejudiced in any way by the fact that particular documents were omitted from the original exhibits bundle but included in the trial bundle.

6.5 I am told that the course canvassed in the previous paragraph is impracticable. I therefore mention it with some diffidence, in the hope that some workable variant might be considered. If such a course were adopted, it would save the solicitors on both sides the immense labour of going through the witness statement bundle and correcting all the page references in manuscript.[53] At the moment this task has to be done just before trial and then the witness statements have to be copied all over again with the new manuscript annotations. It has been my experience as trial judge over several years that the re-paginated witness statement bundle invariably arrives too late (because the solicitors have more pressing tasks just before trial) and this substantially inhibits judicial preparation/pre-reading.

6.6 I look forward to receiving comments during Phase 2 concerning the above proposals and any other proposals which might assist in controlling the costs of witness statements in heavy cases, whilst not impairing (but hopefully promoting) expeditious trials or just settlements.

EXPERT EVIDENCE

7. RULES

7.1 The general rules are found in CPR Part 35, the attached practice direction and several of the pre-action protocols (including the recently implemented Practice Direction on Pre-Action Conduct). Additional guidance for specialist courts are found in the Admiralty and Commercial Courts Guide (section H2 and Appendix 11), Technology and Construction Court Guide (section 13), Chancery Guide (chapter 4) and Queen's Bench Guide (section 7.9).

7.2 In implementing Lord Woolf's suggested reforms to rein in the costs of expert evidence, the CPR impose a duty on the court to restrict expert evidence to that which

[52] When the same document is before the court in more than one place (and sometimes in my experience many times over in different bundles) this is not only a huge waste of paper and costs. It also makes life difficult both for the judge and counsel, who may wish to annotate key documents during the course of the evidence; such annotations become spread around the trial bundle.

[53] I.e. deleting the references to page numbers in an earlier superseded bundle and substituting page numbers in the new trial bundle.

is reasonably required to resolve the proceedings.[54] The court has the power to control the evidence: no party may use expert evidence without its permission.[55] The court will consider the overriding objective when deciding whether to give permission and an expert will be allowed in circumstances where it is considered that the professional or technical knowledge of the expert will be of value to the court on matters which are or may be outside its expertise.

7.3 Where expert evidence is permitted the expert may be required to:

(i) prepare a report on the relevant issues, in accordance with the requirements set out in the CPR;

(ii) respond to one round of questions on his report from the other party;

(iii) attend a meeting with any other expert to try to narrow the issues/reach agreement (the discussions are without prejudice);

(iv) prepare a joint report with the other expert setting out (a) the issues they agree upon and (b) the issues upon which they are unable to agree and why they do not agree (this is disclosable); and

(v) attend court to be cross-examined on his evidence.

7.4 The CPR codified the expert's duty to help the court.[56] In other words, although generally instructed by a single party, the expert is independent and must act impartially to assist the court in resolving the case justly rather than for the benefit of the instructing party. To this end, the instructions from a solicitor to the expert must be appended to the expert report. An expert may be appointed by one or all parties. Although experts are remunerated for their time and expenses, due to their independence, there is no question of them being paid on a conditional or contingency fee basis. This is not to say there is no concern about the level of fees paid to experts. CPR rule 35.4(4) allows the court to limit the amount of the experts' fees recoverable from the other party. I understand that few practitioners have experience of this provision being used. If the proposals for cost management set out in chapter 48 below find favour, then the provisions of CPR rule 35.4(4) may be brought into more extensive use.

7.5 Directions relating to expert evidence are usually given during the first case management conference. Section D of the Allocation Questionnaire should be completed if permission for expert evidence is required. Some query whether this is the right time for the use of expert evidence to be addressed. The Commercial Court has trialled an approach that delays permission for expert evidence until after the list of issues has been judicially settled. Others, particularly in personal injury and clinical negligence cases, argue that even the first CMC is too late to consider the need for expert evidence, as the claimant will by that stage already have obtained any expert evidence deemed necessary (and since most of these cases settle before trial, there are unlikely to be any adverse consequences for the claimant of having done so).

7.6 Single joint expert. This is an expert witness who is instructed by all of the parties in a case to give evidence on a particular issue or issues. The parties may agree to appoint a single joint expert or it may be directed by the court.[57] CPR Part 35 and the accompanying practice direction deal extensively with the instruction and use

[54] CPR rule 35.1.
[55] CPR rule 35.4.
[56] CPR rule 35.3 and Part 35 Practice Direction, paragraph 1.1.
[57] CPR rule 35.7(1).

of joint experts by the parties and the powers of the court to order their use. The use of joint experts is encouraged. A single joint expert is engaged and paid jointly by the parties, whether instructed jointly or separately. An agreed expert is paid for and instructed by one party, but all parties have agreed to the identity of that expert. Where appointed, the single joint expert's report usually has a major impact on a case and can lead to early settlement.

7.7 Single joint experts are most commonly appointed in fast track cases, as the costs of two experts may be disproportionate. In small claims it is rare for permission to be given for any expert reports to be adduced, the proportionality argument being even stronger. A single joint expert will only usually be used in multi-track cases if the subject matter is either (a) not a central issue or (b) relatively uncontroversial. In other circumstances it is rare for a single joint expert to be appointed, particularly against the parties' wishes. However, some practitioners have noted a modest increase in the court's willingness to direct the use of single joint experts in lower value multi-track cases.

8. OVERVIEW OF THE PHASE 1 SUBMISSIONS

8.1 Expert evidence has been identified in the Phase 1 submissions as a substantial, and ever increasing, cost of litigation. All those who addressed expert evidence within their submissions were fairly critical, and many appeared to think that expert evidence is more of a costs burden than witness statements. However, the majority of submissions were silent on expert reports.

8.2 The criticisms made in the submissions were:

- A failure to identify the correct issues (presumably, this means on the part of the lawyers);
- The perceived difficulty for a judge to rule that a claimant cannot rely upon evidence obtained prior to the first CMC;
- An overwhelming failure to impose the use of a single joint expert;
- Delay caused by unrealistically short deadlines in the timetable;
- An inability to contact the opposing expert;
- Prevaricating tactics in relation to the experts' meeting;
- An inability for the parties to agree expediently an agenda for the experts' meeting;
- The expense of obtaining the attendance of an expert at trial (this will be looked at in chapter 44).

8.3 Recently, the LTWP has also raised concerns about the costs and relevance of the expert evidence brought before the court. To address those concerns they are encouraging:

- the court to give permission for expert evidence only after the list of issues have been finalised which includes a list of the issues that the experts should address;
- the sequential exchange of reports (so that both reports address the same issues and hopefully in the same order);

- the meeting of experts to be held after exchange of reports but prior to the service of any supplementary reports. A list of the issues upon which the experts agree and disagree should still be produced after the meeting;
- giving directions to limit the length of the reports (on the basis that this is in the interest of the parties and the court).

9. EXPERT COSTS INCURRED PRE-ISSUE

9.1 For some time the pre-action protocols relating to housing disrepair, disease and illness, clinical negligence and personal injury have contained guidance on the instruction of experts pre-issue. In all other proceedings the Practice Direction on Pre-Action Conduct ("PDPAC") will now apply. It encourages the use of a single joint expert or an agreed expert.

9.2 I am told that in personal injury litigation pre-action liaison over selection of experts is often not working well. In industrial deafness cases even the scope of the required expertise may be contentious. The remedies for this problem appear to be twofold. First, the courts must investigate non-compliance with paragraph 2.14 of the Pre-action Protocol for Personal Injury Claims and impose sanctions for breaches: e.g. disallowing expert evidence or the costs of such evidence. Secondly, proper liaison over selection of experts must be a key part of the "new process" which is being developed for personal injury claims (see chapter 26).

9.3 The new PDPAC contains provisions requiring the parties to consider whether an expert needs appointing to help resolve their differences and, if so, points the parties towards agreeing an expert. If the parties do not agree that a single joint expert is appropriate, the party seeking the expert evidence should provide the opponent with a list of one or more experts in the relevant field of expertise whom the party would like to instruct. The other party then has 14 days to lodge a written objection to any or all of the experts listed. If there are any acceptable experts, one of these should be instructed. If not, the initiating party may instruct an expert of choice. The PDPAC makes clear that "*both parties should bear in mind that if proceedings are started the court will consider whether a party has acted reasonably in instructing (or rejecting) an expert*".

9.4 It remains to be seen whether these provisions will have any impact on the way that litigation is conducted. The perceived reluctance of the court to impose sanctions for protocol breaches (discussed further in chapter 43) may mean that these changes are not effective in the short-term. Others note that even if the PDPAC is followed, permission of the court is still required to adduce the evidence at court. If such permission is obtained but the instructing party subsequently wants to use a different expert at trial, not only may these initial costs have been wasted, but this initial report will still be disclosable.

10. WHEN SHOULD EXPERT REPORTS BE OBTAINED?

10.1 There are various alternatives being mooted about the most appropriate time for the court to consider giving permission for the use of expert evidence. Currently, in most cases, the position is that the court will give directions at the first CMC.

10.2 The LTWP think it is better to postpone the granting of permission for expert evidence until after disclosure and, potentially, exchange of witness statements.

Their reasoning is that this allows the issues to be more clearly identified and narrowed and therefore the experts need only be instructed on issues that will really be in dispute.

10.3 The TCC Guide suggests that the court should be provided with estimates of the experts' costs before providing permission.[58] It also suggests that the parties should, prior to the CMC and at any other pre-trial stage, give consideration to any appropriate or necessary test, inspections, sampling or investigates that could be undertaken jointly or in collaboration with other experts. Any such measure should be preceded by a meeting of the relevant experts at which an appropriate testing or other protocol is devised.[59] These rules would seem to be an embodiment of Lord Woolf's suggestion that the experts should be encouraged to communicate at the earliest possible stage.[60] However, in practice, it seems that the courts (all courts, not just the TCC) rarely encourage such collaboration.

10.4 In discussions with my judicial assistant, some defendant practitioners have criticised claimant solicitors for having obtained expert reports (in some cases, several reports) before the defendant has been informed of the claim. If an expert report has been obtained on a particular issue which is admitted by the defendant at the first opportunity, upon any settlement the defendant will still end up paying the costs of that report even though there was no need for the report to have been procured.

10.5 In the right circumstances, an early expert report can be the key to the parties reaching a settlement. However, in other cases premature instruction of experts may lead to wastage of costs. One issue, upon which I should welcome comment and debate during Phase 2, concerns the timing of instructing experts. In particular, could the cost rules be recast in a manner which would (a) encourage parties to co-operate in relation to appointing experts and (b) encourage the appointment of experts at an appropriate time?

11. THE EXPERT REPORT

11.1 Irrelevant content. A problem identified by Lord Woolf was the inclusion of irrelevant material in the expert report. The submissions received during the Phase 1 indicate that this is still a problem. Several suggest that the tendency for an expert to set out the facts of the case at the start of their report simply adds to costs without achieving anything. My judicial assistant has subsequently raised this point with a number of commercial practitioners, who have commented that such background is required to ensure that it is clear to the court and the other party that the expert has based his report on the correct facts and underlying assumptions. Some may not find this argument compelling.

11.2 Written questions. CPR rule 35.6 provides that a party may put written questions to an expert instructed by another. Unless permission is given (by the other party or the court), the questions must only be aimed at clarifying the report and they may only be asked once. The expenses of this exercise are initially borne by the instructing party, but this does not affect any decision by the court about which party ultimately bears the expert's costs. The responses will be treated as part of the expert's report. If any question is left unanswered the court may order that the evidence cannot be relied upon and/or the fees and expenses of that expert will be

[58] TCC Guide paragraph 13.2.2.
[59] TCC Guide paragraph 13.3.4.
[60] Lord Woolf's Final Report, chapter 13, page 48.

irrecoverable from the other party. As far as I am aware, this process works satisfactorily[61] and is cost effective.

11.3 Timetabling. Several submissions mentioned that insufficient time is being built into the litigation timetable for expert evidence to be compiled properly. I should be interested to hear whether this is the experience of most court users.

12. THE EXPERTS' MEETING AND JOINT REPORT

12.1 Experts' meetings. These were introduced by Lord Woolf as a means of encouraging the experts to narrow the issues between them and to eliminate the peripheral issues. He suggested the agenda should be set by the court.[62] In practice it seems that the parties are usually left to agree the agenda themselves.

12.2 The purpose of the discussions at the experts' meeting should be, wherever possible, to:

(i) identify and discuss the expert issues in the proceedings;

(ii) reach agreed opinions on those issues, and, if that is not possible, to narrow the issues in the case;

(iii) identify those issues on which they agree and disagree and summarise their reasons for disagreement on any issue; and

(iv) identify what action, if any, may be taken to resolve any of the outstanding issues between the parties.[63]

12.3 There is little comment in the submissions as to whether the experts' meetings usually achieve these aims. My own experience as a "consumer" of expert evidence is that expert meetings have been extremely effective in narrowing technical or expert issues.[64] I can recall cases where hours, or even days, of court time have been saved as a result of constructive discussion and agreement at expert meetings. My judicial assistant has spoken to a number of solicitors and counsel about the effectiveness of expert meetings and has received mixed responses. Even those who thought that they can be useful commented that it may require a series of meetings, rather than a single meeting, for issues to be narrowed down. This obviously adds to the costs of the exercise.

12.4 In the discussions with my judicial assistant it was also mentioned that experts are busy people with competing interests. They may live abroad. Despite the solicitors' best efforts, it can be quite difficult to pin all of the experts down so that a meeting can be held. This can cause delays to the timetable. The logistics of holding the meeting can also prove to be expensive, if video conferencing needs to be set up or attendees flown in from abroad.

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[61] In a recent report (7/12/2007) the Experts Committee of the CJC expressed the view that CPR rule 35.6 struck the right balance.

[62] Lord Woolf's Final report, chapter 13, paragraph 45.

[63] As set out in paragraph 18.3 of the CJC's "*Protocol for the Instruction of Experts to give evidence in civil claims*", June 2005.

[64] I note that the Experts Committee of the CJC regards experts meetings as generally satisfactory, although they will be proposing a more prescriptive procedure for setting the agenda for such meetings.

12.5 The LTWP has recommended that expert meetings should be retained. In patent litigation, on the other hand, I understand that it is rare for expert meetings to be held.

12.6 Subject to any comments which may be made during Phase 2, it seems to me that the costs involved in expert meetings are worthwhile. However, there may be categories of case (e.g. complex international disputes) where such meetings may be dispensed with, leaving the experts to liaise as appropriate by telephone or email.

13. SCHEMES FOR CONSIDERATION IN FAST TRACK RTA, EL, AND PL CASES

13.1 The greatest concerns were raised in relation to the costs associated with expert reports in fairly straightforward road traffic accident ("RTA"), employer's liability ("EL") and public liability ("PL") cases. I understand that the costs incurred on the reports can be up to or more than the amount being claimed in damages. A number of suggestions have been made during Phase 1, which are aimed at reducing those costs. Two of the suggestions were as follows:

(i) One suggestion was the use of accredited experts. If only experts who are known to provide truly impartial (rather than claimant or defendant sympathetic) opinions are accredited, this would enable the more straightforward cases to be resolved with only one expert report having been obtained.

(ii) A proposal set out by a clinical defence organisation in its submission was:

> "We would welcome consideration of a scheme whereby single experts, jointly instructed, but paid for by defendants, binding defendants but not claimants, might be appropriate for claims identified as low value (to be defined) by both parties from inception. Whether claimant lawyers were paid fixed or variable fees, only on success or otherwise, could all be considerations but claimants could be guaranteed a decision, with explanations, the determining evidence, and an offer, if appropriate, without any financial risk or detriment to their option to litigate if they subsequently wish it."

13.2 I look forward to comments on whether court users would support either of these propositions. If the first suggestion were adopted, it might be helpful for accredited experts to have a specific qualification or diploma for medico-legal work, as in France.[65]

14. REVIEW

14.1 Other proposals for saving costs. Some of the suggestions for saving costs proposed in the Phase 1 submissions are set out above. Other proposals include:

- Sequential exchange of expert evidence on liability to be standard. In personal injury/clinical negligence cases, the claimant should be obliged to disclose their expert report with service of proceedings.
- Presumption that all quantum experts will be instructed on a "single joint" basis, unless the court decides that there is a good reason for individual experts to be permitted. Experts must be agreed prior to instruction and one party will not be

[65] See chapter 27, section 3.

required to jointly instruct "after the fact" an expert who has been unilaterally instructed by another party.

- Parties should not be able to recover the costs of expert reports which are not relied upon or not covered by leave given for experts to be called.

14.2 Hot tub. One other matter which merits consideration is whether the Australian procedure, whereby opposing experts give evidence concurrently, might be included in the CPR as an option. This procedure is described in section 4 of chapter 58. I am told by the Federal judges in New South Wales that this procedure works well in practice and leads to a saving of costs. If practitioners and court users see any merit in this procedure, it might be suitable for a pilot exercise.

14.3 Conclusion. It is clear, both from my own experience and from the submissions received, that expert evidence makes a major contribution to the costs of civil litigation. I look forward to receiving comments during Phase 2 upon the various proposals which have been canvassed in this chapter. The ultimate objective, which is easier to state than to achieve by rule change, is to obtain at proportionate cost expert evidence truly focused upon what (in the absence of settlement) the judge must decide.

CHAPTER 43. CASE MANAGEMENT

1. INTRODUCTION

1.1 The second bullet point of my terms of reference requires me to "*establish the effect case management procedures have on costs and consider whether changes in process and/or procedure could bring about more proportionate cost*".

1.2 The main thrust of the Woolf reforms was that judicial case management was required so that ultimate responsibility and control of the litigation moved from the litigants and their legal advisers to the court. The key elements of his proposal were to:

(i) allocate each case to the track and court at which it can be dealt with most appropriately;

(ii) encourage and assist the parties to settle cases or, at least, to agree on particular issues;

(iii) encourage the use of ADR;

(iv) identify at an early stage the key issues which need full trial;

(v) summarily disposing of weak cases and hopeless issues;

(vi) achieve transparency and control of costs;

(vii) increase the client's knowledge of what the progress and costs of the case will involve;

(viii) fix and enforce strict timetables for procedural steps leading to trial and for the trial itself.

1.3 Research was undertaken in 2005 by Professor John Peysner and Professor Mary Seneviratne on behalf of the, then, Department for Constitutional Affairs into the effect of the Woolf reforms on the civil justice system (the "DCA Research"). [66] They concluded that the "*case managed court based dispute resolution system is delivering quality (justice) at a much improved pace, but probably at a higher cost*". In reaching this conclusion they noted that "*Lord Woolf's aspiration that case management would achieve his aims in relation to costs has not been achieved. Rules alone cannot achieve proportionality, economy, certainty and predictability of costs: policy solutions are required*." Professors Peysner and Seneviratne had a longer timeframe in which to compile their research than is available in Phase 1 of the Costs Review. The information gathered in their report is therefore most helpful. I have regard to that information in conjunction with the written submissions during Phase 1 and the views expressed to my judicial assistant and me in discussions over the last four months.

1.4 The majority of practitioners, judges and regular court users comment that a fundamental and welcome change has been enacted in the way that litigation is conducted and controlled.[67] However, a general theme from the Phase 1 submissions and from the meetings that I have attended is that the court could, and should, do

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[66] "*The management of civil cases: the courts and post-Woolf landscape*" by Professor Peysner and Professor Mary Seneviratne, Nottingham Law School, Nottingham Trent University, DCA Research Series 9/05, November 2005

[67] This has been expressed in the written submissions received in Phase 1, comments made to my judicial assistant throughout Phase 1 and the findings in the DCA Research.

more actively to manage cases and to exert greater control over the conduct (and therefore the costs) of proceedings. Few respondents made specific recommendations as to what measures would be appropriate and effective. Several suggested that the appropriate framework already exists within the CPR but it is not implemented properly or consistently.

1.5 The majority view seems to be that pro-active management is the key to proportionate costs i.e. prevent the costs from being incurred in the first place.[68] Suggestions as to how this can be achieved include:

- More effective use of sanctions and greater use of interim payments of costs.
- Greater examination of prospective costs. Potentially by more frequent reference to costs estimates (and possibly, a requirement for more detailed costs estimates).
- Increased use of specialist judges who, due to their expertise in dealing with a specific type of case, are more likely to intervene robustly to control costs. Those who deal with specialist judges note a marked difference in case management.
- Simplification of the rules and processes.
- Greater control of the use of experts. In this regard, see chapter 42.
- Where a party fails to control its costs that party could be prevented from recovering those additional costs from the other side

1.6 The ideas set out in this chapter should be read in conjunction with all the other chapters in this Part of the report. As pre-action protocols and ADR fall broadly within the remit of "case management", and as they are not addressed in detail elsewhere in this report, they are also considered in this chapter. The use of costs estimates in case management will be discussed separately in chapter 48.

2. THE RULES

2.1 The rules and powers relating to case management are found throughout the CPR. However, the main rules are found in CPR Parts 1, 3, 24, 30-35 and the practice directions thereto. Further guidance for specific tracks can be found in Parts 27 (small claims), 28 (fast track) and 29 (multi-track).

2.2 In his Final Report, Lord Woolf explained that even though individual rules offer detailed directions for the steps to be taken in the course of litigation, their success in achieving a sensible and just resolution "*depends upon the spirit in which they are carried out*" and on the "*understanding of the fundamental purpose of the rules and of the underlying system of procedure*".[69]

(i) The general jurisdiction

2.3 CPR rule 1.1 sets out the "*overriding objective*", a framework for how cases can be dealt with justly. Dealing with a case justly includes, so far as is practicable –

> "(a) ensuring that the parties are on an equal footing;

[68] Indeed Brooke LJ has stated that it would be much better for the court to exercise control over costs in advance, rather than to wait until the end of the case: see *King v Telegraph Group Ltd* [2004] EWCA Civ 613 at [92]; [2005] 1 WLR 2282 at 2299.
[69] Final Report, chapter 20 paragraph 10.

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

The court must seek to give effect to the overriding objective when it (a) exercises any power given to it by the CPR; or (b) interprets any rule.[70]

2.4 Further, the court has a duty *actively* to manage cases. CPR rule 1.4(2) explains that this duty includes:

"(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;

(b) identifying the issues at an early stage;

(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;

(d) deciding the order in which issues are to be resolved;

(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;

(f) helping the parties to settle the whole or part of the case;

(g) fixing timetables or otherwise controlling the progress of the case;

(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;

(i) dealing with as many aspects of the case as it can on the same occasion;

(j) dealing with the case without the parties needing to attend at court;

(k) making use of technology; and

(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently."

(ii) The requirements of case management post-Woolf

2.5 Lord Woolf's Final Report strongly advocated the need for greater judicial control over the preparation for and conduct of hearings. Practically, for judges today (without trying to be wholly exhaustive) this now means that they must:

[70] CPR rule 1.2.

- After the filing of the allocation questionnaire (which is sent out after service of the defence), allocate a case to a specific track. [71]
- Give directions for any further clarification required in respect of any party's statement of case.
- Identify the key issues and earmark issues for summary disposal.
- Explore the scope for ADR or settlement.
- Determine what disclosure should be given; whether a joint expert should be appointed; and whether a split trial would be appropriate.
- Set a timetable for:
  - disclosure of documents;
  - exchange of witness statements;
  - exchange of expert evidence;
  - sending of pre-trial checklists[72] by the court;
  - filing of completed pre-trial checklists by the parties;
  - the hearing.
- Set a timetable for trial, including a date or window for the trial, timetable for the preparation of the trial bundle, length of hearing, the evidence to be heard and the order in which the evidence shall be given. Permission can also be given for IT facilities or video conferencing as required.

2.6 Although the parties will seek to agree draft case management directions themselves, the court has the discretion to make any order as it sees fit. If appropriate, the court has the power to dispense with the exchange of disclosure, witness statements, expert evidence and the filing of any of the questionnaires. [73] The court gives its directions either in writing or at case management conferences ("CMCs") by telephone or in court.

(iii) The court's power to manage cases

2.7 The court's general powers of case management. These are set out in CPR rule 3.1 and are expressly stated to be additional to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.[74]

2.8 Except where the CPR provides otherwise, the court may –

"(a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);

(b) adjourn or bring forward a hearing;

[71] See CPR Part 26. There is a common misconception that allocation is done automatically upon issue, but it is actually done once the allocation questionnaires have been served and each case requires a judicial decision.
[72] Prior to 2nd December 2002 this was known as the "listing questionnaire".
[73] Although the court fees due to be served with any questionnaire will still fall due.
[74] CPR rule 3.1(1).

(c) require a party or a party's legal representative to attend the court;

(d) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication;

(e) direct that part of any proceedings (such as a counterclaim) be dealt with as separate proceedings;

(f) stay the whole or part of any proceedings or judgment either generally or until a specified date or event;

(g) consolidate proceedings;

(h) try two or more claims on the same occasion;

(i) direct a separate trial of any issue;

(j) decide the order in which issues are to be tried;

(k) exclude an issue from consideration;

(l) dismiss or give judgment on a claim after a decision on a preliminary issue;

(ll) order any party to file and serve an estimate of costs;

(m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective."[75]

This list is not exhaustive and further powers are set out elsewhere in the CPR, such as the power to make costs orders that reflect the court's view of the conduct of the parties[76] and the power to control the evidence that will be admissible.[77]

2.9 Additional rules include:

- Any order may (a) be subject to conditions, including a condition to pay a sum of money into court; and (b) specify the consequence of failure to comply with the order or a condition.[78]
- Where the court gives directions it will take into account whether or not a party has complied with the Practice Direction on Pre-Action Conduct and any relevant pre-action protocol.[79]
- The court may order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, practice direction or a relevant pre-action protocol.[80] When exercising this power the court must have regard to (a) the amount in dispute; and (b) the costs which the parties have incurred or which they may incur.[81]
- The court has the power to vary or revoke any order that is makes.[82]
- Unless specifically prohibited by an enactment or rule, the court may make an order of its own initiative.[83] In such circumstances it will be usual to allow the

[75] CPR rule 3.1(2).
[76] CPR rule 44.3(4) and 44.5(3).
[77] CPR rule 32.1.
[78] CPR rule 3.1(3).
[79] CPR rule 3.1(4).
[80] CPR rule 3.1(5).
[81] CPR rule 3.1(6).
[82] CPR rule 3.1(7).
[83] CPR rule 3.3.

parties to make representations, either before the order is made or in seeking to have the order set aside or varied.

2.10 Parties' power to vary time limits. The CPR provides the freedom for the parties to agree in writing a variation to any time limit set out in a direction, unless the CPR or a practice direction provides otherwise.[84]

2.11 Exercise of discretion. A court exercising case management powers has a considerable measure of discretion. An appeal court will not interfere with a case management decision, unless it involves an error of principle or law, or the court misapprehended some material factual matter.[85]

2.12 Sanctions. One of the court's more Draconian powers is the ability to strike out a claim or defence where a party has failed to comply with a time limit fixed by a rule, practice direction or court order. The power is most frequently used when parties fail to file the allocation questionnaire[86] or court fees are not paid.[87] The power to strike out can also be used in respect of specific evidence (e.g. a party may not be able to rely upon a witness statement or expert report that is served late). However, it is usually deemed more appropriate to use an alternative sanction: for example, awarding costs on an indemnity basis payable immediately or ordering a payment into court.[88]

2.13 Unless orders. An unless order is an order by which the court attaches a conditional sanction to an order requiring performance of a particular act by a specified date or within a particular period. The Court of Appeal has previously indicated that unless orders should be used sparingly.[89] They should only be made if the court is prepared to enforce. Idle threats would diminish the authority of the court and undermine the normative force of rules and court orders.

2.14 Relief from sanctions. CPR rule 3.8 provides that if a party has failed to comply with a rule, practice direction or court order, any sanction has effect unless relief from the sanction is obtained. An application for relief must be supported by evidence.[90] CPR rule 3.9(1) sets out factors that the court will consider when considering an application for relief from any sanction imposed on a party.

2.15 It is noted in several of the submissions that the court tends to shy away from implementing the various weapons in its armoury. Several respondents believe that if these powers were utilised more rigorously, then costs could be controlled to a proportionate level. These existing powers should be borne in mind when considering the possible reforms set out below.

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[84] CPR rule 2.11.
[85] *Wallbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427 at [33].
[86] Practice Direction to Part 26 paragraph 2.5(1)
[87] CPR rule 3.7(6)
[88] See *Biguzzi v Rank Leisure plc* [1999] 1 WLR 1926 at 1933-1934 per Lord Woolf MR.
[89] In *Crawley v Seacor Marine (Guernsey) Limited* [2008] EWCA Civ 492, Moore-Bick LJ repeated a view expressed previously that unless orders should be used sparingly. He also said that it was not possible to lay down any general principle that the court must follow when deciding whether a party had complied with an unless order. Each order must be construed by reference to its own terms and the context in which it was made.
[90] CPR rule 3.9(2)

3. PRE-ACTION PROTOCOL

3.1 There is a general consensus that the early exchange of information is beneficial to a quick resolution of claims and many note a marked improvement in the early communication between parties. However, there are concerns that claimants run up substantial costs even before the letter of claim is sent. Even if a defendant settles at the first available opportunity, he may be faced with a significant costs burden.

(i) Rules

3.2 Under the CPR parties to a dispute are required to comply with pre-action protocols before commencing proceedings. The pre-action protocols require prospective claimants to notify prospective defendants of their claim. Thereafter the parties are expected to engage in a meaningful exchange of information in order to see whether the dispute can be resolved without proceedings and, if proceedings appear necessary, to reach a mutual understanding of the issues and core evidence. These requirements are not directly enforceable, but the courts have considerable powers to attach adverse consequences to non-compliance with protocols, especially in terms of costs, once proceedings have started. Even where the dispute settles before the issuing of a claim form, failure to comply with protocols may have adverse costs consequences if costs-only proceedings take place. Such proceedings may be commenced where the parties have reached agreement on all issues, including liability for costs, but have failed to agree the amount of those costs.[91]

3.3 What types of cases does the protocol apply to? The pre-action protocols apply to almost all cases. There are specific pre-action protocols for: personal injury; clinical disputes; construction and engineering; defamation; professional negligence; judicial review; disease and illness; housing disrepair; possession claims based on rent arrears; possession claims based on mortgage or Home Purchase Plan arrears in respect of residential property. If no specific pre-action protocol applies the parties should adhere to the Practice Direction on Pre-Action Conduct, which I shall refer to as "the PDPAC".

3.4 The PDPAC came into effect on 6th April 2009, replacing an earlier and somewhat less prescriptive practice direction. It supplements CPR Part 3. Some of the new PDPAC applies only to cases where no other subject-specific protocol applies but some of it applies in all cases. It includes a requirement in business debt claims for the creditor to provide information about sources of advice to the debtor before issuing proceedings (see Annex B). It also includes guidance on instructing experts (see Annex C). There are a small number of exceptions which are beyond the scope of the PDPAC, as set out in paragraph 2.2 thereto. Some of the new provisions of the PDPAC could result in a change in approach by the courts. For example, the PDPAC includes a requirement that claimants should state in the claim form or particulars of claim whether they have complied with the practice direction or any relevant protocol. This may lead to more attention being focused by the courts on the parties' pre-action behaviour when costs are being assessed.

3.5 The court takes into account compliance or non-compliance with the relevant protocol when (a) giving case management directions and (b) making orders about costs. When assessing compliance, the court will be concerned with substance, rather than technical defects. The court will consider the proportionality of the steps taken

[91] CPR rule 44.12A.

to the size and importance of the matter. The court will also consider the urgency of the matter.[92]

3.6 Overview of principles. Unless the circumstances make it inappropriate, prior to commencing proceedings the parties should:

(i) exchange sufficient information about the matter to allow them to understand each other's position and make informed decisions about settlement and how to proceed;

(ii) make appropriate attempts to resolve the matter without starting proceedings, and in particular consider the use of an appropriate form of ADR in order to do so.

In particular, the protocols state that the costs incurred in complying should be proportionate to the complexity of the matter and any money at stake. The parties must not use the protocols as a tactical device to secure an unfair advantage for one party or to generate unnecessary costs.

3.7 Examples of non-compliance. As set out in paragraph 4.4 of the PDPAC, breaches of the protocol include:

- providing insufficient evidence to allow the other party to understand the case;
- not acting within the prescribed time limit or, where relevant, "a reasonable period";
- unreasonably refusing to consider ADR; and
- without good reason, refusing to disclose requested documents.[93]

3.8 Sanctions for breach. If the court concludes that the relevant protocol has not been complied with, the cost sanctions available to it include:

- an order that the party at fault pays the costs, or part of the costs, of the other party or parties (this may include an order under CPR rule 27.14(2)(g) in cases allocated to the small claims track);
- an order that the party at fault pays those costs on an indemnity basis;
- if the party at fault is the claimant in whose favour an order for the payment of a sum of money is subsequently made, an order that the claimant is deprived of interest on all or part of that sum, and/or that interest is awarded at a lower rate than would otherwise have been awarded; and
- if the party at fault is a defendant, and an order for the payment of a sum of money is subsequently made in favour of the claimant, an order that the defendant pay interest on all or part of that sum at a higher rate than would otherwise have been awarded, but not exceeding 10% above base rate.[94]

[92] PDPAC paragraph 4.3
[93] PDPAC paragraph 4.4.
[94] PDPAC paragraph 4.6

(ii) The submissions

3.9 The submissions contained very mixed views on the pre-action protocol. Those championing the pre-action protocols put forward the following reasons:

- They greatly assist in the early exchange of information, which in turn helps to effect early settlement.
- The costs incurred are preferable to trial by ambush.
- One user expressed "no experience of it working adversely".
- In environmental and public law cases it is a process to "*be commended*". Similar sentiments have been expressed in relation to personal injury cases.

3.10 Others praise the intentions of the pre-action protocols, but query the continued need for them given the change in attitude effected by the protocols. It is also acknowledged that the protocol can be useful in helping parties to avoid damaging existing relationships (commercial or otherwise), as is often the case once formal litigation has commenced.

3.11 The criticisms in the Phase 1 submissions include the comments that:

- They lead to heavy "front-loading" of costs.
- They are a "*distraction*".
- There is nothing that a defendant can do to prevent cost accumulation or to commence proceedings if a claimant is unduly prolonging the pre-action process.
- The court has no power to intervene in case management until a claim is issued, by which stage substantial and disproportionate costs may already have been incurred.
- Steps taken pre-issue may be duplicated post-issue (e.g. the statement of case is often the letter of claim re-formulated).
- Once claims are brought within the jurisdiction of the court, the sanctions for non-compliance are not imposed as often as they should be. There is little benefit to be gained from wrapping up any non-compliance in a detailed assessment at the end of the case. One submission referred to Ramsey J's view in *Charles Church Developments Ltd v Stent Foundations Ltd* [2007] EWHC 855 (TCC) "*the courts should generally deal with the cost consequences of failure to comply with a pre-action protocol at an early stage*".
- When effecting this reform, Lord Woolf envisaged the exercise of much more control.
- Overseas litigants find it difficult to understand why so much has to be done pre-issue.
- Many clients (domestic and foreign) find the process frustrating. They see that substantial costs are being incurred but perceive that "*nothing is being done*".

3.12 Are the recent reforms likely to be effective? Already a number of concerns have been raised in relation to the new practice direction:

- Fears that the new guidance on identifying and asking for copies of further relevant documents could potentially be used oppressively, either as a fishing

expedition, or to attempt to require the claimant to obtain documents which it does not possess.

- Time and money can be wasted if parties are pressurised into ADR (rather than risk a punitive costs sanction), before they are ready to take an objective view of the dispute and to consider a solution which offers benefits to both sides. An ADR attempt which fails in such circumstances can delay or even prevent subsequent settlement attempts. Notably, the words "*[i]t has been expressly recognised that no party can or should be forced to mediate or enter into any form of ADR*" have been removed from the PDPAC.
- It is claimed by some that despite the recent revisions the system and processes are still not user friendly for litigants in person.

(iii) Specific types of cases

3.13 Protocol for Possession Claims based on Rent Arrears. This protocol is in its nature very different to the other protocols, and concerns have been raised as to whether it actually saves costs. The Civil Justice Council Housing and Land Committee recently put forward some potential reforms to the protocol for consideration. Details of these proposed reforms are set out in chapter 31 at paragraph 2.21. Comments on these proposed reforms are invited.

3.14 Chancery litigation. Although a number of protocols may be applicable to cases across the Chancery courts[95] , there is no "special" pre-action protocol. There are some compelling arguments that due to complexity of the matters litigated in this division a general practice direction on pre-action conduct is inappropriate. There is a view amongst experienced practitioners that the necessary "cultural shift" of early exchange of information and willingness to engage with the other party has been achieved; and that detailed pre-action requirements serve only as an additional costs burden. This is discussed in more detail in chapter 33 from paragraph 5.5 and need not be repeated here. The question is whether (a) formal pre-action protocols should be dispensed within in Chancery litigation; (b) the new PDPAC strikes the right balance; or (c) a special pre-action protocol for chancery litigation should be drawn up.

3.15 Commercial Court. In the Commercial Court, the LTWP suggested that cases governed by the Practice Direction – Protocols (now replaced by the PDPAC) need only to comply with the "*minimum expectations of the pre-action protocol regime*". This is understood to mean (a) a concise letter of claim containing, but limited to, sufficient information to allow the claim to be understood; (b) provision of only essential documents; and (c) a concise response from the defendant attaching only key documents. The rationale for this approach is to reduce wasted costs. It is considered that full compliance with the practice direction in large cases would lead to excessive work before issue of proceedings. The LTWP considers much of the work should be done once a claim has been issued, so that the court can use its powers to streamline the work and so reduce costs.

3.16 A serious issue for consideration is whether the approach proposed by the LTWP should be adopted by any courts outside the Commercial Court, which deal with "heavy" litigation. In this regard, it should be noted that there are some similarities between the LTWP proposal and the proposal put forward in respect of

[95] Such as the professional negligence pre-action protocol.

the Technology and Construction Court ("TCC"), which is discussed in section 4 of chapter 34.

3.17 TCC. Despite reforms introduced two years ago, there are still some concerns that the pre-action process in the TCC is too costly. It has been suggested that the "pre-action" process should be carried out after issue of the claim form. This proposal is set out in section 4 of chapter 34. Comments are invited on this during Phase 2.

3.18 Clinical negligence claims. It was stressed with some force in submissions made by associations whose members find themselves defending clinical negligence claims (e.g. the NHSLA and the MPS) and their panel solicitors that costs incurred before issue are a substantial concern for them. Due to professional regulatory considerations, there is often reluctance on the part of a professional to "admit" liability, as generally required under the protocol and the CPR. Yet the practitioner may be willing to accept that a settlement by the indemnifier is the most appropriate resolution. The clinical defence organisations say that failure to make admissions is often treated as a reason to issue proceedings, even when an indication has been made that they are willing to settle. This may possibly be an explanation for the observation made in section 4 of chapter 11 that a substantial number of meritorious claims are not settled until after issue. I invite comments on this issue during Phase 2. In particular, it will be necessary to consider whether the Clinical Disputes Protocol should be amended in manner which might promote pre-action settlements without any admission of liability.

3.19 A further concern indicated by defendants is that the claimants sometimes spend years compiling their case, yet the defendant is faced with putting their defence together in three months. This is another issue upon which I shall seek assistance during Phase 2. My recollection of clinical negligence litigation at the Bar (acting for both claimants and defendants) is that very often less work is involved in preparing a properly particularised defence than in formulating a claim. Furthermore, very often the defendants know that a claim may be on the way and therefore start to collate their evidence in advance of a letter of claim.

(iv) Review

3.20 Need for a radical re-think. The purpose of all pre-action protocols and of the PDPAC is to facilitate a proper exchange of information and also to achieve settlement, where that is possible, before issue of proceedings. Few would quarrel with that objective or with the good sense of Lord Woolf's proposal in 1996 that protocols should be introduced, in order to bring about constructive pre-action conduct and dialogue.[96] There is, however, a concern that now – a decade later – some of the protocols are becoming counter-productive and generate more costs than they save.[97]

3.21 It is now necessary to take a critical look at all eleven pre-action protocols (including various amendments made over the years) and at the PDPAC and to examine whether they are achieving the beneficial objectives set out in chapter 10 of Lord Woolf's final report. In particular, it is necessary to consider:

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[96] See Lord Woolf's Final Report, chapter 10.

[97] In recent years I have dealt with at least one case where the pre-action protocol process generated costs of about £1 million. I recall another case where the pre-action protocol letter of claim ran to some 350 pages. There must be a question as to whether that level of expenditure before either party puts pen to pleading is a wise use of resources.

(i) Whether any of those protocols should be made simpler or less onerous.

(ii) Whether any restriction should be placed upon recoverable costs in respect of the protocol period.

(iii) Whether any of the "pre-action" processes could sensibly be brought into the post-issue period, either along the lines suggested by the LTWP or along the lines suggested by certain TCC judges and practitioners.

(iv) Whether any detailed amendments to individual protocols (for example, of the type canvassed above in respect of clinical negligence) would assist in promoting settlement.

(v) Whether there should be more effective sanctions (possibly prescribed sanctions)[98] for non-compliance with the protocols. This appears to be a particular issue in respect of the Pre-action Protocol for Personal Injury Claims. Both sides make complaints about non-compliance with this protocol.

(vi) Whether defendants should be able to bring to an end protracted pre-issue processes by themselves issuing proceedings.

(vii) Whether claimants should be required to notify claims which they are investigating, so that defendants can do parallel investigations if they wish to.

3.22 Since pre-action protocols are seen by many as generating substantial costs, this is one of the issues upon which I would like to concentrate during Phase 2. In focusing upon this issue, it is vital that we do not take for granted or throw away the benefits already achieved by the protocols. To take the most obvious example, the Pre-action Protocol for Personal Injury Claims enables essential information to be passed both ways and leads to settlement of many personal injury cases pre-issue. Even there, however, complexities are growing. A "new process" for dealing with personal injury claims pre-issue is being developed, which hopefully will deal with some of the present problems: see chapter 26 above. Once the "new process" has been finalised, that process will presumably have to be operated in conjunction with the pre-action protocol. These two procedural documents together will run to some length. A question, which at least merits consideration, is whether the two procedures could somehow be combined into a single reasonably concise and user friendly document.

3.23 I must confess to finding the issues surrounding pre-action protocols some of the most intractable questions in the Costs Review.[99] I shall therefore welcome assistance, including detailed comments and any suggested drafts, during Phase 2.

4. STEPS IN CASE MANAGEMENT

(i) Allocation and process to trial

4.1 Once proceedings have been issued and a defence filed a case will be tried on one of three procedural "tracks": small claims; fast track or multi-track. Although the

[98] For example, a firmer steer towards imposing interest penalties on defendants who do not provide essential information than the power conferred by paragraph 4.6 of the PDPAC.

[99] The issue about which I was questioned most often and most closely by practitioners in Australia was whether pre-action protocols in their present form in England and Wales were (a) saving costs and promoting settlement or (b) generating unnecessary costs. There seems to be a perception amongst some overseas lawyers that pre-action protocols are driving up English litigation costs.

parties may indicate which track they prefer the court will ultimately determine the appropriate route[100] based on factors such as (a) the financial value of the case; (b) the amount in dispute; (c) the complexity of the issues; (d) the number of witnesses likely to be called; (e) whether expert evidence is needed; (f) any intended applications; (g) costs estimates; (h) trial time estimates; (i) settlement proposals and (j) pre-action exchanges. Necessary information is provided by the parties in the allocation questionnaire ("AQ") which is sent out after service of the defence. Each party must lodge a costs estimate with its AQ.

4.2 More detailed guidance on allocation to tracks is found in the CPR, but in general:

(i) Small claims: Claims worth less than £5,000, personal injury claims where the value for general damages is not more than £1,000 and housing disrepair claims for less than £1,000.[101]

(ii) Fast track: Claims worth up to £25,000[102] where the trial is likely to last less than one day (five sitting hours) and there is expert evidence in no more than two fields.

(iii) Multi-track: This track accommodates all other cases.[103] Cases issued in the Commercial Court, TCC, Mercantile Courts and Part 8 claims are automatically allocated to the multi-track.

4.3 Small claims. The process is described in chapter 49 below. It is fairly informal and is specifically aimed at litigants in person. The courts have a target that all small claims cases should be heard within 15 weeks of allocation. In the financial year 2006/2007, this was achieved in 80% of cases.[104] As noted elsewhere in this report, users of the small claims track are generally reasonably satisfied with the procedure.

4.4 Fast track cases. For fast track claims paragraph 3.12 of the Practice Direction to CPR Part 28 sets out a typical timetable of 30 weeks from the date of notice of allocation to trial. The Appendix to the same Practice Direction sets out standard directions. Cases will normally be tried in the county court by a district judge, unless it is more practicable or appropriate for it to be heard by a circuit judge. Efforts will also be made so that the case is heard in the defendant's "home court".[105] Where it is necessary or appropriate, claims can be transferred between the courts. A worrying trend is that sometimes claimants are perceived to be starting proceedings in courts other than the relevant home court, or most convenient court, because of "difficulties" with certain courts.[106]

4.5 Multi-track cases. All of the larger and more complex claims are allocated to the multi-track. These cases may be heard in the High Court or in a county court at one of the designated civil trial centres. Cases under £50,000 will generally be heard in a county court,[107] unless (a) an enactment requires the cases to be heard in the

[100] Except where cases are automatically assigned to a track
[101] See CPR rule 26.6.
[102] Prior to 6th April 2009 this limit was £15,000.
[103] CPR rule 26.6(6).
[104] See the Crown, County and Family Court Annual Report April 2006 to March 2007.
[105] CPR rule 26.2.
[106] See, for instance, page 4 of the Leeds Group Annual Report for 2006 – 2007, which was written by the Designated Civil Judge and Regional Director. The same sentiment has been expressed to my judicial assistant by one of the court clerks that she spoke to.
[107] Practice Direction to Part 29, paragraph 2.6.

High Court (e.g. defamation claims), (b) the cases fall within a specialist list or (c) the cases fall into the categories mentioned in the Practice Direction to CPR Part 29, paragraph 2.6. Although there is an outline procedure for multi-track cases set out in CPR Part 29 and the Practice Direction thereto, the procedure is much more flexible than that which applies to fast track cases. HMCS has set a target of 50 weeks for the completion of multi-track cases.

4.6 It has been the experience of judges and practitioners alike that since the CPR were introduced, almost exactly ten years ago, proceedings have been brought to trial more quickly. This is a cost saving factor, which should not be overlooked. There are two key reasons why shortening the timetable reduces cost:

(i) Work tends to expand to fill available time, especially since fee earners are under constant pressure to record chargeable hours.[108]

(ii) The longer a case runs on, the more often the personnel handling the file will change. Every change of personnel involves significant additional costs and a learning curve.

(ii) Interim hearings

4.7 Case management conferences ("CMCs"). The purpose of a CMC is to:

> (1) "review the steps which the parties have taken in the preparation of the case, and in particular their compliance with any directions that the court may have given;
>
> (2) decide and give directions about the steps which are to be taken to secure the progress of the claim in accordance with the overriding objective; and
>
> (3) ensure as far as it can that all agreement that can be reached between the parties about the matters in issue and the conduct of the claim are made and recorded."[109]

4.8 The DCA Research states that "*[CMCs] represent the practical and philosophical expression of court control in the case managed track*". It praises CMCs as "*one of the major successes of the CPR*". The Phase 1 submissions seem to recognise that CMCs work well. However, one submission suggested that they can be formulaic and lacking in the assertive case management role that was envisaged by Lord Woolf.

4.9 In complex or high value cases it is usual for a number of CMCs to be held throughout a case so that the court can monitor compliance with directions and to make further directions as necessary. In allowing variation to the directions, the judge will always be mindful of any amendments that may jeopardise the ultimate date for trial.

4.10 Agreeing directions – the pros and cons. Prior to the CMC the parties will try to agree the directions. In many cases this is a worthwhile exercise, as experienced

[108] This assertion does not involve any imputation upon solicitors. It is almost universal experience that work tends to follow the most remunerative path.
[109] Practice Direction to CPR Part 29, paragraph 5.1.

practitioners are just as well placed as[110] the judiciary to be able to devise a sensible timetable. However, in larger, and sometimes more acrimonious proceedings, this attempt to agree directions can become a cost consuming exercise. There may be several rounds of correspondence (rather than a simple call between partners). In an attempt to show the court that they are being co-operative, each party may concede a little, but neither party may be satisfied and the resultant compromise agreement may not reflect the best course of action. In such circumstances it may be cheaper and more effective for each party (a) to set out its position; (b) to make clear that neither party believes a compromise to be the best course of action; and (c) to refer the matter to the court for an appropriate direction.

4.11 Interim hearings. In addition to CMCs, the court may be called upon between issue of proceedings and trial to hear interim applications. These may include requests for specific disclosure, applications for extensions of time, applications for permission to amend, etc.

4.12 Listing of interim hearings. I am told that in some courts the listing of interim hearings is problematic. There can be lengthy delays before an interim application is heard.[111] This in turn delays the parties' preparations for trial, generates further inter-solicitor correspondence and leads to increased costs. It would be helpful to receive further information on this issue, both from court users and from HMCS, during Phase 2. If it turns out that some re-allocation of resources within the court service would assist in bringing down civil litigation costs, then this is an option which should be pursued. Given the present level of court fees,[112] it ought to be possible to provide an efficient service to court users at all civil justice centres.

4.13 Telephone hearings. CMCs due to last less than an hour should be held by telephone, if the court facilities allow.[113] Many, but not all, of the county courts are now able to offer this facility. The county court Annual Reports for 2006/07 and a number of comments in the Phase 1 submissions indicate that overall this service is being well received. There appears to be less frequent use of telephone hearings in the High Court.

4.14 The Designated Civil Judge for London Group of county courts has noted that under this regime fewer cases can be listed and the DCJ for the South Wales Group concurs that telephone hearings are a less effective use of judicial time. However, the extra judicial time must be balanced against the fact that (a) costs incurred by the parties will be less (e.g. because there is no travelling time) and (b) other court resources are saved (e.g. a court room does not need to be used, an usher does not need to be present etc.).

4.15 Listing for trial. The DCA Research calls the diary managers and listing officers the "*unsung heroes of the civil court system*". "*They will normally list to a trial window of varying lengths of time with fixtures being offered in more complex and longer cases. … This is a job that is more art than science and requires a cool head, good nerves and strong networking skills, including e-mail contacts, with other listing officers, when a case suddenly needs a home at short notice*." This sentiment is echoed in several county court annual reports, which praise their diary manager and listing officers.

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[110] Indeed, on one view better placed than the judge, because of their intimate knowledge of the case.

[111] The concern expressed relates to routine applications, rather than urgent matters. Courts can generally respond rapidly when an application is urgent.

[112] As to which see chapter 7

[113] Practice Direction to CPR Part 23 paragraph 6.2.

4.16 The listing of cases for trial has not generally been a matter of complaint or concern in the Phase 1 submissions. Trial listing is never easy because of (a) the propensity of cases to collapse at or close to the door of the court and (b) the difficulty of predicting which those cases will be. It seems to be generally accepted that listing officers and diary managers are doing the best job that is practicable with the resources available.[114]

(iii) Other case management issues

4.17 Sanctions for delay or non-compliance. Phase 1 submissions indicate that many court users and practitioners believe that the court system is failing to impose strict enough sanctions upon offenders. The general perception amongst practitioners appears to be that there is little risk of any adverse order as a consequence of a "minor" delay in filing a document. It is suggested that greater weight needs to be given to the prejudice to the judicial system as a whole suffered as a consequence of widespread delays and disregards for procedural deadlines and the resulting inflation of costs as well as the impact on judicial resources.

4.18 Compliance with court guides? The Chancery Guide states that "*failure to lodge skeleton arguments and bundles in accordance with this Guide may result in: (1) the matter not being heard on the date in question; (2) the costs of preparation being disallowed; and (3) an adverse costs order being made.*"[115] The other court guides contain similar provision. There are no data to show whether these rules are implemented, but the feeling amongst practitioners is that unless it is a significant default which actually leads to the hearing being vacated, the transgression will go unpunished. What is more likely is that there will be "toing and froing" at the start of the hearing as everyone establishes whether they have the relevant documents. Furthermore, in many instances, the documents will not have reached the court file, so that the judge cannot be fully prepared.

4.19 In their Phase 1 submission The Association of Law Costs Draftsmen said "*It is understood that there are many matters outside the control of solicitors that can force delays in dealing with directions, but there is almost an acceptance that time limits can be extended without any real comeback. Any delay leads to an inevitable escalation of costs.*"

4.20 A number of suggestions have been put forward as a means for re-establishing due respect for deadlines set out in the CPR or imposed by way of direction in a specific case, including the following:

- All deadlines imposed by virtue of the CPR shall be amended so as to carry a specified sanction, which will take effect in default of compliance without the requirement for a further application. The right for the parties to apply for relief from sanctions would still apply.
- Where directions refer to "exchange" of documents, in default of one party complying, the party who is able to proceed but does not wish to disclose evidence unilaterally, should be permitted to file its evidence with the court. The defaulting party will then require a court order for an extension of time.

[114] This is certainly confirmed by my own experience of working closely with the TCC court manager/listing officer.
[115] Paragraph 7.30 of the Chancery Guide.

4.21 Another possibility would be a declared change of judicial policy[116] that as from a stated date, say 1st January 2010, non-compliance with deadlines or due dates would no longer be tolerated, save in exceptional circumstances. There would then be a series of "hard cases" in January 2010 where parties found themselves struck out or unable to rely upon late evidence etc., and thus thrown back upon their remedies against their own lawyers. This may rapidly lead to a tightening up of practice on the part of all litigators, for the benefit of civil litigation generally. This is not a reform which I am positively advocating, because of the hardship which it would cause to individual litigants and lawyers. However, I raise this as one possible way of dealing with the concerns expressed in the Phase 1 submissions.

5. THE JUDICIARY AND COURT RESOURCING

(i) The judiciary of England and Wales and allocation of work

5.1 The judiciary. As at 1st April 2008 there were[117] 12 Lords of Appeal in Ordinary, five heads of division, 37 Lord Justices of Appeal, 110 High Court judges ("HCJs"),[118] 48 masters, registrars, costs judges and district judges ("DJs") and 115 deputy masters, deputy registrars, deputy costs judges and deputy district judges. In the county courts there were 653 circuit judges ("CJs"), 1,305 recorders, 438 district judges and 773 deputy district judges. Some individuals sit in various capacities.

5.2 Brooke Report. At the behest of the Lord Chief Justice, in August 2008 Sir Henry Brooke completed the report "*Should the Civil Court be Unified?*". Amongst other things, this report set out the complexities of and the processes for allocating judges, the processes for transferring cases between courts and the jurisdictions of each type of judge (both civil and criminal). Sir Henry made many suggestions about how these processes could be made more efficient for the benefit of all. The report has been considered by a working party, headed by Moore-Bick LJ. Their recommendations are being considered by the Judicial Executive Board. It is not the purpose of this report to re-cover the ground recently trodden, particularly given that its findings are still being actively considered. However, in accordance with my terms of reference to "*consider whether changes in procedure could bring about proportionate cost*" it is necessary to touch upon this subject. In particular, the areas which could lead to a more efficient system include docketing and the use of specialist judges.

5.3 Generally, the pre-trial process is managed by the procedural judges: the masters in the Royal Courts of Justice and the DJs in the county court and the High Court district registries. However, interim injunction applications will be decided by a judge.[119] It is also possible to ask the court to allocate a judge to hear interim application based on the complexity and importance of the dispute, but given current resourcing levels such requests are frequently rejected.

5.4 Cases in the Chancery and Queen's Bench Divisions are assigned to individual masters. This system is liked by the parties, as it affords them some continuity and it is believed that case management can be achieved more effectively. The only

[116] There would need to be a rule change as well, to reverse the effect of guidance given in *Biguzzi v Rank Leisure plc* [1999] 1 WLR 1926. See paragraph 2.12 above.
[117] http://www.judiciary.gov.uk/keyfacts/statistics/monthly.htm.
[118] If one excludes family Division judges, the number is 91.
[119] See CPR Part 2 Practice Direction B.

perceived draw-back is that if the assigned master is very busy or away from the court, then there can be delay in getting a direction or hearing.

5.5 Case management by judges. Some larger cases are effectively case managed by judges, rather than masters. In the specialist courts (Commercial Court, TCC, Administrative Court) all case management is done by judges, rather than masters.

5.6 Case management of heavy litigation in London. Most Queen's Bench ("QB") judges go on circuit for three periods of approximately 6 weeks during the year. This makes it difficult for cases being managed in London by QB judges to be assigned to a single judge.

5.7 Case management of heavy litigation outside London. Sir Henry Brooke found that cases outside London that are fit for an HCJ do not get case-managed or tried by a HCJ, unless they can be fitted into the small window when the HCJ will be paying a local visit. Furthermore, there need to be more specialist circuit judges to conduct Chancery business below the level of HCJ. Case management at major civil justice centres requires more specialised DJs who are accustomed to heavy civil litigation.

5.8 I have little doubt that implementing the extremely sensible package of proposals put forward by Sir Henry Brooke (only a few of which I have specifically enumerated) will make a major contribution towards reducing the costs of civil litigation.

(ii) Docketing

5.9 The docket system. The system of assigning a case to one judge from issue up to and including trial is sometimes referred to as "docketing". The "docket" is then the collection of cases which a particular judge is managing.[120] It is extremely difficult to operate a docket system in England and Wales, because of the way that the judiciary are organised.

5.10 Report and Recommendations of the LTWP. The LTWP considered carefully whether to recommend docketing, but did not do so. Their reasons included the following:

> "First, the Commercial Judges themselves have always been against the notion of being confined to commercial cases. The Commercial Judges believe, rightly or wrongly, that it is better for the Commercial Court and for the system generally if they have experience in other areas of the law, perhaps particularly the criminal law. Secondly, there is no need to confine the judges to Commercial Court work, provided that sufficient judges are allocated to the court overall. The only real problems arise in relation to HCCs, if a judge who is new to the case has to grapple with heavy facts and a procedural history for the first time when the proceedings are already well advanced. That exercise takes time both before and during court hearings and so costs money."

[120] These terms are not universal. In the USA some lawyers use the term "docket" to describe the file for a particular case and the term "assignment to a single judge" to mean that one judge manages a case from beginning to end. However, I shall use the terms "docket" and "docketing" in the sense set out in paragraph 5.9 above.

Unlike the LTWP, however, some commercial litigation solicitors strongly advocate a docketing system: see chapter 10, section 11.

5.11 My own opinion. My terms of reference do not extend to judicial deployment. However, it may be of assistance if I proffer some brief observations concerning the effect of docketing on civil litigation costs. In common law systems around the world there is a general perception amongst both practitioners and judges that docketing promotes efficient case management and reduces the costs of civil litigation. See in particular chapters 58 (Australia) and 60 (USA). Furthermore, my own experience supports the same conclusion. Between 2004 and 2007 I sat in a court where it was possible for judges to run heavy civil cases on a docket system. My impression from those three years is that a docket system makes it distinctly easier for the court to deliver a cost effective service to users.

5.12 Whether it is possible combine criminal work with a docket system for heavy civil cases must be for others to consider. In case it is relevant, I was informed by Chief Justice Martin of the Western Australia ("WA") Supreme Court[121] that judges of the WA Supreme Court are able to operate a docket system, despite going on circuit to deal with criminal matters for about one month per year.

5.13 The views of my assessors. All seven assessors who are assisting me with the Costs Review are strongly of the view that a docketing system should be introduced for civil litigation. They believe that this would promote effective case management and help to reduce costs.

5.14 Conclusion. As stated above, judicial deployment lies outside my terms of reference. It may, however, be appropriate to place on record the view of the assessors and myself that, where possible, civil cases should be (a) assigned to a single judge or (b) assigned to a team of specified master/DJ and specified judge. Any structural reforms which facilitate this arrangement are likely to reduce the costs of civil litigation.

(iii) Court staff

5.15 Under-staffing. Court users and the judiciary praise the efforts of the court staff, but it is widely acknowledged that many court centres are grossly understaffed. In the introduction to the Crown and county court Annual Reports 2006/07, Leveson LJ stated:

> "Many areas stated that their courts were running under tight budgetary constraints; real problems in relation to insufficient resources and understaffing have been reported. In many areas, particularly in the County Court, there is a high staff turnover which is symptomatic of the pressure placed on staff as a result of reduced headcount, the remuneration received and the wage differentials between government departments and the private sector…".

The details of staffing efficiency and staff morale in the county courts are summarised in Annex A to Sir Henry Brooke's report.

5.16 Filing. Many of the courts in their reports identified a problem in the time it takes for a document received by the court to be put on the relevant file. Others noted that mis-filing was as much of a problem as delay. In his report Sir Henry

[121] Meeting on 27th March 2009.

Brooke recommends that HMCS should review their filing arrangements so that mistakes may be less frequently made by inexperienced staff and managers (and judges). He suggested that colour coding court files could improve the position, and more easily intelligible case numbering on court files should supplement colour coding. He considered that the arrangements in Cardiff whereby a judge marks and signs the outside of a file with a felt-tip pen to indicate how the case should be managed thereafter should be adopted across the country.

5.17 Comment. There is a direct link between the resourcing of the civil courts and the costs of civil litigation. When documents are lost or staff are unavailable to deal with matters, the work of the solicitors on both sides of a case increases. So also does the cost of the litigation. Although the organisation of the Court Service lies outside my terms of reference, I am bound to point out that better resourcing of the civil courts is one direct way to reduce litigation costs. Also, it may be thought that sometimes able staff are better employed delivering a frontline service at civil justice centres, rather than undertaking "policy" work or other head office functions. The better the service that the civil courts deliver, the more often those courts will be used,[122] thus increasing the revenue from court fees. Also the administrative efficiency of the courts is relevant to overseas parties who are choosing a forum for future disputes.

(iv) Use of technology

5.18 The contribution made by technology to good case management and reducing costs has been stressed on many occasions[123] and need not be repeated here. The Law Society in its submission for Phase 1 stressed the importance of (a) modernising IT systems and (b) providing an electronic filing and document management system in all civil courts. It is also right, however, to note and to welcome the progress that has been made in recent years in relation to IT systems.

5.19 Virtually all full time judges have been given laptop computers, and many type up their own judgments. Some judges use their laptops for case management purposes, that is to say overseeing the progress of cases. The LINK project is bringing an IT infrastructure to all the judiciary and to court staff in the Crown Courts and Combined Crown and Civil Courts. It aims to provide desktop IT facilities and e-mail facilities to promote better communication between the judiciary and staff with the public, colleagues and other Government Agencies. LINK is now rolled out throughout most of the courts in England and Wales, and its users report satisfaction with the system.

5.20 Service online. The creation of electronic services has meant that claims for a specified amount of money or repossession of property can be completed via the internet. Money Claim Online ("MCOL")[124] was launched in February 2002 and issues claims in the name of Northampton county court. Possession Claim Online ("PCOL")[125] was launched in October 2006 and issues claims in the name of the court relating to the postcode of the property. With both systems the claimant can pay the court fee by credit or debit card. In addition, for PCOL, large issuers can pay by

[122] I am not suggesting that litigation should be encouraged for its own sake, but that access to justice should be promoted. Parties should not be deterred by cost or delay from pursuing proper claims or proper defences. Parties who would prefer litigation to alternative methods of dispute resolution should not be driven away from the courts by the prospect of excessive cost or delay.

[123] See e.g. Lord Woolf's Final Report and Sir Henry Brooke's report.

[124] www.moneyclaim.gov.uk.

[125] www.possessionclaim.gov.uk.

direct debit. These services remove time consuming and repetitive administrative work from the court, reducing the cost of litigation and freeing up resources to do other work. These systems do not deal with the claim beyond issue, but many of the cases issued in this way settle immediately after issue and therefore the automation of this initial process actually reaps much of the necessary benefits.

5.21 "Electronic Working". The Commercial Court is currently trialling "Electronic Working" ("EW"). This is the replacement programme to the EFDM system referred to at paragraph 4.6.3 of Sir Henry Brooke's report and it offers the potential of a full electronic case file.[126] When the rollout is complete it is intended to cover the court processes end-to-end for all case types. This programme goes beyond the service capabilities of MCOL and PCOL, as it will allow for the service of all documents and forms online. It also has case management capabilities and is integrated with the existing listing capability for the court staff and judges,[127] who will have access to the full case file in an electronic format via a "Case Reader" facility.

5.22 It is hoped that the system will bring benefits to all users:

- For external users (solicitors/counsel/litigants in person): working on the forms offline, electronic filing, pre-population of forms, reducing time and cost associated with form filling and correction and transport to court.
- For court staff: automation of mundane and time-consuming tasks, in particular avoiding the need for re-keying of case information into the case management system.
- For judges: access to a fully electronic case file, with easy navigation and effective search, saving time associated with transporting files to judge's rooms and locating hard copy documents. It also minimises the likelihood of documents being put on the wrong file or not being filed in sufficient time.

5.23 The pilot exercise will run in the Admiralty, Commercial and London Mercantile Courts (the administration of which is handled by the Admiralty and Commercial Registry) in the RCJ before being extended to the other courts/divisions going into the Rolls Building in 2010/11. Those other courts/divisions will include the Chancery Division at the RCJ (not the district registries), the Technology and Construction Court at the RCJ and the Bankruptcy and Insolvency Courts at the RCJ.

5.24 It is to be hoped that the EW system will in due course be extended to civil courts outside London. This has the potential to achieve real savings in the costs of civil litigation.

6. SETTLEMENT AND THE USE OF ADR

(i) Introduction

6.1 It is a fair assumption that attempts will have been made to settle any claim before issue. In such cases, the attempts will have failed. Nevertheless ADR techniques (particularly mediation) have an important role to play in many civil actions.

[126] It is understood to be a programme of a similar nature but, due to budgetary cutbacks, the implementation of EW is much narrower than was originally envisaged by EFDM.
[127] It is envisaged that this capability will be rolled out to all users overtime.

6.2 The overwhelming majority of cases[128] settle between issue and judgment. A significant proportion of settlements are achieved through conventional negotiation. Many are resolved using ADR techniques (including mediation). In the context of TCC litigation, approximately two thirds of settlements are achieved by conventional negotiation and approximately one third of settlements are achieved through mediation.[129]

(ii) ADR: What it is and the rules

6.3 ADR is a broad term for which there is no accepted definition. The White Book glossary explains it as a "*collective description of methods of resolving disputes otherwise than through the normal trial process*." This can include:

(i) Non-binding processes without third party intervention. This means bilateral negotiation. It still appears to be the most commonly used process for resolving disputes, whether before or after solicitors have been instructed.

(ii) Non-binding ADR processes with third party intervention. This may mean mediation (in other guises where the third party plays a more active role it may be called conciliation); or stakeholder dialogue (used in environmental disputes where various stakeholder groups are consulted); or executive tribunals (used in commercial disputes: a representative for each party makes a presentation to a panel comprised of senior executives of each party and a mediator, the panel then retires to discuss the dispute); or early neutral evaluation; and

(iii) Binding ADR processes: expert determination (usually used in disputes of a technical nature); adjudication; arbitration; Med-Arb (hybrid process – if mediation fails, the mediator becomes an arbitrator who makes a binding decision).

Generally within the UK, ADR is more commonly understood to describe all dispute resolution methods other than litigation in court and arbitration.

6.4 Since its effective rebirth in America in the 1970s ADR has steadily grown in importance. This was recognised in England and Wales in the Heilbron/Hodge Report which preceded and informed the two Woolf Reports. Lord Woolf saw ADR as playing a crucial role (a) in achieving resolution of many disputes before the issue of proceedings and (b) in promoting settlement as early possible in the course of proceedings.

6.5 Procedural rules which encourage ADR. The CPR introduced a number of mechanisms to give effect to Lord Woolf's aims. For instance, pre-action protocols were introduced to facilitate the settlement of disputes before the parties resorted to the courts. All protocols now stress that parties should consider whether "*some form of alternative dispute resolution would be more suitable than litigation and, if so, endeavour to agree which form to adopt.*"[130]

6.6 Once litigation has been commenced the court and the parties must abide by the overriding objective. Active case management includes encouraging the parties to use ADR, if appropriate, and facilitating the use of ADR (CPR rules 1.4(1)(e) and (f)

[128] Leaving aside those cases that settle pre-issue.
[129] See chapter 34, section 2.
[130] Paragraph 4.7 of the PDPAC.

and 3.1). The virtues of mediation in suitable cases are recognised in the various court guides.[131]

6.7 Active pursuit of ADR is further encouraged by CPR 26.4(1), which enables parties to make a written request with their AQ for a stay of proceedings while settlement via ADR is attempted. Alternatively, the court may make such an order of its own initiative. The costs rules provide an incentive to mediate: see CPR rule 44.5(3)(a)(ii). Parties who unreasonably refuse to mediate may be penalised in the court's eventual costs order: *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002. ADR is further encouraged by a number of court-based mediation schemes, such as the one operated by the Court of Appeal.

6.8 One of the important benefits of ADR is the ability for a remedy to be agreed that is not within the court's power. For instance, as a result of ADR one party may agree to give a public apology. Other perceived advantages include informality; speed of process; confidentiality; and the fact that the parties themselves are involved in shaping the outcome. Conversely, some criticise the fact that the solution may not reflect the parties' rights and note that sometimes it desirable (in the public interest) for a ruling from the court.

6.9 Who pays? Unless agreed otherwise, each party will usually bear its own costs related to any form of ADR. However, it is becoming more common in larger cases for parties to agree that the costs of any failed ADR will become costs in the case.

6.10 Optimum time for ADR. There is much debate about when the parties should consider ADR. The pre-action protocols obviously encourage the parties to engage very early on in the process. Some of the Phase 1 submissions suggest that this is too early and that entering into an ADR process too soon may wreck the chances of a later attempt. The current rules give most prominence to the use of ADR at the allocation stage.

(iii) Government policy

6.11 The Government pledge. In 2001 the Government set out its pledge on the "*Settlement of government disputes through ADR*". Government departments undertook, amongst other measures, to consider and use ADR in all suitable cases where the other party accepts it and, where appropriate, to use an independent assessment to reach a possible settlement figure. Certain types of dispute are acknowledged as being unsuitable for ADR: e.g. cases involving intentional wrongdoing, abuse of power, public law, human rights, vexatious litigation, where a legal precedent is required to clarify the law or where it would be contrary to the public interest to settle.

6.12 The Government departments must measure their performance. The aim is that in leading by example they will encourage greater uptake. During the reporting period 2007/08, ADR was used in 374 cases with 271 leading to settlement, saving costs estimated at £26.3 million (although there is no indication as to how this estimate has been calculated).[132] It is worth noting that statutory bodies such as the NHSLA are covered by the pledge scheme.

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[131] Chancery Guide (paragraphs 17.1 and 17.3); the Queen's Bench Guide (paragraph 6.6); the Admiralty and Commercial Court Guide (paragraph D8.8) and the Technology and Construction Court Guide (paragraph 6.4).

[132] "*Annual Pledge Report 2007/08: Monitoring the effectiveness of the government's commitment to using alternative dispute resolution, April 2009.*"

6.13 The court has considered whether any "great weight" should be given to this pledge in determining adverse costs orders against a successful public body on the grounds that it refused to agree to ADR. In *Halsey*, overruling *Royal Bank of Canada v Secretary of State for Defence*,[133] it was decided that the pledge does not create an additional burden: "*If a case is suitable for ADR, then it is likely that a party refusing to agree to it will be acting unreasonably, whether or not it is a public body to which the ADR pledge applies*."[134]

(iv) Court backed schemes

6.14 Mediation. Over the years a number of court mediation schemes have been piloted. The first was in the Central London county court in 1996 and similar initiatives were subsequently established at Birmingham, Exeter, Guildford and South Wales. In March 2004 the Central London county court piloted an "Automatic Referral to Mediation Scheme" ("ARMS"), but following the decision in *Halsey* this scheme encountered difficulties. A number of schemes continue today. For example, the Mayor's and City of London Court has a mediation scheme with a success rate of 60%, but only a very low take-up rate.[135]

6.15 Court of Appeal mediation scheme ("CAMS"). This scheme, for non-family work, is administered by CEDR Solve ("Centre for Effective Dispute Resolution"). The parties are not obliged to take part in the scheme and are free to terminate the mediation by informing the Civil Appeals Office or CEDR at any time without giving any reason. CEDR is responsible for nominating mediators, preparing a mediation agreement and liaising with the parties over mediation arrangements. The court remains responsible for the composition of the panel (the mediators) and for any adjustment to the fees payable. The panel includes mediators from a varied range of disciplines including commercial, personal injury, insurance, shipping, employment, intellectual property, etc.

[133] [2003] EWHC 1941 (Ch).
[134] [2004] EWCA Civ 576 at paragraphs 34-35.
[135] See the report by Professor Simon Roberts entitled "*The Mayor's and City of London Court Mediation Scheme: a review of the Scheme's second year*", dated 31st August 2008.

6.16 I understand (subject to confirmation) that the usage of CAMS is as follows:

Table 43.1: Use of CAMS 2003-2008

Case numbers 2003-08	Referrals	Mediations	Mediation refused	Settled before mediation / other
1 April 2003 to 31 July 2004 (15 months)	63 (3.9 p.m.)	**38** (2.5 p.m.)	14 (22% rate)	11
1 August 2004 to 31 July 2005 (12 months)	21 (1.75 p.m.)	**15** (1.25 p.m.) +1 outstanding	1 (4.7% rate)	4
1 Aug 2005 to 31 July 2006 (12 months)	31 (2.7 p.m.)	**21** (1.75 p.m.) + 3 outstanding	3 (9.6% rate)	4
1 Aug 2006 to 31 July 2007 (12 months)	24 (2 p.m.)	**13** + 4 outstanding	6 (25% rate)	1
1 Aug 2007 to 31 July 2008 (12 months)	15	**8** +6 outstanding	0	1

p.m. = per month

6.17 I understand (subject to confirmation) that the success rates are as follows:

Table 43.2: Success rates of CAMS, 2003-2006

Comparative settlement rates 2003-2006	Settlement rate
1 April 2003 to 31 July 2004 (15 months)	66%
1 August 2004 to 31 July 2005 (12 months)	47%
1 Aug 2005 to 31 July 2006 (12 months)	48%
1 Aug 2006 to 31 July 2007 (12 months)	57%
1 Aug 2007 to 31 July 2008 (12 months)	22%

6.18 Following the recommendations in Professor Genn's paper, "*Court based initiatives for non family civil dispute*", a Lord/Lady Justice considering an application for permission to appeal is expressly required to consider whether the matter is suitable for mediation. The full Court may also propose mediation where there are outstanding issues and a possibility of further litigation.

6.19 It has been found that very few cases go to mediation without judicial encouragement. Little explanation has been proposed as to why the settlement rate has dropped so drastically in the past year. It has been suggested that it is not standard of the mediators but perhaps more "intransigent parties".

6.20 The National Mediation Helpline ("NMH"). This is a self-funded scheme pioneered by the Ministry of Justice ("MoJ"). It was set up at the end of 2004 when it became apparent that smaller court centres would not be able to maintain a court-based mediation scheme. The service explains the basic principles of mediation, answers general enquiries relating to mediation and puts parties in contact with a mediation provider. The provider then assigns a local, professional and experienced mediator if required. The rates for the mediator are reasonable:

Table 43.3: The costs of mediating via the NMH[136]

Amount you are claiming	**Fees** per party**	**Length of session**	**Extra hours** per party
£5,000 or less*	£50 + VAT £100 + VAT	1 hour 2 hours	£50 + VAT
£5,000 to £15,000	£300 + VAT	3 hours	£85 + VAT
£15,000 - £50,000 **	£425 + VAT	4 hours	£95 + VAT

* The mediator/mediation provider should agree in advance whether this should be dealt with in one or two hours. For the one-hour rate the option is available to facilitate settlement over the telephone if appropriate, and if the parties agree.

** If the claim is for more than £50,000, the fees will need to be agreed with the organisation providing the mediation.

6.21 Parties contact the NMH either by telephone or by completing an online enquiry form. The NMH has an average settlement rate of 66%. The table below provides a snapshot of mediation activity for the past two years:[137]

Table 43.4: Data relating to the NMH service

	2007	**2008**[138]
Calls to the NMH	12,050	15,073
Referrals to providers	1,632	1,398
Mediations	799	630
Settled	525	417
% settled	65.7%	66.2%

6.22 Small claims mediation service. This is a free and confidential service for court users who are already involved in current defended small claims cases. The mediators are specially trained members of HMCS. The Annual Reports of the county courts indicate that the service is generally well received by those that use it. An online survey is currently underway.[139]

[136] Taken from the NHM website: http://www.nationalmediationhelpline.com/costs-of-mediation.php.
[137] Data provided by the Proportionate Dispute Resolution Team at the MoJ on 20th April 2009.
[138] These are only preliminary figures, which could increase once all the data is reported back (i.e. given that it can take a few months of the parties actually to mediate).
[139] http::/www.surveymonkey.com/s.aspx?sm=L2jj8Uo3DFunLrkKFZdbyQ_3d_3d.

6.23 TCC and Commercial Court early neutral evaluation schemes. These courts have their own neutral evaluation schemes whereby a judge will offer the parties a non-binding assessment of their prospects. However, the take up of early neutral evaluation has generally been low. The TCC also operates a form mediation by judges entitled "Court Settlement Process". I understand that this is principally used in lower value cases and that it has a high success rate.

(v) Research

6.24 Over the past ten years volumes of research have been conducted into the use and effectiveness of ADR. This is not the place to pull that research together. However, there is some research that is useful in determining the extent to which the court should be encouraging ADR and identifying the reasons why, perhaps, ADR is not as widely used as would be expected given the encouragement in the CPR and by Government:

6.25 DCA Research. This 2005 research concluded that ADR is not yet incorporated into the court process. Judges are reluctant to order ADR because of the lack of court facilities to provide such a service. The report indicated a general view that mediation was perceived to be more effective in commercial litigation than in personal injury and clinical negligence claims. It also found that many litigants in person give little thought to ADR, focusing instead on their "day in court".[140]

6.26 Research into consumer use of ADR in the UK. A report entitled "*Seeking Resolution: the availability and usage of consumer-to-business alternative dispute resolution in the United Kingdom*",[141] commissioned by the Department for Trade and Industry, aimed to map the provision and use of ADR options for consumer disputes in the UK in 2003. For the purpose of this report the most note-worthy findings were that:

(i) The provision of ADR in consumer disputes is a lottery depending on the type of problem, where the consumer is, and whether the consumer can afford the fees. The result is a major gap between the government policy of promoting ADR on the one hand and the on-the-ground reality of access to effective and affordable ADR on the other.

(ii) Very few disputes go to ADR processes for resolution. The main reason appeared to be the low awareness of ADR schemes among consumers and advisers.[142]

6.27 MoJ research 2007.[143] Professors Hazel Genn and Paul Fenn and others conducted research for the MoJ into the quasi-compulsory ARMS which ran in the Central London county court between April 2004 and March 2005 and the voluntary mediation scheme ("VOL") which had been operating in the court since 1996 and was previously evaluated in 1998. The decision in *Halsey* had a significant effect on the ARMS project, as the court felt that it could no longer insist that parties tried mediation if they objected. Therefore unwilling parties had to be allowed to opt out.

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[140] DCA Research, section 4.5.
[141] URN 03/1616.
[142] As summarised on www.adrnow.org.uk.
[143] "*Twisting arms: court referred and court linked mediation under judicial pressure*" Genn, D.H. and Fenn, P. and Mason, M. and Lane, A. and Bechai, N. and Gray, L. (2007) Ministry of Justice Research Series 1/07.

6.28 The research found that the parties' willingness to negotiate and compromise played a significant part in the success or failure of the mediation. The researchers noted that this sits uncomfortably with the evident support shown by some mediation organisations for experimenting with compulsory mediation. Key findings included:

- The proportion of lawyers in the VOL scheme who reported having recommended mediation to their clients once or more than once was virtually identical to the findings of the 1998 review,[144] suggesting no significant growth in the profession's enthusiasm for mediation over the past 10 years.
- The majority of cases in the ARMS scheme settled out of court anyway without going to mediation.
- Judicial time spent on mediated cases was lower, but administrative time was higher.
- Participation in the VOL scheme was significantly higher following the decision in *Dunnett v Railtrack*.
- Parties in higher value cases were less likely to object to going to mediation.

6.29 TCC research. This research into the role of mediation in TCC cases is summarised in chapter 34.

6.30 Commercial users. In 2007, Herbert Smith LLP, interviewing 21 multinational organisations, conducted research into how blue-chip companies were using ADR.[145] The research found:

- Varied attitudes to the use of ADR, ranging from those for whom it played a central role in the dispute resolution culture to those who did not use ADR processes. The key differentiator to an organisation's behaviour was the attitude of the in-house legal team to ADR.
- Many of the organisations reported the "strategic" use of ADR, attending only to seek information or comply with court orders, rather than attending with a mandate to settle.[146]
- The role of ADR in the English legal system was observed by some organisations as encouraging unmeritorious claimants who would previously have been deterred from bringing claims by the cost of litigation.

(vi) Submissions

6.31 Both the submissions received in Phase 1 and the practitioners who spoke to my judicial assistant generally confirm the research previously conducted. The opinions expressed include the following:

- The court should adopt a more robust policy of encouraging parties not just to consider ADR but actively to pursue an ADR process.
- Mediation is often said to be of limited use in moderate to low value claims because of its relative cost. However, innovative low-cost initiatives, such as set time telephone mediations, are being tried and are generally found to be useful.

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[144] Similar research conducted by Professor Genn in 10 years earlier.

[145] http://www.herbertsmith.com/NR/rdonlyres/3141C429-F85D-45C8-A65D-906D326BCFF4/5093/6398ADRreportD4.pdf.

[146] See page 6 of the report.

- In many instances nowadays the parties only pay lip service to ADR.
- ADR should not be imposed on a party as substitute for legal redress.
- It is commonplace for many district registries to adopt Master Ungley's draft directions on the issue of ADR, or a version of the same, which whilst stopping short of compelling participation, provide that the court must be provided with justification by any party who refuses to participate.
- In Manchester, the clinical negligence DJs order a "joint settlement meeting" in all cases with a value in excess of £100,000; and joint settlement meetings will also be ordered in routine case management orders where appropriate.
- the court can and should encourage ADR, but not in a vacuum.
- the encouragement of ADR in the wrong circumstances can simply encourage procrastination by the parties and create delay and additional costs.

6.32 Notwithstanding the concerns of some practitioners that parties should not be forced into ADR, others suggested reforms which would make it a requirement to utilise ADR before trial. Such suggested reforms included:

- Adopting the rule followed in other jurisdictions that a trial date will not be provided until such time as the parties can confirm that ADR has taken place.
- Automatically building ADR into the court timetable, say a two month stay of proceedings following service of Schedule of Loss / Counter-Schedule.

(vii) Review

6.33 Tentative opinion. My own tentative opinion, based upon experience and upon the material gathered during Phase 1, is that in the context of business disputes the parties and their advisors are nowadays well aware what ADR has to offer. In the Commercial Court, the Mercantile Courts and the TCC parties can usually make sensible decisions about ADR without extensive input from the judge. If they want to mediate they will do so. If, on the other hand, they desire the decision of the court, then that is what they are entitled to receive, without being forced to incur fruitless mediation costs.

6.34 Away from business litigation, however, parties are less well informed about the benefits of ADR and there is a need for better information and education about ADR and its benefits. Even there, however, if reluctant parties are forced to mediate, the outcome may be wastage of costs rather than settlement.

6.35 I look forward to receiving comments on the above issues during the course of Phase 2. In particular:

(i) What more should be done to promote the use of ADR in the cases where one or both parties are individuals, rather than businesses?

(ii) Is the NMH a satisfactory substitute for the various court-based mediation schemes which it replaced?

(iii) In the experience of practitioners and court users are the present procedural rules and the present judicial approach to ADR leading to a (a) saving of costs or (b) wastage of costs?

In relation to questions (iii), it will probably be necessary to consider separately the different categories of litigation.

6.36 In chapter 33 a request for feedback is made in relation to the use of ADR in the Chancery Division.

7. REVIEW

7.1 A large number of issues concerning case management have been raised in this chapter. I look forward to receiving the comments of practitioners and court users on those issues during the course of Phase 2.

CHAPTER 44. TRIALS

1. INTRODUCTION

1.1 Notwithstanding that the litigation process is now front-loaded, it is well known that the costs of going to trial can be substantial and, in the larger cases, immense. There are several heads under which costs accrue in relation to a trial: case preparation time – usually in the form of counsel's fees and solicitors' time costs; trial bundle preparation; transcripts of the trial; interpreters' fees; experts' time costs; and any IT services that may be utilised. These services need to be organised well in advance of trial, and substantial costs may still be payable even if the case settles on the steps of court. Many of the costs are incurred daily, counsel's retainer, court transcriber's fees etc. So the length of trial will usually have a direct effect on the costs.

2. COSTS ASSOCIATED WITH TRIAL

2.1 Court fees. A court fee is payable (a) when the pre-trial questionnaire is filed or the trial date fixed (£100); and (b) upon listing (the "hearing fee"): £1,000 for a multi-track track case; £500 for the fast track and between £25 and £300 for a small claim (depending upon the quantum of damages claimed).

2.2 Counsel's brief fee. Counsel is usually retained for trial by way of a "brief fee". This brief fee is a fixed fee for all of the preparation work together with the first day's advocacy in court. A "refresher" fee is then payable for any subsequent days in court. The alternate method of payment is hourly rates. However this method of billing is used infrequently for trials. Fees for any appeal will be charged separately. Counsel's fees are extremely varied, as shown by Table 15 in chapter 8, which sets out the approximate hourly charge-out rates for barristers as assessed by Legal 500 in 2007. Larger cases may have more than one counsel, usually a leader and a junior, but sometimes more.

2.3 Solicitor time costs. In the run up to trial the amount of time spent on a case is likely to increase significantly. Bundle preparation, building the case, helping counsel to prepare the skeleton argument, liaising with the client, witnesses and experts to ensure that everyone has access to the necessary documents and is available when required are a few of the main tasks that will be required. The amount of logistical work should not be underestimated. The solicitors' time will be charged out on hourly rates previously agreed. There is not normally any kind of uplift for trial, and soon as the solicitor stops work there will be no more fees payable.

2.4 Trial bundles. This process may commence many months in advance of the trial and the costs can be huge. Bundles usually need to be lodged three to seven days before trial, unless a different order has been made. However, counsel will usually insist upon bundles at the earliest opportunity. PD39 paragraph 3.2 sets out which documents should be included. Ostensibly these are the pleadings, witness statements, expert reports, case management documents and any other "necessary" documents. The bundles should be compiled in accordance with the rules in the CPR and the relevant court guide. They must be paginated. Pagination is an important task, but one which nonetheless increases the costs and preparation time. Many factors add to the costs of preparation:

(i) *Co-operation.* Responsibility for preparing the bundles falls on the claimant, but the bundle must be agreed and should contain all of the documents that any

party proposes to rely upon.[147] There is an obligation on the parties to cooperate in the preparation. In practice, it appears that a constructive attitude is not always adopted, and substantial correspondence may be entered into in order to agree the bundle (incurring additional costs). However, unless one party is clearly in default it is usually quite difficult for the court to intervene. Parties also seem to take the view that the court will look dimly on both parties if they need to resort to the court for directions on how to proceed.

The need for "*courtesy and co-operation*" has been noted in the Report and Recommendations of the LTWP.[148] The report advocates the use of sanctions if the parties do not act appropriately. However, the problem is that it can be difficult to ascertain which party is truly at fault.

(ii) *Cross-referencing.* Documents exhibited to all of the witness statements and pleadings are arranged chronologically in one set of bundles. The trial bundle reference of each document is then written on the witness statement or pleading so that the court/counsel can easily locate the document. This can be a time consuming, and therefore expensive, process.

(iii) *Translation and transcription.* Foreign language documents must be translated into English and, where possible, the translation should be certified by a recognised translation company. Illegible and manuscript documents should be followed in the bundle by a transcribed, legible copy. Such services incur additional costs.

(iv) *Volume.* An approach that is sometimes is adopted is the "better safe than sorry" attitude of throwing most of disclosure into the bundles. This wastes costs – not only copying charges, but counsel and the court's time.[149] It is not uncommon to see trial bundles that run to hundreds of volumes, yet only a handful of bundles are actually referred to at trial. The court has the power to order cost sanctions if the trial bundle becomes too voluminous, but given that few cases actually reached detailed assessment this is insufficient deterrent to incentivise co-operative and cost effective bundle preparation.

(v) *Copies.* A copy of the bundle must be made available for the judge and, where appropriate, the witness. In addition, each counsel and set of instructing solicitors will also have at least one set. It is imperative that all copies of the bundles are the same otherwise this can cause confusion, and delay, in the court room. It is therefore usually necessary to copy check the bundles to ensure that they are exact duplicates. Again, this task takes time and contributes to the costs.

(vi) *Originals.* Although original documents are rarely examined during a trial, other than in fraud cases, there is a requirement that the original of any document in the trial bundle should be available in court.

(vii) *Updating.* The various copies of the bundles will need to be updated throughout trial to include any new evidence or skeletons that may be served, additional documents that are referred to in court and the daily transcripts. The bundles may need to be corrected to amend any errors. This process can take time. It may also go awry, causing problems within the courtroom which lead to time (and therefore costs) being wasted.

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[147] CPR 39 Practice Direction A, paragraph 3.9.
[148] K16, page 52.
[149] A counter-argument is sometimes advanced as follows. It is cheaper to put everything into the bundle than for senior solicitors or counsel to spend many hours identifying those particular documents which will be referred to at trial.

2.5 Transcripts.[150] In large trials the parties may use a realtime transcription service, so that the transcript is available in court only moments behind the actual spoken words. This allows counsel to make notes alongside the transcript and for individuals outside the court to know what is going on (the system can be hooked up externally). This service typically has a base cost of around £840/day. This cost is usually shared between the parties. In addition each party will be charged for the number of "licences" it requires i.e. screens upon which the transcript can be viewed. This is an additional cost of between £50-£220 per licence/per day (depending upon the provider and the number of licences required). Some providers will also charge a "set-up and take down charge" which can be around £300. Hard or electronic copy transcripts are provided at the end of each day, some providers charge additional fees for the provision of these documents. Additional charges may also be incurred if the court sits over 5.5 hours in a day or anytime at the weekend/on a bank holiday; for non-sitting days (if the provider is not given sufficient notice); and for attending hearings outside of London.

2.6 Interpreters. Where the witnesses or experts are not sufficiently fluent in English to understand the questions being put to them or to respond, the court will allow an interpreter to assist. A knock on effect of this is the lengthening of the trial. Further, it can be a difficult and time-consuming task for the parties to identify interpreters of the necessary standard to do the translating. Interpreters are usually paid about £500 per day.

2.7 Experts. A number of the submissions commented on the expense of having experts attend trial. Their expenses will be remunerated and their time will be paid for. Sometimes the expert may have travelled. Lord Woolf looked at the possibility of capping the amount that could be paid to experts (discussed further in chapter 42). He concluded that if there was a cap, this may affect the quality of expert who would be prepared to take on the role. Alternatively, if there was only a cap as to the recoverable amount, it may result in a disparity of expert between two parties if one party had the resources to fund the difference between the cap and the amount that their preferred expert was requesting. However, one option that could be considered would be to make the costs of the expert's attendance at the trial irrecoverable on the days when he (or perhaps even another party's expert) is not giving evidence.

2.8 Use of IT at trial. The Commercial Court's Long Trials Working Party ("LTWP") recognised a need for both the judiciary and senior lawyers to "*get to grips with IT and to adopt a positive stance towards the use of IT in court, in particular in trials*".[151] Currently there is little use of IT at trial. Part of the reason for this must be attributed to the fact that very few of the civil courts are set up to conduct paperless trials, therefore the use of IT must be organised and funded by the parties themselves. However, part of the reason must also be attributed to the reticence of some practitioners, particularly counsel, to embrace this new form of working.

2.9 When it is used properly, IT can assist to make proceedings more efficient and thereby save substantial costs. For instance, IT has been used very satisfactorily at the Hutton Inquiry and the Inquests into the deaths of Diana, Princess of Wales, and Mr Dodi Al Fayed. The LTWP acknowledged the importance of developing the use of IT. Until such time as the Commercial Court moves to the new Rolls Building the LTWP has recommended that the parties in each case should consider whether the use of IT would be of assistance. Following the move there is an indication that there will be a much more stringent requirement to move to paperless trials. Hopefully the

[150] All prices in this paragraph are shown exclusive of VAT.
[151] Paragraph 109 of the Report and Recommendations of the LTWP.

Electronic Working scheme (see section 5 of chapter 43) will make this possible. If successful, this model can hopefully be rolled out to the other courts.

2.10 The court encourages IT to be used "*where it is likely substantially to save time and cost or to increase accuracy*". As stated in chapter 40, the use of IT and electronic documents needs to be managed well from the outset to ensure that costs are kept proportionate. For the majority of cases, unless the basic infrastructure is already in court, the costs of obtaining the IT equipment and uploading the documents will be disproportionate. However, even now there will be some large cases where some or all of the following may be appropriate:

(i) *Video links.* Permission is required for evidence to be given by video link (see CPR Part 32 Practice Direction Annex 3).[152] An estimate from one of the leading IT providers at the RCJ indicated that it costs around £1,250 for setting up the equipment for the first day's evidence and to have an engineer on stand-by, the cost reduces to around £750/day for any subsequent days.

(ii) *Presentation of video or audio evidence.* If permission has been given for such evidence, equipment can be brought into court to show a specific piece of pre-recorded evidence. These costs are usually less than those outlined above.

(iii) *Electronic trial bundles.* Currently there is a great reluctance by counsel to adapt to the use of electronic bundles as the majority are wedded to their post-it notes and hand written notes. The technology is beginning to develop and various competitors are beginning to emerge on the market. This can only help to increase the capabilities of these products and to reduce the cost. If disclosure has not been done electronically it can be time-consuming and costly to create electronic bundles. If e-disclosure has been given, but poorly or on an inadequate system it can also be difficult to generate electronic bundles efficiently. However, when electronic disclosure is done well, then electronic bundles can be a much more efficient and cost-effective way of creating the trial bundle. It is most likely to be done well if it is considered very early on in the process (i.e. at the beginning of disclosure).

(iv) *Visual display evidence.*[153] A system can be set up in the court room which allows an operator to display the relevant document onto screens around the room. This will usually be run in conjunction with an electronic trial bundle. It has the benefit of ensuring that everyone in the court room is looking at the same document. A charge will be made for processing the documents into the necessary format (this process can be combined with the compilation of an electronic trial bundle). A charge is usually incurred for setting up the facilities in the court room. These costs seem to vary from around £200 to £600. Daily rates will then apply for the hire of the equipment and the attendance of an operator. The parties will be charged around £750 per/day for the operator. The equipment hire varies depending upon the number and size of screens and the period of hire. Some providers are more prescriptive with their rates than others, charging for each length or type of cabling required.

(v) *Internet connection.* Some court rooms already have this facility, sometimes BT will allow broadband to be set up quite cheaply. Those who provide real-time transcription services will usually help to set up internet access.

For each of the above, better value contracts can usually be obtained for longer trial periods. In all cases, cancellation charges may apply and will vary from provider-to-

[152] Also paragraphs 14.13 – 14.16 of the Chancery Guide and Section H3 and Appendix 14 of the Commercial Court Guide.
[153] All prices in this paragraph are shown exclusive of VAT.

provider. As the majority of these services have a "base cost" which is shared between the parties, these services may be cheaper (per party) in multi-party cases.

2.11 Logistics. Costs are incurred in setting up the court room, costs of travel and accommodation costs for the witnesses and experts and, to a lesser degree, counsel and solicitors. Those who do not have offices in the immediate vicinity to court may have to hire a room at the court for around £50 +VAT per day.

2.12 Client time. It is likely that the client will want to be in court for the majority of the trial, or they will at least need to be easily contactable in case additional instructions are required. Although not a direct cost of litigation that is a cost between the parties, there is the knock on cost to the client's business in terms of management (or other) time spent in court. The LTWP Report recommends that the Commercial Court Guide should be amended to emphasise the judge's power to require senior representative to be present in court, by video link if necessary. Although this has merit, there is some concern that such an approach could deter foreign litigants from the English courts.

3. THE TRIAL ITSELF

3.1 Controlling the timetable and the evidence to be heard. Within the CPR the court has the power to limit the amount of time available for cross-examination or limit the issues on which evidence can be adduced. Although the practice varies between judges, the general consensus is that, if it were so minded, the judiciary could do more to exercise control over the conduct of proceedings. This was recognised by the LTWP.[154] They recommended changes to the Commercial Court Guide to provide that the judge (after hearing submissions) will control the length of cross-examination of each witness, the length of written submissions and so forth.[155] Thus the trial should be fully programmed and kept within proportionate length.

3.2 Chess clock agreements. The LTWP Report was specifically concerned with Commercial Court practice. I would suggest, however, that the LTWP's observations are equally applicable to all long and complex trials. My own experience, both at the Bar and on the bench, has been that "chess clock" agreements[156] are highly effective in controlling the length and cost of trials. They force parties to concentrate on their best points. They also establish proper discipline and control the costs of trial. All chess clock arrangements in which I have participated (either as judge or counsel) have been consensual. However, it may now be appropriate for courts to impose chess clock orders, whether or not the parties consent. An alternative view, which some argue with force, is that it is wrong in principle to impose guillotines or time limits, and that anyway these are unnecessary. In this regard, it should be noted that the trial of the recent "*Trigger*" litigation was concluded within two months, despite the multiplicity of issues and vast array of counsel, without any fixed time limits or guillotine.[157]

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[154] K18, paragraph 159(d).
[155] K12 to K 14, paragraphs 150, 154.
[156] Under a "chess clock" agreement, each side has a specified time in which to present its case. It may use that time however it wishes, whether in oral submissions, cross-examination or arguing procedural points. As counsel, I have experienced such agreements in arbitrations - sometimes winning and sometimes losing the case. I do not believe that the result would ever have been different, if more time had been allowed.
[157] See *Durham v BAI (Run Off) Ltd (in Scheme of Arrangement)* [2008] EWHC 2692 (QB) at [3]; [2009] 2 All ER 26.

3.3 Skeleton arguments v oral advocacy. Some submissions have expressed a concern that skeletons are no longer "skeletal", but that they substantially set out all that an advocate has to say. The effect is that there is a duplication of court effort: clients pay for their counsel to prepare the skeleton and then to effectively deliver it orally at trial, the judge will have spent time reading the skeleton and then the court and all attendees have to listen to it being repeated. One firm mooted the idea that the skeletons should be submitted in advance of the trial and then the judge should have the opportunity to ask questions at the start of the trial, but there should be no repetition, or even summarising, of the written openings. There could be sequential exchange of written closings and, if the judge requires it, a subsequent short hearing for him to ask questions.

3.4 Alternatively, if oral openings are permitted, should there be a cap on the length of the written openings? The various court guides indicate that skeletons should be concise and avoid arguing the case at length.[158] The LTWP has recommended that, in two-party cases, skeletons should not exceed 50 pages.[159] The LTWP has also recommended that opening speeches should not exceed two days unless there are special reasons. Such reasons need to be justified at the PTR.

3.5 Recoverable costs of attendees at trial. The army of lawyers present at a major trial can be formidable. For each party there may be leading counsel, junior counsel, partner, associate, trainee and paralegal. Sometimes there is more than one lawyer in each category. On city rates, one day in court for one party in legal fees alone may well be a five figure sum. In the recent *Buncefield* litigation the costs of the post trial costs hearing were said to be running at £250 per minute.[160] A party may also determine that it is necessary to have the expert whom it has instructed present in court. Even if no other costs cap is imposed in an action, it may be sensible for the court to impose a cap on the recoverable costs of attendance during the trial.

3.6 Fast track trials. These trials are at the other end of the spectrum. As part of its submission to Phase 1 of this review, The Professional Negligence Bar Association conducted a survey of it members. They were asked if they were satisfied with the existing costs regime for Fast Track Cases, why they were of that view and what they would do to change the existing costs regime. Although the majority had no view (as they had little or no experience), six expressed satisfaction whilst three were dissatisfied. Regardless of which side of the fence they fell, I am informed that they thought that advocates' fees should be recoverable (*inter partes*) for any second day of a trial in addition to the first. There were also suggestions that there should be more flexibility to allow higher recoverable fees to be ordered. My own view is that in respect of fast track trials, it is essential that the fixed costs regime be maintained. If all fast track fixed costs are reviewed every year (as recommended in chapter 22 above), this should meet most of the concerns which have been expressed.

3.7 Settling on the steps of court. The DCA Research[161] states:

> "Although the CPR has had a beneficial effect in encouraging settlement, there is a major problem of late settlement. A high number

[158] E.g. Appendix 9, paragraph 2 of the Commercial Court Guide; Appendix 7, paragraph 2 of the Chancery Guide.
[159] K18, paragraph l (page 55).
[160] See *Colour Quest Ltd v Total Downstream UK plc* [2009] EWHC 823 (Comm) at [3].
[161] "*The management of civil cases: the courts and post-Woolf landscape*" by Professor Peysner and Professor Mary Seneviratne, Nottingham Law School, Nottingham Trent University, DCA Research Series 9/05, November 2005.

> of cases are settling on the day before trial, sometimes quite late on that day, and there are still cases settling on the day of trial, at the door of the court. This is problematic because where court time is vacated late in the day there is no opportunity to put on another trial."[162]

3.8 The court tries to minimise the impact on the list in a number of ways: (a) sometimes the relevant judge or master may telephone to find out if the case is likely to settle; (b) the judge or master may ask about the likelihood of settlement at the CMC and mark the response on the face of the file; or (c) solicitors or counsel's clerks may forewarn the listing officer if settlement is likely.

3.9 Suggestions in the DCA Research to try to reform the system included (a) tapering listing fees or imposing fines; (b) calling the parties in for settlement meetings a couple of weeks before trial is due or (c) settlement within 21-days of listing, otherwise a mandatory trial with the consequent costs penalties. None of these options seems particularly satisfactory. Option (a) would be difficult to implement because (i) it provides no incentive to the defendant; and (ii) in order to be effective the fee/fine would need to be fairly large (much greater than the current listing fee). Option (b) may have merit, but if the settlement discussions are led by the trial judge there could be allegations of bias if the case actually went to trial. Option (c) seems to be a huge waste of costs. Parties should at all stages of litigation be incentivised to enter into fair and reasonable settlements. Even at the door of the court a fair and reasonable settlement is better than a trial. However, a settlement achieved three weeks earlier would be very much better because (A) this would optimise the use of court resources and (B) this would substantially reduce the costs to the parties.

3.10 Devising rules to bring about the early resolution of cases which are destined to settle is one of the biggest challenges of civil procedure. This is the quest for the philosophers' stone. Any submissions during Phase 2 which are directed to this issue will be gratefully received.

3.11 Jury trials. In certain categories of case any party is entitled as of right to trial by jury, unless "*the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury*". The principal categories in which there is such a right are claims for fraud, defamation, malicious prosecution or false imprisonment: see section 69(1) of the Supreme Court Act 1981 (in respect of actions in the Queen's Bench Division) and section 66(3) of the County Courts Act 1984 (in respect of county court actions). As noted in chapter 37 concerning defamation proceedings,[163] the presence of a jury increases the cost of litigation.

3.12 In the context of criminal trials on indictment, many (including myself) believe that the cost of a jury is well worth paying, because the liberty of the subject is at stake. In relation to civil litigation, however, different considerations arise. The question must now be asked whether the statutory right to jury trial in civil litigation should be retained in all or any of the specified categories. In so far as the right should be retained, should that be for all claims or only for claims above a certain value? I have an open mind upon these questions, but invite the views of court users and others during Phase 2.

3.13 The data in the appendices to this report do not reveal by what amount the cost of a trial increases by reason of having a jury. It would be of great assistance

[162] See section 4.4.
[163] See paragraph 2.9

during Phase 2 of the Costs Review if anyone can provide such data or, alternatively, can identify any recent study of the topic.

4. REVIEW

4.1 Although the majority of civil cases settle, there is a hard core of cases which, for perfectly good reasons, need to go to trial. There may be disputes of fact or law which require judicial resolution. There may be real controversy over the costs of future care or other quantum issues. There may be reputational issues. Although the procedural rules recognise that most cases settle and, therefore, seek to incentivise early settlements, it is not the function of civil procedure to erect obstacles to trial. That would be inimical to access to justice. On the contrary, in respect of cases which go to trial, it is the function of the procedural rules to promote a fair and expeditious trial at proportionate cost.

4.2 The procedural rules governing fast track trials appear to be broadly satisfactory. However, there are concerns about the costs of multi-track trials, especially in the larger cases. Possible means of addressing these concerns are discussed above. I look forward to receiving comments on all of these issues during Phase 2 of the Costs Review.

CHAPTER 45. COST CAPPING

1. INTRODUCTION

1.1 The meaning of costs capping. Costs capping is a mechanism whereby judges impose limits on the amount of future costs that the successful party can recover from the losing party. Protective costs orders, while a species of costs capping, are specifically dealt with in chapter 35 regarding judicial review.

1.2 The jurisdiction. Judges have in the past[164] found the authority to make costs capping orders under the provisions of section 51 of the Supreme Court Act 1981[165] (as amended) and rule 3.1 (2)(m) of the Civil Procedure Rules ("CPR").[166] However, since the 6th April 2009 the power to make costs capping orders has been set out in rule 44.18 of the CPR.

2. RELEVANT CASE LAW

2.1 *AB and others v Leeds Teaching Hospitals NHS Trust (The Nationwide Organ Retention Group Litigation).*[167] The case related to several claims arising out of the retention of the organs of deceased children and adults by various hospitals. The nature of the individual claims meant that they were capable of being grouped together in a group litigation order. The claimants had already incurred costs of £1.45 million and estimated future costs of £1 million to the conclusion of the trial. The estimates of recoverable damages ranged from between £3 million (per the defendants) and £10-15 million (per the claimants). The issue before Gage J was whether to permit an application by the defendants for an order to cap the claimants' costs retrospectively and prospectively.

2.2 Gage J found, pursuant to the provisions of section 51 of the Supreme Court Act 1981 and various provisions of the CPR (including rule 3.1 (2)(m)), that the court has the power to make a costs capping order. Gage J held that, in the context of group litigation, the desirability of ensuring that costs remain within bounds meant that it was unnecessary for the court to require exceptional circumstances before exercising its discretion to make a costs capping order.

2.3 In the instant case, Gage J made a costs capping order on the claimants costs to the end of the trial. The claimants' costs were capped at £506,500. The order was retrospective[168] and prospective and was based upon certain assumptions (e.g. the trial lasting no longer than four weeks). Gage J specifically permitted the parties to

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[164] See, for example, *AB and others v Leeds Teaching Hospitals NHS Trust (The Nationwide Organ Retention Group Litigation)* [2003] EWHC 1034 (QB).

[165] Sections 51(1) and 51(3) of the Supreme Court Act 1981 provide that: *"(1)... the costs of and incidental to all proceedings in– (a) the civil division of the Court of Appeal; (b) the High Court; and (c) any county court, shall be in the discretion of the court... (3) The court shall have full power to determine by whom and to what extent the costs are to be paid."*

[166] CPR rule 3.1(2)(m) provides that the court may: *"...take any other step or make any other order for the purpose of managing the case and furthering the overriding objective."* The overriding objective of the CPR is to enable the courts to deal with cases justly. This includes saving expense and dealing with cases in a manner which is proportionate to the sums involved and the financial position of the parties (see CPR rule 1.1 (1) and (2)).

[167] [2003] EWHC 1034 (QB).

[168] With the agreement of the parties. In normal circumstances a costs capping order would not be retrospective.

apply for a variation to the order upon the occurrence of any unforeseen and exceptional factor which affects costs.

2.4 *Smart v East Cheshire NHS Trust.*[169] The case concerned a clinical negligence claim against the defendant NHS Trust. The defendant sought an order capping the costs of the claimant's claim. Accordingly, three issues arose to be determined: (1) whether the court had jurisdiction to order a costs cap; (2) assuming jurisdiction, what test should be applied by the court in determining whether or not to order the costs cap; and (3) whether a costs capping order should be made in the instant case.

2.5 As to the first issue, Gage J, who was the judge in *AB*, held that the court has jurisdiction to make costs capping orders (see above). With regard to the second issue, Gage J set out the test to be applied by the court when considering whether to exercise its discretion to make a costs capping order. Gage J held that costs capping orders should be limited to cases where: (a) the claimant proves that there is a real and substantial risk that the costs of the case will be disproportionate and unreasonable; (b) such risk cannot be controlled by case management methods or post-trial detailed assessment; and (c) it is just to make such an order.[170] Gage J stated that each case must be considered on its facts and that it would be wrong to attempt to prescribe a specified ratio of costs to value for any particular class or type of case as a trigger to the making of a costs capping order.[171] Gage J noted that the observations above are applicable to actions other than group actions, as group actions involve different problems.

2.6 As to the third issue, Gage J held that the instant case did not merit a costs capping order in the light of the evidence (including historical costs data) adduced by the claimant and the fact that the prospect of post-trial detailed assessment was a sufficient safeguard to ensure costs did not become disproportionate.

2.7 *Leigh v Michelin Tyre Plc.*[172] The case involved a claim by an employee against his employer for injuries sustained during the course of his employment. The issue before the Court of Appeal concerned an inaccurate costs estimate submitted by the claimant. The Court of Appeal held that there was no justification for equating costs estimates with costs caps.[173] The Court of Appeal noted that there was much to be said about costs capping and that prospective costs budgets are likely to be more effective at controlling the costs of litigation than the regime of taking costs estimates into consideration at the post-trial assessment stage.

2.8 *King v Telegraph Group Limited.*[174] The case concerned a libel action against the Telegraph Group Limited. The claimant brought the claim under a conditional fee agreement ("CFA") and did not have in place after-the-event ("ATE") insurance. It was noted that, given the lack of ATE cover and the limited means of the claimant, if the defendant were successful in defending the claim, the defendant was unlikely to recover its own costs. Alternatively, if the defendant were to lose at trial, the defendant would have to pay not only the claimant's reasonable and proportionate costs but also the substantial success fee under the claimant's CFA. Brooke LJ referred to the "chilling effect" this unfairness is bound to have on newspapers

[169] [2003] EWHC 2806 (QB); 80 BMLR 175.
[170] *Ibid*, at 181.
[171] *Ibid*, at 181.
[172] [2003] EWCA Civ 1766; [2004] 1 WLR 846.
[173] *Ibid*, at 859.
[174] [2004] EWCA Civ 613; [2005] 1 WLR 2282.

exercising their right to freedom of expression under Article 10(1) of the European Convention on Human Rights.[175]

2.9 Having approved Gage J's approach to the court's power to make costs capping orders in *AB*, Brooke LJ considered the use of cost capping orders as a solution to the instant problem. Brooke LJ (with whom Jonathan Parker and Maurice Kay LJJ agreed) stated that in defamation proceedings initiated under a CFA but without ATE insurance, the master should at the allocation stage make a costs capping order.[176] Brooke LJ noted that in order to "square the circle" cost capping orders should prescribe the total amount recoverable, including any success fee under a CFA.[177] Brooke LJ suggested that this approach may have the additional effect of ensuring that the costs incurred would be more proportionate to the sums in issue.

2.10 Brooke LJ went on to propose three weapons available to a party who is concerned about extravagant conduct (or the risk of such conduct) by the other side: (1) prospective costs capping; (2) retrospective costs assessment; and (3) a wasted costs order against the other party's lawyer.[178] Brooke LJ stated that:

> "…[prospective costs capping orders] should be the court's first response when a concern is raised by defendants of the type to which this part of this judgment is addressed."[179]

Indeed, earlier in his judgment Brooke LJ noted that it would be very much better for the court to exercise control over costs in advance, rather than to wait until the end of the case.[180] However, the court declined to make a costs capping order in the instant case, because no such order had been sought from the judge whose decision was under appeal.

2.11 *Campbell v Mirror Group Newspapers Ltd.*[181] In this case Mirror Group Newspapers Ltd sought a ruling that the success fee provided for in the CFA between the claimant and her lawyers in relation to her appeal to the House of Lords should be wholly disallowed. In relation to costs capping, Lord Hoffman approved the approach of Brooke LJ in *King*, although he noted that it was only a palliative and did not address the problem of a defendant (specifically in this context, a newspaper) being faced with the prospect of incurring substantial and irrecoverable costs.

2.12 *Henry v British Broadcasting Corporation.*[182] This case concerned a libel claim against the BBC. The claimant's lawyers were instructed under a CFA and the claimant had ATE insurance. The claimant's costs estimate as contained in the allocation questionnaire was £360,000. This estimate was then revised to £694,000. Both estimates were exclusive of VAT, the CFA success fee and the ATE premium. The BBC found itself in a difficult predicament. If the BBC successfully defended the case, there were reasons to doubt whether it would recover much of its costs (due to the extent of the cover provided under the ATE insurance and the assets of the claimant). Conversely, if the BBC were to lose at trial, it would be liable for the claimant's costs including uplift, a figure likely to be in the region of £1.6 million.

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[175] *Ibid*, at 2300.
[176] *Ibid*, at 2299.
[177] *Ibid*, at 2301.
[178] *Ibid*, at 2302.
[179] *Ibid*.
[180] *Ibid*, at 2299.
[181] *(Costs)* [2005] UKHL 61; [2005] 1 WLR 3394.
[182] [2005] EWHC 2503 (QB); [2006] 1 All ER 154.

Accordingly, the BBC applied for a costs capping order, albeit at a very late stage in the proceedings.

2.13 The question before Gray J was whether the BBC was entitled to a costs capping order. Gray J began by noting that the case was a prime candidate for costs capping, given the high costs and the existence of the CFA with a substantial success fee. However, Gray J declined to order the costs cap for two reasons. First, the application was made too late. Gray J held that the purpose of a costs capping order is to:

> "...enable the capped party to plan ahead the appropriate level of expenditure to bring the case to trial at a cost which is in line with the amount of the cap."[183]

Gray J noted that the imposition of a costs cap so close to trial would penalise the claimant rather than achieve this purpose. Secondly, Gray J felt that he was not sufficiently qualified to determine the level of costs that are reasonable and proportionate for the period to the end of the trial without the assistance of a costs judge.

2.14 *Knight v Beyond Properties Pty Ltd and others.*[184] This case concerned a passing off action. The claimant was instructing lawyers under a CFA without ATE insurance. For these reasons, and because the defendant alleged that the claimant had incurred and would continue to incur extravagant costs, the defendant applied for a costs cap to be imposed.

2.15 Mann J identified the opposing principles established by Gage J in *Smart* and Brooke LJ in *King*. Satisfied that Brooke LJ had not impliedly overruled the principles established by Gage J in Smart, Mann J held that the use of costs capping orders by the court as a weapon of first choice (as established in *King* by Brooke LJ) was not a principle applicable to wider litigation, but a principle relevant only to defamation actions. The fact that the instant case was one in which there was a CFA with a large success fee and no ATE cover did not alone justify a costs capping order.

2.16 Applying the test laid down by Gage J in *Smart*, Mann J stated that it was necessary to show that there was a risk of excessive or extravagant expenditure and that such expenditure could not be controlled by case management or post-trial detailed assessment. Mann J concluded that, while there was a risk of extravagant expenditure by the claimant in this case, this could be adequately addressed by post-trial costs assessment. Accordingly, no costs capping order was made. Mann J noted certain disadvantages with estimating costs in advance, namely that it was a difficult exercise, involved a degree of speculation and any subsequent applications to vary the cap would add more costs to the case.[185]

2.17 *Dawson and others v First Choice Holidays and Flights Ltd*[186]. This case involved a group litigation consisting of some 213 claimants who were claiming damages for personal injuries and other losses incurred as a result of the breach of contract or negligence by the defendant in its provision of holiday services. The

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[183] *Ibid*, at 165.
[184] *Knight v Beyond Properties Pty Ltd and others* [2006] EWHC 1242 (Ch); [2007] 1 WLR 625.
[185] *Ibid*, at 632.
[186] *Dawson and others v First Choice Holidays and Flights Ltd*, 12 March 2007, Birmingham District Registry, unreported.

claimants valued the claim at over £1 million and the defendant valued the claim at £400,000. The judge considered the defendant's valuation to be more appropriate.

2.18 Initially, the claimants' estimated their total costs to the conclusion of the trial to be £940,000 (although this was subsequently revised). However, the claimants submitted a subsequent estimate of their costs which put the total costs at £2,170,000 (this included £900,000 of future costs to the conclusion of the trial) (this estimate was then further revised). HH Judge MacDuff expressed concern at the claimants' costs and the estimates involved. He held that the court could make a costs capping order of its own motion and such an order could not be retrospective. Accordingly, the judge capped the claimants' costs at £215,000 from the date the costs capping application was made. In responding to the claimants' suggestion that a costs cap would stifle their access to justice, the judge held that access to justice:

> "...does not mean that any claimant must be allowed to bring his claim, however small, at whatever cost, regardless of all sensible economic argument, and with no personal costs exposure."[187]

2.19 *Willis v Nicolson.*[188] This case related to a serious road traffic accident. The claimant submitted three separate costs estimates at different stages in the proceedings. The final estimate represented a significant increase from the original estimate and was far greater than the costs estimated by the defendant. Accordingly, the defendant applied for a costs capping order on the grounds that there was a real and substantial risk that the costs would be disproportionately or unreasonably incurred. The application came before Field J on 13th October 2006. While he expressed unease at the high level of costs incurred to date, Field J refused to impose the costs cap as he was unable to find that there was a real risk that the future costs would be disproportionately or unreasonably incurred; however, he did order that the claimant's costs to the final determination of the claim should not exceed the claimant's most recent estimate. The defendant appealed this order on the grounds that the judge should either: (1) have ordered a lower limit; or (2) have remitted the case to a costs judge for him to set a cap.

2.20 The Court of Appeal dismissed the appeal and held that the decision of Field J could not be disturbed. In particular, it was noted that there would be considerable time and costs implications for assessing and determining the level of a cap at such a late stage in the proceedings. Furthermore, the Court of Appeal noted the practical difficulties of adjusting the claimant's costs and, accordingly, the claimant's preparation of the case so close to the trial. The Court of Appeal, while declining to issue specific guidance on costs capping, commented generally on the use of costs capping orders.[189] Specifically, it was noted that:

- Limiting the way in which professionals conduct a case is a delicate matter. The court must, therefore, be careful before imposing any costs cap. This is particularly so when the professionals act for a claimant who has suffered catastrophic injuries.
- In order to conduct the costs capping exercise properly, the court will need reliable information about, and an understanding of, the particular case. In the light of the costs and time involved in the costs capping exercise, costs capping should not be entered into lightly.

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[187] *Ibid*, at paragraph 35.
[188] *Willis v Nicolson* [2007] EWCA Civ 199; [2007] C.P. Rep 24.
[189] *Ibid*, paragraphs 22 and 23.

- Finally, costs caps cannot be imposed retrospectively for reasons of fairness and practicality. The enquiry (and hence the application) must take place at a sufficiently early stage in order to ensure the cap has a real effect on expenditure.

2.21 Points of note arising from the case law. The following points of note can be distilled from the costs capping jurisprudence:

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- Costs capping orders should be prospective and must be applied for or ordered at an early stage in the proceedings.
- Costs caps do have a role to play in the effective management of costs, although judges without the relevant expertise may find that they are unable to make costs capping orders. The issue of relevant expertise is a key consideration given the difficulties in assessing the level of the cap and the costs consequences of getting it wrong.
- The readiness with which costs caps will be ordered will depend on the type of claim. For example, the court may be more willing to make a costs capping order in defamation claims or group actions.

3. THE MINISTRY OF JUSTICE CONSULTATION

3.1 Background. The Court of Appeal in *Willis* declined to issue specific guidance on costs capping, but opted instead to invite the Civil Procedure Rule Committee ("Rule Committee") to address this area further. Accordingly, the Rule Committee established a sub-committee to consider the issues. The Rule Committee subsequently considered the sub-committee's views and concluded that: (1) the court had jurisdiction to make costs capping orders; (2) the approach to costs capping should be conservative; and (3) costs capping orders should generally be made on application. Following this guidance the sub-committee was asked to produce a set of draft rules amending the CPR and the accompanying practice direction. These rules were then put to consultation between 12th September 2008 and 24th October 2008.[190]

3.2 The results of the consultation. There were 64 responses to the consultation. While most respondents commented on the draft rules appended to the consultation paper, many respondents also took the opportunity to comment generally on the costs capping regime. Some of these views are summarised below.

3.3 Perceived advantages of costs capping. The following perceived advantages were noted:

- Costs capping can assist in controlling legal costs – i.e. the parties are aware from the outset what sum they will be able to recover if they are successful and there is a pressure then not to greatly exceed this amount. The control of costs and the capping of costs liability may improve access to justice. Certainty as to costs liability is of great benefit to litigants and will aid commercial decision making in relation to the litigation.

[190] The consultation letter, consultation paper, accompanying questionnaire and response paper *Civil Procedure Rules: Cost Capping Orders* can be found at: http://www.justice.gov.uk/publications/costs-capping-orders-consultation.htm.

- Costs caps can provide some protection to defendants who defend claims brought by impecunious claimants funded by CFAs and without ATE insurance. Without such a cap, the potential exposure to costs may make defending a claim too risky and force unmerited settlement.
- Dealing with costs at the detailed assessment stage of proceedings is too late. By this stage the costs have actually been incurred and judges are reluctant to disallow significant costs. Costs caps have the distinct advantage of setting the budget at the outset and thus enabling the parties to plan the litigation accordingly.

3.4 Perceived disadvantages of costs capping.

- Costs capping is potentially expensive, time consuming and the outcome may not be predictable. Indeed, costs capping could lead to costly satellite litigation. The costs capping exercise may consume a disproportionate amount of specialist judicial time if it requires the services of expert costs judges or district judges designated as regional costs judges.
- Dealing with costs prospectively can be problematic. Parties may find it difficult to justify their costs without jeopardising confidentiality or disclosing the tactics of their case.
- Ascertaining the quantum of the cap is difficult and, as it will affect the level of work undertaken by a party's legal representatives, may lead to risks of injustice to a party. Furthermore, costs capping could be used tactically to frustrate a claimant's right to pursue a legitimate claim.
- The capping of costs rather than the amount parties spend on litigation raises the potential for problems related to inequality of arms. The cap will not prevent parties with deep pockets from spending large amounts on litigation (as recoverability of costs is less of an issue), but may restrict the amounts impecunious parties or parties funded by CFAs are prepared to spend or their ability to respond adequately to the other party.
- In relation to CFA funded claims, costs capping may promote "cherry picking" of claims by practitioners, as firms will be discouraged from taking on cases that require substantial investment for fear that a cap will be imposed and this will limit the recoverable amount to less than that invested. This problem is particularly acute in certain jurisdictions (e.g. personal injury) where practitioners rely on CFA success fees in high costs cases that succeed in order to counter "losses" incurred in cases that are lost. This may lead to a reduction in access to justice.

3.5 Other points of interest. In addition to comments on the advantages and disadvantages of costs capping, certain respondents to the consultation raised certain general points of interest. These included:

- Views were divergent on the frequency with which costs capping orders should be made. Some respondents felt that costs capping should be conducted as a matter of course in certain types of proceeding (e.g. publication proceedings and group litigation) or if it is in the interests of justice to do so. Alternatively, some respondents to the consultation felt that costs capping should be restricted to very narrow circumstances and such orders only be made in exceptional cases. Views also differed as to the extent of the cap (e.g. whether the cap should include

additional liabilities) and whether it should be available flexibly to cover any part or stage of the litigation.

- Some respondents felt that costs capping is inappropriate for low value claims where the expense of setting the cap will undermine any benefits associated with the cap. However, others noted that lower value claims are more likely to attract disproportionate costs and accordingly a costs cap may be more appropriate.
- Several respondents noted that costs capping and costs estimates are linked. Accordingly, some respondents identified a need for an estimates process within the CPR which is closely monitored and routinely enforced by the courts to supplement the costs capping regime. Parties should also be encouraged to meet and discuss costs estimates. Finally, given the front loading of work during the pre-litigation phase of proceedings, there must be a mechanism for exchange of estimates in this stage so that costs issues can be identified and addressed earlier. Costs capping should be available during this stage.
- To be effective, costs management[191] must be an integral part of the court's case management procedures. Indeed, it was noted that some regional costs judges make costs capping orders routinely as part of the case management process. There was also concern expressed about case management generally.

4. RULES 44.18 – 44.20 OF THE CIVIL PROCEDURE RULES

4.1 The principles established in the costs capping case law have to some extent been codified by rule 44.18 of the CPR. CPR rules 44.18 to 44.20 set out the new provisions relating to costs capping. The new cost capping rules entered into force on the 6th April 2009.

4.2 The definition of costs capping order. CPR rule 44.18 (1) sets out the meaning of a costs capping order. Specifically, the rule states that:

> "[a] costs capping order is an order limiting the amount of future costs[192] (including disbursements) which a party may recover pursuant to an order for costs subsequently made."

4.3 The costs capping order may relate to the whole of the litigation or any issues which are to be tried separately[193] and may be made at any stage of the proceedings.[194] The effect of the costs capping order is to limit the costs that are recoverable by the party subject to the order, unless a party successfully applies to vary the order.[195]

4.4 The criteria. CPR rule 44.18 (5) sets out the criteria that must be satisfied before the court is able to make a costs capping order. In particular, the court may make a costs capping order if:

> "(a) it is in the interests of justice to do so;

[191] Costs management will be discussed separately in chapter 48.
[192] Pursuant to CPR rule 44.18 (2) "future costs" means those costs incurred in respect of work done after the date of the costs capping order, but excluding any additional liability.
[193] CPR rule 44.18 (4).
[194] CPR rule 44.18 (5).
[195] CPR rule 44.18 (7).

(b) there is a substantial risk that without such an order costs will be disproportionately incurred; and

(c) it is not satisfied that the risk in sub-paragraph (b) can be adequately controlled by—

(i) case management directions or orders made under Part 3; and

(ii) detailed assessment of costs."

The practice direction accompanying CPR rule 44.18, expressly states that costs capping orders will only be made in "exceptional circumstances".[196]

4.5 The circumstances. In deciding whether to exercise its discretion to make a costs capping order, the court is required to consider all the circumstances of the case, including: (a) whether there is a substantial imbalance between the parties' financial position; (b) whether the costs of determining the amount of the cap are likely to be proportionate to the overall costs of the litigation; (c) the stage the proceedings have reached; and (d) the costs incurred to date and the future costs.[197] The practice direction to CPR rule 44.18 makes it clear that applications for costs capping must be made as soon as possible (and preferably before, at or shortly after the first case management hearing).[198]

4.6 The level of the costs cap. In assessing the quantum of the costs cap the court is obliged to consider the factors set out in rule 44.5 of the CPR and the provisions of the practice direction supporting that rule.[199] The court is also entitled to include a reasonable allowance for contingencies.[200]

4.7 Varying the cap. CPR rules 44.18 (7) and 44.20 provide that a party may apply to vary a costs capping order. However, no such variation will be made unless there has been a "*material and substantial change of circumstances*" since the date of the order or there is some other "*compelling reason*" for the variation.[201]

5. THE USE OF COSTS CAPPING IN TUNBRIDGE WELLS

5.1 Several academic texts and commentators on costs capping draw attention to and commend the approach to costs capping and costs management of District Judge Lethem in the Tunbridge Wells county court.[202] Accordingly, on the 5th February 2009 my judicial assistant spent a day with DJ Lethem in order to understand his approach to costs capping. My judicial assistant also spoke to two practitioners[203] who practise in the Tunbridge Wells county court. The findings are set out below.

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196 See the Costs Practice Direction section 23A.1.
197 CPR rule 44.18 (6).
198 Costs Practice Direction section 23A.2.
199 *Ibid*, section 23A.5.
200 *Ibid*.
201 CPR rule 44.18 (7).
202 See for example: Cook MJ: Cook on Costs 2009, LexisNexis Butterworths (2009), paragraph 10.10; Locke D: "*Practice Points: If the cap fits…*", Law Society Gazette, 30th August 2007; Peysner J: "*Predictability and Budgeting*", Civil Justice Quarterly, 2004, 23 (Jan), 15-37; O'Hare J: "*Costs: latest news*", New Law Journal, Issue 7081, 23rd May 2003. In addition, some of the respondents to the Ministry of Justice consultation commended the approach of District Judge Lethem.
203 One claimant solicitor and one costs draftsman who acts for both claimants and defendants.

(i) The approach of DJ Lethem

5.2 When costs capping orders should be made. DJ Lethem maintains that costs capping, while an effective tool for controlling costs, should only be used in certain circumstances and that post-trial assessment of costs should remain the general position. Generally speaking, he is of the view that costs capping will be appropriate where there might be an issue of proportionality[204] (e.g. boundary disputes or small building disputes). This will encompass cases in the fast-track or lower value multi-track cases, although he maintains that there is a case for costs capping in some major litigation. Effective costs capping involves considering each case on its own merits and adopting a "broad brush" approach to the cap.

5.3 Parties' costs estimates. The parties' estimates provide essential information to inform the costs management process. These estimates should be attached to the allocation questionnaire. If they are not, DJ Lethem will order the parties to file such estimates.

5.4 Procedure adopted. If DJ Lethem is of the opinion that the case requires costs control he will give the parties notice to that effect and hold a case management hearing (frequently by telephone) to hear the parties' submissions and to determine whether a cap is required. In the interests of proportionality he will occasionally adopt an alternative procedure of capping costs as a paper exercise. In that event he will invite the written submissions and estimates of the parties and then make a costs capping order (if appropriate) on paper, giving the parties permission to apply to vary or discharge the order.

5.5 Setting the amount of the cap. In setting the appropriate level of the cap DJ Lethem will have regard to the parties' costs estimates. For example, he will consider whether the disbursements incurred or to be incurred are proportionate and whether the correct grade of solicitor is undertaking the work. Once the appropriate level of the cap has been determined, a "contingency fund" will be built into the cap. This essentially involves increasing the costs cap by a specified percentage. This allows for any unforeseen circumstances and ensures that the parties are less likely to return to the court to apply for a variation.

5.6 Only the claimant's costs capped. Frequently only the claimant's costs will be capped. This is often due to the fact that the claimant's costs are higher[205] than the defendant's costs and therefore the claimant is more likely to infringe the test in *Smart* or CPR rule 44.18. There are two alternative approaches whereby parity can still be achieved. First, if one party's costs are capped, the other party's costs may also be capped. However, this approach risks appeal on the ground that the judge misdirected himself (i.e. the defendant's costs situation does not trigger the appropriate test and therefore does not warrant a cap). Secondly, and in the alternative, the uncapped party may be held broadly to its costs estimate.

5.7 Costs management through costs estimates. The court can control the costs of the uncapped party through its costs estimates by making the following order:

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[204] In assessing proportionality consideration will be given to, *inter alia*, the value of the claim, the complexity and the factors set out in rules 1.1 (2)(c) and 44.5 of the CPR.

[205] The claimant's costs may be higher than the defendant's costs for a variety of reasons, including: (1) the claimant frequently has to "drive" the litigation and prove its case and will incur more costs in so doing; (2) defendants are frequently in a position to drive down their legal costs (e.g. insurers put pressure on panel firms); and (3) the claimant may have to deal with multiple defendants.

> "The [Claimant][Defendant] shall file and serve an updated costs estimate forthwith upon their costs exceeding the present estimate by x%."

Thus the costs of the uncapped party are monitored and an application to cap the costs of that party can be made at a later stage if necessary.

(ii) Practical experience

5.8 Frequency. In DJ Lethem's experience, costs caps are rarely applied for by the parties. He believes that the use of costs caps may not yet be a fully accepted practice by legal practitioners. Therefore, most caps are ordered of the court's own volition. The number of costs caps which he orders remains low.[206]

5.9 Variation. In the last three years, DJ Lethem has only received two applications to vary a cap (one application was made due to a significant change in the prognosis of the claimant and one application was necessitated following the death of an expert). In both cases the applications were granted. DJ Lethem has never assessed a bill of costs where the cap had been exceeded and the party requested that the cap be retrospectively varied upward.

(iii) Costs capping: an example

5.10 My judicial assistant observed DJ Lethem's approach to costs capping at a case management hearing conducted by telephone. The case involved a personal injury claim against multiple defendants. The claim was valued at between £5,000 and £15,000 and was only moderately complex in terms of the legal and factual issues in dispute. However, the claimant's costs estimate stated that costs to the conclusion of the trial would reach £30,000 (this included £9,000 already incurred). Upon an analysis of the case and submissions from the parties, the judge concluded that the costs were not proportionate to the sums in issue.

5.11 The judge noted that the claimant's estimate allowed for a Grade A solicitor undertaking significant amounts of work on relatively straightforward tasks. Given the complexity of the case, this was not likely to be appropriate or proportionate. The claimant's estimate also forecast a significant amount of time and expense in attendances with the client. The judge concluded that this was unnecessary and disproportionate in the light of the amount of time the claimant's solicitors had already spent with their client.

5.12 Accordingly, the judge ordered a costs cap of £16,700 on the claimant's future costs. This included a contingency fund of 7.5%. However, in order to protect the claimant, the judge further ordered that the defendants must both file and serve updated costs estimates in the event that their costs exceed their present estimate by 20%.

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[206] For example, of 93 cases reviewed by DJ Lethem over a two day period in December 2008, there were 20 cases where costs were an issue. Of those 20 cases, only two or three would be suitable for a costs cap.

(iv) Users of the Tunbridge Wells county court

5.13 The practitioners to whom my judicial assistant spoke confirmed that in their experience costs caps were only imposed infrequently. For example, one practitioner had experienced six costs caps over the last five years. None of these needed to be varied. The practitioners were clear that costs caps could be justified in certain cases; however, costs caps should not be imposed as a matter of course as this would generate additional and unnecessary costs. Concern was expressed as to the fairness of capping only one party's costs.

5.14 Several practitioners[207] commended DJ Lethem's approach. However, concern was expressed as to the wider use of costs caps by members of the judiciary without the necessary expertise.

5.15 One of the practitioners in Tunbridge Wells noted that costs capping at an early stage allowed the court to seize a case by "the scruff of the neck" and control costs. Furthermore, in preparing for a costs capping hearing, the parties are compelled to plan the litigation carefully.

6. PRACTITIONER VIEWS ELSEWHERE

6.1 During February 2009 my judicial assistant spoke to a small number of practitioners[208] with experience of costs capping orders. The pertinent points that emerged during the discussions are summarised below.

6.2 Frequency. Costs capping orders are not regularly made by the courts. Several practitioners commented that judges are reluctant to address costs issues (including costs caps) at the interlocutory stage, perhaps for fear of stifling access to justice or fettering the claimant's ability to pursue a claim. Instead, judges opt to treat costs as a discrete task to be dealt with by post-trial assessment.

6.3 Costs management, costs estimates and case management. Several practitioners spoke of the need for the active management of costs as part of general case management. Costs capping orders (and costs estimates) are both tools by which the proper management of costs can be achieved. It was noted that costs management should be undertaken at the pre-issue stage, to counter the (often significant) costs incurred during this period. Costs management will be addressed in greater detail in chapter 48.

6.4 Access to justice: costs not disproportionate. One practitioner recounted his experience of a costs capping order in a serious personal injury case which was appealed to the Court of Appeal. In that case the claimant, a person of very limited means, was faced with the possibility of an adverse costs order if he was unsuccessful. The claimant decided to withdraw his appeal, as the risk and implications of an adverse costs order were too great. However, the Court of Appeal then made a costs capping order limiting the costs recoverable. As a result of this limitation of risk, the claimant continued with his appeal, which was ultimately successful. Two points of note emerge. First, the costs would never have been disproportionate to the sums in issue (the personal injury was severe and the potential damages were very large). Secondly, the fact that the claimant's maximum exposure to costs was limited ensured that the claimant was not prevented from receiving access to justice.

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[207] The two practitioners in Tunbridge Wells and a number of practitioners elsewhere.
[208] The practitioners included a barrister and five solicitors.

6.5 The cost of costs capping. One practitioner spoke of his experience of costs caps in large group actions. The practitioner had experience of 10-12 costs caps over the past 18 months. In his experience, the costs of a costs capping hearing usually exceed the costs of any post-trial assessment, as the setting of the costs cap may involve two separate hearings,[209] both of which are usually attended by counsel (and sometimes senior counsel). The costs will undoubtedly increase if either of the parties applies to vary the cap. Overall, the practitioner commented that costs caps were appropriate in certain exceptional cases (e.g. where costs are disproportionate), but that the routine ordering of caps was not appropriate.

6.6 Costs capping in arbitration. One practitioner discussed his experience of costs capping in arbitration proceedings and the wide power bestowed upon arbitral tribunals to limit recoverable costs under section 65(1) of the Arbitration Act 1996.[210] The practitioner noted that it would not be uncommon in such proceedings for arbitrators to address the issue of costs capping at the outset, for instance by raising the possibility at the first directions meeting. While it is relatively unusual for the power conferred by section 65(1) to be exercised, the practitioner noted that the availability of this power was widely welcomed in the arbitration community.

7. REVIEW

7.1 Polarisation of views. The question of costs capping is a hugely controversial one. Views range from one extreme (*viz* that there should be universal cost capping) to the other extreme (*viz* that costs should never be capped because the exercise is unfair and counter-productive). The Rule Committee when drafting the new costs capping rules has adopted a conservative approach, in the knowledge that there was about to be a fundamental review of costs.

7.2 During Phase 2, the consultation period, it seems likely that the same polarisation of views will emerge. Although the recent consultation on cost capping rules did not seek views on the principle of cost capping, the arguments on each side were submitted.

7.3 One possible approach. One possible analysis would be as follows. Costs capping cannot be used in isolation to control costs, tempting though this may seem to those who throw up their hands in horror at the present levels of costs. Costs capping may be used as an adjunct to a wider exercise of costs management in those cases where it is appropriate for the court to undertake costs management. Otherwise, however, costs capping should be reserved for exceptional circumstances, as currently prescribed in CPR rule 44.18 and section 23A of the Costs Practice Direction. Costs capping must not be used as a shortcut or as treated as a sword to cut through the Gordian knot of civil costs.

7.4 Request for comments. I look forward to receiving the further comments of practitioners and court users on the matter of costs capping during Phase 2. It may be helpful to deal with this topic in conjunction with costs management, which is discussed separately in chapter 48.

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[209] One hearing to determine whether a cap is required and a further hearing to determine the level of the cap.

[210] Section 65(1) of the Arbitration Act 1996 provides that: *"[u]nless otherwise agreed by the parties, the tribunal may direct that the recoverable costs of the arbitration, or of any part of the arbitral proceedings, shall be limited to a specified amount."*

CHAPTER 46. SHOULD THE COST SHIFTING RULE BE MODIFIED?

1. INTRODUCTION

1.1 Background. The principle of cost shifting has been ingrained in litigation in this jurisdiction for over two centuries. Whilst costs always remain in the discretion of the court, the general rule that "loser pays" has always been an important feature of litigation in England and Wales. Until 1999 the costs shifting rule was enshrined in order 62 rule 3 of the Rules of the Supreme Court as follows:

> "(3) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

1.2 Lord Woolf's Interim Report. In chapter 25 of his "*Interim Report on Access to Justice*" (June 1995) Lord Woolf noted that the problem of costs was the most serious problem besetting the litigation system. After summarising the adverse effects of the present costs regime, he then addressed whether we should abandon the costs shifting rule altogether. Lord Woolf identified two arguments in favour of retaining the rule:

(i) It is fairer that a party who succeeds in litigation should at least recover the major proportion of his own costs from his opponent.

(ii) The rule deters unmeritorious litigation and encourages earlier settlement.

Lord Woolf identified three arguments for abandoning the rule:

(i) The rule can deter meritorious claims. Because of the uncertainty of litigation, even the meritorious litigant may be deterred from proceeding by the costs risk.

(ii) The costs shifting rule favours wealthy litigants over the less wealthy.

(iii) Once litigation is under way, the costs at stake may be so great that the parties feel impelled to press on.

Having balanced the conflicting arguments, Lord Woolf favoured retaining the costs shifting rule but making it more effective in two ways: first, by the court making more focused costs orders rather than simply awarding to the winner all of his costs; secondly, by the court managing litigation so as to keep down costs.

1.3 Lord Woolf's Final Report. In chapter 7 of his "*Final Report on Access to Justice*" (July 1996) Lord Woolf reiterated the significance of the costs problem. He identified three factors in particular:

(i) Litigation is so expensive that the majority of the public cannot afford it without financial assistance.

(ii) The costs incurred in the course of litigation are out of proportion to the issues involved.

(iii) The costs are uncertain in amount so that the parties cannot predict their ultimate liability in the event that they lose.

Lord Woolf then explained that the problem of costs would be tackled by his case management reforms and by the making of more focused costs orders. In chapter 7, paragraph 5 he stated:

> "Costs are central to the changes I wish to bring about. Virtually all my recommendations are designed at least in part to tackle the problems of costs."

1.4 Civil Procedure Rules 1998. As part of the Woolf reforms the cost shifting rule was codified in the Civil Procedure Rules in the following terms:

> "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."[211]

So far as costs are concerned, the principal difference between the former Rules of the Supreme Court and the present Civil Procedure Rules is that the court is now more willing than formerly to make a "different order" in cases where the victor of the litigation has lost on discrete issues.[212]

1.5 Full Cost Shifting. It is also a feature of England and Wales that we have full cost shifting, i.e. a reasonable litigant can in principle expect to recover every penny which they have reasonably incurred in bringing or defending their case successfully.[213] This is in contrast to many other jurisdictions where, although cost shifting exists, the amounts recoverable are strictly regulated such that one would normally expect costs recovered from the other side to be less than costs as between solicitor and own client. The New Zealand system[214] is a good example of such an approach. Such a policy of less than full cost recovery has as one of its aims making litigation unattractive for the parties so as to encourage early and reasonable settlement.

1.6 No Cost Shifting. There are also many examples of jurisdictions, here and overseas, where either there is no costs regime at all, or there is a strong presumption that each party should bear their own costs. Such systems are considered in other parts of this report – see chapters 49 to 51 (small claims track, employment tribunals and ancillary relief proceedings respectively) and 60 (USA).

1.7 Options. A whole range of reform options could be considered for non-family litigation in this jurisdiction, including:

(i) whether cost shifting should continue at all;

(ii) whether the amount recovered should be more restricted (creating the differential with own client costs mentioned above);

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[211] CPR rule 44.3(2). This rule and its qualifications are discussed in chapter 3 above.

[212] For a recent and graphic example, see *Ratiopharm GmbH v Napp Pharmaceutical Holdings Ltd* [2009] EWHC 209 (Ch). The claimants succeeded in a patent action but, having regard to the extent of the issues which they lost along the way, were ordered to pay 20% of the defendants' costs. The substantive issues were decided differently on appeal, and so the Court of Appeal did not need to review the correctness of the original costs decision: [2009] EWCA Civ 252.

[213] This is the theory. In practice some items are always disallowed on detailed assessment.

[214] Discussed in chapter 59 below.

(iii) whether different principles should apply to cost shifting in favour of claimants and against them;

(iv) what the principle of awarding costs should be if it is anything other than "loser pays";

(v) whether there are particular types of case which deserve special treatment in terms of cost shifting. One way cost shifting in personal injury claims is considered in chapter 25. Other candidates include public interest cases and environmental litigation: see chapters 35 and 36

It is, however, first useful to consider what the purpose and policy of cost shifting is under the current scheme and how those policies would be affected by any potential reforms.

2. WHAT IS THE PURPOSE OF COST SHIFTING?

2.1 Who pays? Cost shifting performs a different role as between claimants bringing proceedings and defendants resisting them. Further, cost shifting can be a mechanism to encourage appropriate behaviour on all sides for the benefit of the court[215] and dispute resolution generally. It is worth looking at some of these perspectives separately.

2.2 Claimants. The ability of claimants to recover their costs when successful is beneficial for two main related reasons:

(i) It ensures effective access to justice. Without fee shifting many funding mechanisms, in particular CFAs, would become unworkable in their present form. Even systems of public funding like legal aid depend heavily on recovery of costs from defendants in successful cases.

(ii) Cost shifting preserves remedies for the client, allowing the client in a damages claim to recover 100% of their damages and the lawyers recover their costs in full. One hundred percent damages recovery is largely taken for granted in this jurisdiction, but is a rarity elsewhere.

2.3 Defendants. Costs shifting in favour of defendants has two key objectives:-

(i) The existence of cost shifting acts as a major deterrent against claimants bringing unmeritorious claims. This is seen as a key safeguard against the perception that there is a "compensation culture".

(ii) Cost shifting aims to promote a fair and balanced system for defendants, allowing them to be indemnified where they have been vindicated in the defence of their position.

2.4 Wider objectives. The cost shifting rules also provide a means by which the court can pursue wider objectives. In particular:

(i) The court can punish unreasonable conduct. For example, withholding a costs order which would normally be forthcoming can encourage reasonable behaviour by the parties, e.g. in relation to appropriate use of ADR. See *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR 3002.

[215] In the sense that court resources are conserved, so that the court can deal with other cases more swiftly.

(ii) The court can promote early and reasonable settlement of cases. The costs rules should incentivise all parties to make and accept reasonable settlement offers at the earliest opportunity. The Part 36 cost regime is a clear manifestation of this policy.

3. THE LACK OF COST SHIFTING IN TRIBUNALS

(i) Nature of tribunals

3.1 The purpose of tribunals. Tribunals are dispute-resolving bodies, which (at least traditionally) differ in character from courts. Each tribunal has been established as a result of a policy decision that a particular category of disputes should be resolved by a tribunal rather than by the courts.

3.2 A conventional description of tribunals. A conventional summary of the respects in which tribunals differ from courts would run along the following lines:

(i) The procedure of tribunals is, or should be, more informal than court procedure.

(ii) Tribunal members possess specialist expertise relevant to the cases that come before them (whereas judges may or may not possess such specialist expertise).

(iii) Tribunal members do not have to be lawyers.

(iv) In tribunal proceedings the balance struck between considerations of (a) speed and efficiency and (b) justice comes down more heavily in favour of the former.[216]

(v) The cost of tribunal proceedings is, or should be, less than the cost of court proceedings.

For the reasons set out in the next paragraph, this conventional summary is not now (if it ever was) a fair account of the respects in which tribunals differ from courts.

3.3 Reality. Some tribunals have become increasingly formal in their procedures (e.g. a hearing before the Lands Tribunal,[217] the Employment Appeal Tribunal or the Asylum and Immigration Tribunal, in which counsel may be instructed on both sides). Some court hearings have become increasingly informal (e.g. the family courts). Likewise there is an increasing number of specialist courts which offer expertise in defined areas, comparable to the expertise offered by tribunals. Indeed the new First Tier Tribunal, which has been set up under the Tribunals Courts and Enforcement Act 2007, appears to be less specialist than some courts.[218]

3.4 Coalescence of courts and tribunals. For the reasons set out in the previous paragraph, over the years courts and tribunals have come to resemble one another in many respects. The boundaries between the two institutions have become blurred. High Court judges and circuit judges are increasingly being called upon to sit in tribunals. Furthermore tribunals are taking over areas of work which have traditionally been the preserve of the courts, even including judicial review.[219]

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[216] See Wade & Forsyth, 9th edition, pages 907-8.
[217] Due to become the Lands Chamber of the Upper Tribunal in June 2009.
[218] This point will not be correct if, in practice, First Tier Tribunal members only ever sit in chambers corresponding with their own specialist expertise. I understand that this is the current intention.
[219] Since November 2008.

(ii) Costs rules in tribunals

3.5 The costs tradition of tribunals. Tribunals are forums in which, traditionally, (a) each party bears its own costs and (b) costs should, in any event, be kept low. The reasons for this tradition are threefold. First, tribunals are intended to be user-friendly bodies before which parties can safely appear unrepresented. Secondly, tribunals are expected to possess relevant expertise, so that they need less assistance from the parties in arriving at correct decisions. Thirdly, in the context of tribunals the cost shifting rule is generally seen as a deterrent for parties, in other words as a rule which inhibits (rather than promotes) access to justice. The Lands Tribunal has cost shifting, but this is by way of exception to the norm.

3.6 The opposing approaches of courts and tribunals to cost shifting. For the reasons set out above, it can be seen that courts and tribunals have diametrically opposed approaches to costs. The culture of the courts is that cost shifting promotes access to justice; therefore cost shifting is the norm or the default rule in most forms of litigation. The culture of tribunals is that costs shifting inhibits access to justice; therefore no cost shifting is the norm or the default rule in most tribunal proceedings.

(iii) Tensions arising from the coalescence of courts and tribunals

3.7 As mentioned above, because of their different historical origins, courts and tribunals have diametrically opposed traditions in respect of costs. Therefore the coalescence of courts and tribunals throws up tensions which must be resolved. In particular, to what extent should tribunals be adopting cost shifting? To what extent should the courts be abandoning cost shifting? These questions force both institutions to re-examine the rules which are embedded in their culture.[220]

3.8 Judicial review. When certain categories of judicial review passed from the Administrative Court to the Upper Tribunal in November 2008, those cases moved from a costs shifting regime to a regime in which there was no cost shifting. At the time of writing (March 2009) I understand that a general discretion to award costs in judicial review cases will soon be conferred upon the Upper Tribunal, but it is not yet known what steer will be given, by practice direction or otherwise, as to the exercise of that discretion.

3.9 Statutory appeals. A number of statutory appeals passed from the Administrative Court to the Upper Tribunal in November 2008. These cases (like the judicial review cases) moved from a cost shifting regime to a regime without cost shifting. In respect of these cases, however, no rule change is currently planned. The costs rules on appeal to the Upper Tribunal will be the same as the costs rules in the tribunal from which the appeal emanates (i.e. usually no cost shifting).

3.10 Costs rules of First Tier Tribunal. In respect of most proceedings before the First Tier Tribunal each party bears its own costs.[221] The principal exception is the category of "complex" cases in the Tax Chamber of the First Tier Tribunal ("the FT

[220] As to the embedment of costs rules, see Kritzer "*Fee Regimes and the Cost of Civil Justice*", which is due to be published in Civil Justice Quarterly this year.

[221] The Health, Education and Social Care Chamber of the First Tier Tribunal can (a) order a party to pay costs in the event of unreasonable behaviour or (b) make a wasted costs order, when merited, against representatives. The Tax Chamber of the First Tier Tribunal has similar powers. It is not anticipated, however, that these powers will be used with any frequency.

Tax Chamber"). There is a cost shifting regime for these cases, subject to the right of the right of the tax payer to opt out of that regime.

3.11 I very much hope that before the end of Phase 2 of the Costs Review (31st July 2009) sufficient experience of the costs rules in the new tribunals will have built up to provide some input into my final report. In particular, it would be helpful if the Tribunals Service could collate data concerning:

(i) the number of complex tax cases which have proceeded in the FT Tax Chamber;

(ii) in how many of those cases a party applied to opt out of cost shifting;

(iii) in how many instances that application was granted and in how many instances it was refused;

(iv) in how many complex cases proceeding in the FT Tax Chamber there was no application to opt out of the cost shifting regime;

(v) in how many complex cases proceeding in the FT Tax Chamber with no opt out (a) the taxpayer subsequently obtained an order for costs and (b) HM Revenue and Customs subsequently obtained an order for costs.

3.12 The data requested in the previous paragraph will reveal, at least in one category of case, the extent to which appellants perceive costs shifting as a benefit and the extent to which they perceive it as a burden.

3.13 Trade mark disputes. In trade mark disputes, most parties regard cost shifting as a burden rather than a benefit. This is evidenced by the fact that 90% of appellants from decisions of the Trade Mark Registry choose to appeal to an "Appointed Person" rather than to the High Court. This is principally because the High Court has full cost shifting, whereas the Appointed Person only awards modest sums of costs to the winning party.[222] In other words in respect of trade mark disputes, most parties prefer the tribunal regime (with limited cost shifting) to the court regime (with cost shifting under the CPR).

3.14 Employment tribunals. Employment tribunals are dealt with at some length in chapter 50 below. In spite of the fact that such proceedings are strongly adversarial and very much akin to litigation, nevertheless the no cost shifting tradition of tribunals prevails in those proceedings. Although such a regime has both benefits and drawbacks, as set out in chapter 50, it is seen at least by some as promoting access to justice.

4. SHOULD THE COST SHIFTING RULE BE ABOLISHED IN COURTS?

(i) The general consensus

4.1 Views expressed during Phase 1. Those who have so far contributed to the Costs Review either by written submissions or at meetings[223] do not speak with one voice.[224] Nevertheless, despite the discordant arguments which resonate on every other issue, there is one matter upon which all the warring parties are agreed. The cost shifting rule must be retained.

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[222] See page 10 of Mr Justice Arnold's paper to the Midlands Intellectual Property Society, dated 26th February 2009. This matter is further discussed in chapter 29.
[223] See chapter 10.
[224] See chapter 1, paragraph 5.9.

4.2 The general consensus must be critically examined. This unanimity of view about cost shifting is, at first blush, surprising. There are, after all, several jurisdictions within England and Wales where either cost shifting has never existed[225] or, alternatively, where cost shifting has recently been abolished without the heavens falling in.[226] It is, therefore, necessary to examine critically those jurisdictions (and similar jurisdictions overseas), in order to ascertain how the absence of cost shifting impacts upon the parties and their lawyers.

(ii) Jurisdictions where there is no cost shifting

4.3 Small claims track. The costs regime on the small claims track is described in chapter 49. There is effectively no cost shifting for cases on that track. Parties sometimes choose to be represented by a lawyer or other person, but when they do so it is at their own expense and this does not give rise to complaint.

4.4 Comment. In the exercise of their legal rights citizens pay for other services, such as conveyancing, probate etc. Provided that litigation costs are (a) proportionate and (b) kept within an ordinary person's means, there is no objection in principle to a party paying for the successful enforcement or defence of his rights in court. The absence of cost shifting on the small claims track means that neither party need fear a crushing adverse costs order.[227] The absence of cost shifting on the small claims track brings two further benefits, namely:

(i) In relation to the small claims track, there has been none of the satellite litigation which, in the eyes of some, has tarnished the reputation of lawyers in recent years.[228]

(ii) Any party who chooses to be represented on the small claims track (and any lawyer acting on the small claims track) has a powerful incentive to keep costs down. Such incentive is lacking within a cost shifting regime for any party or lawyer on a CFA.[229]

4.5 Tribunals. Tribunals have been discussed in section 3 above. For the most part they function without costs shifting. As can be seen from chapter 50 below in respect of employment tribunals, at least for some parties a regime without cost shifting promotes access to justice. Also satellite litigation about costs is avoided.

4.6 Ancillary relief proceedings. Ancillary relief proceedings are dealt with in chapter 51 below. As set out in that chapter, cost shifting was effectively abolished in ancillary relief proceedings as from 3rd April 2006.[230] This reform has brought a number of benefits. For some parties it has facilitated access to justice. Overall it has had the effect of encouraging economy in the conduct of litigation and in the incurring of costs.

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[225] Most tribunals.
[226] Small claims, up to (now) £5,000 in value; ancillary relief proceedings since 3rd April 2006.
[227] The risk in litigation above the small claims track is that neither party has any control over the (potentially recoverable) legal costs which the other party is running up.
[228] See chapter 3, section 5.
[229] See e.g. chapter 10, paragraphs 17.4 to 17.9 and paragraphs 17.22 to 17.25.
[230] This development may be seen as yet another example of the process described in paragraphs 3.3 and 3.4 above whereby the procedures of courts come to resemble the procedures of tribunals and vice versa.

4.7 United States of America. The US is the only overseas jurisdiction without cost shifting, which has been examined this review. The US costs rules are described in some detail in chapter 60 below. As can be seen from section 4 of that chapter, there are two views as to whether the "American rule" promotes greater access to justice than the "English" rule. My overall impression from the data in that chapter and in chapter 9 is that the "American rule" does promote greater access to justice than the "English" rule, but at a price. In particular, (a) more claims lacking in merit[231] tend to be brought; (b) a higher level of damages is required to make American litigation viable; (c) a well-resourced litigant with a weak case can cause his opponent to run up irrecoverable costs, unless firmly controlled by the court.

4.8 Conclusion from other jurisdictions. The pros and cons of retaining the cost shifting rule are more finely balanced than is suggested by the universal tenor of the contributions to Phase 1 of the Costs Review. Experience in other jurisdictions suggests that the absence of such a rule is not an unmitigated evil. Each category of litigation needs to be critically examined, in order to assess whether retention of abolition of cost shifting is beneficial for that particular category.

(iii) Discussion

4.9 Tentative conclusion. There may possibly be further specific areas of litigation where the abolition of cost shifting is a serious candidate. For example, the question whether to abolish cost shifting in group actions is discussed in chapter 38. Subject to defined exceptions, however, it appears that cost shifting in some form must remain for the generality of litigation.

4.10 Whilst there are different arguments for cost shifting for and against claimants, it is appears that in most categories of litigation the case for retaining cost shifting in favour of successful claimants is a strong one. My working assumption is, therefore, that cost shifting in favour of claimants, in the sense that successful claimants should generally expect to recover their costs, should continue. The quantification of such costs is, of course, an important area of potential reform (see earlier chapters on fixed fees etc.). The question whether cost shifting should extend to CFA success fees and ATE insurance premiums is a more difficult one. This is considered separately in the next chapter. It is, however, worth noting that if cost shifting against claimants were to be abolished, the main purpose of ATE insurance premiums would also disappear.

5. POSSIBLE MODIFICATIONS TO THE COST SHIFTING RULE, IF RETAINED

5.1 One way cost shifting? At first sight the arguments for cost shifting in favour of defendants are also strong, but perhaps less so than for claimants. It must be remembered that one way cost shifting was a very common feature of our litigation system for fifty years through the mechanisms of legal aid (see further chapter 12). From the implementation of the Legal Aid and Advice Act 1949 to that of the Access of Justice Act 1999, defendants in personal injury litigation and other areas were used to the regime under which they would pay costs to the claimant if they lost, but they would recover nothing if they successfully defended. Whilst such a system is far from perfect, the same is true of all costs regimes. One issue which now merits serious consideration is whether one way cost shifting should be reintroduced for personal injuries litigation. This has been addressed in chapter 25 above.

[231] Sometimes low value claims, which it is cheaper to settle than to resist.

5.2 The argument that adverse costs orders against claimants have an important deterrent effect is certainly true, but difficult to justify in terms of its practical application. We have arguably reached the position in this jurisdiction where the level of costs is so high that facing a full adverse costs order is likely to be a disaster for most ordinary citizens. This is so much so that litigation on behalf of individuals does not tend to happen these days unless a mechanism can be found to protect the claimant (either legal aid cost protection or after-the-event insurance). Even small corporate bodies like NGOs will not litigate on important issues if there is a risk of full costs exposure (see *Corner House*, which is discussed in chapter 35 above).

5.3 Problems of one way cost shifting. One way cost shifting causes its own problems, however. If defendants have no general right to recover their costs from claimants, it might become harder for the court to influence defendant behaviour, e.g. in relation to ADR. On some matters withholding costs which would normally be awarded appears more appropriate than imposing a punitive costs sanction such as wasted costs.

5.4 General Cost Protection. If it was thought essential for the early legal aid scheme to protect claimants from the full rigour of cost shifting, should similar principles apply to claimants not covered by public funding? One could envisage a system in which (a) there was two way cost shifting, but (b) whilst there would be full cost shifting in favour of individual claimants, orders against individual claimants would be strictly regulated. Another possible model would be to apply such cost protection to all litigants who were individuals rather than bodies corporate, and to extend protection to individual defendants too.

5.5 The form of such cost protection could use a similar test to legal aid (see chapter 12). That would provide that, whilst the court would decide whether to award costs on existing principles, the amount of a protected litigant's liability under the order would not exceed whatever amount was held to be reasonable in all the circumstances, including the individual's means. Alternatively there could instead be prescribed ceilings on costs orders made against individuals, perhaps banded according to the size and nature of the claim. The thinking would be that, if a main aim of costs against claimants was a deterrent against unmeritorious litigation, the level of costs sanction should be no higher than necessary to act as a real deterrent, rather than threatening financial ruin for the claimant.

6. WHAT SHOULD THE PRINCIPLE OF COST SHIFTING BE?

6.1 Outcome based cost shifting. The two most likely cost models to consider could be summarised as follows:-

(i) "loser pays". The existing UK system under which the unsuccessful party pays unless there are special circumstances to dictate otherwise;

(ii) "no order". A presumption that there is no order for costs unless special circumstances apply, as in employment tribunals.

6.2 Settlement based costs. The above models (which lead to costs orders being made in almost all or almost no cases respectively) are not the only possible approaches for a court to take when considering whether to order costs. One can also envisage compromise proposals under which, whilst there is no starting presumption that costs will be ordered, the jurisdiction to award costs should be based more on the conduct and reasonableness of the parties, in particular in relation to whether reasonable attempts have been made to settle the proceedings. This could be

summarised under the principle that the court should make a costs order at any stage only if it was unreasonable for the paying party to take the case to that stage. There are some similarities between this approach and the regime which existed in ancillary relief cases prior to recent tightening of the costs rules (see chapter 51). There may also be lessons to be learned here from the system in Germany, which can reward parties for settling cases early by refunding certain elements of fees (see chapter 55).

6.3 Another variation on this theme is to look at the elements of the current costs regime which, in the opinion of my panel of assessors, currently works well. There appeared to be a degree of consensus that the Part 36 regime generally works well and incentivises settlement. The strictness of the Part 36 costs regime, whilst sometimes producing harsh results, avoids dispute based on arguments of conduct and reasonableness. One could therefore imagine a costs regime under which claimants had no general liability for defendant's costs unless and until a defendant had made a Part 36 offer, but from that point the current entitlements and costs sanctions would apply.

6.4 In relation to this last option, I would suggest that serious consideration be given to reversing the Court of Appeal's decision in *BAA v Carver* [2008] EWCA Civ 412 by rule change. That decision introduces an unwelcome degree of uncertainty into the Part 36 process. The decision also puts unreasonable pressure on claimants to accept offers which are not quite high enough. Many of those who have contributed to Phase 1 of the Costs Review have been strongly critical of *Carver*.

6.5 Special cases. Whether there should be one way cost shifting specifically in personal injury proceedings is considered separately in chapter 25 above. Arguments can also be made for special costs regimes in judicial review claims and environmental claims, as discussed in chapters 35 and 36 above.

7. CONCLUSIONS

7.1 The existing cost shifting regime should not be regarded as a "sacred cow", but on the other hand its complete abolition does not appear to be a realistic option for the foreseeable future. Some of the main issues on which I would particularly welcome views are as follows:

(i) whether there are any further discrete areas of litigation where the cost shifting rule should be effectively abolished altogether;

(ii) whether there is a case for a presumption of one way cost shifting, either in personal injury litigation or across the board, and what issues and options should be considered under such a regime;

(iii) if cost shifting (one way or two ways) is retained, on what principles it should operate. "Loser pays" is not the only option. Other options which are more directly based on encouraging earlier and appropriate resolution of claims, including ADR, may well be worthy of further consideration;

(iv) in cases where costs orders are made, whether the rules should mitigate the full impact of such orders, by forms of cost protection either (a) in favour of claimants or (b) in favour of individuals generally.

CHAPTER 47. THE RECOVERABILITY OF SUCCESS FEES AND ATE PREMIUMS

1. INTRODUCTION

1.1 This chapter explores two questions. First, should success fees and ATE insurance premiums continue to be recoverable under costs orders? Secondly, if not, what steps should be taken to protect access to justice for claimants. Along the way, I shall touch upon the question whether success fees and premiums are currently set at too high a level. The related question of whether there should be one way cost shifting for personal injury cases has been addressed in chapter 25 above.

2. THE RELEVANT LEGISLATION AND RULES

2.1 Section 27 of the Access to Justice Act 1999. As set out in chapter 16 above, section 27 of the Access to Justice Act 1999 inserted section 58A into Courts and Legal Services Act 1990. Section 58A made success fees recoverable under a costs order, subject to rules of court.

2.2 Section 29 of the Access to Justice Act 1999. Section 29 of the Access to Justice Act 1999 made ATE insurance premiums recoverable under a costs order, subject to rules of court.

2.3 The relevant rules of court. CPR rule 43.2 includes the following definition clauses:

> (k) 'funding arrangement' means an arrangement where a person has –
>
> (i) entered into a conditional fee agreement or a collective conditional fee agreement which provides for a success fee within the meaning of section 58(2) of the Courts and Legal Services Act 19901;
>
> (ii) taken out an insurance policy to which section 29 of the Access to Justice Act 1999 (recovery of insurance premiums by way of costs) applies; or
>
> (iii) made an agreement with a membership organisation to meet that person's legal costs;
>
> (l) 'percentage increase' means the percentage by which the amount of a legal representative's fee can be increased in accordance with a conditional fee agreement which provides for a success fee;
>
> (m) 'insurance premium' means a sum of money paid or payable for insurance against the risk of incurring a costs liability in the proceedings, taken out after-the-event that is the subject matter of the claim;
>
> (n) 'membership organisation' means a body prescribed for the purposes of section 30 of the Access to Justice Act 1999 (recovery where body undertakes to meet costs liabilities);

(o) 'additional liability' means the percentage increase, the insurance premium, or the additional amount in respect of provision made by a membership organisation, as the case may be;"

2.4 Effect of CPR rule 43.2. The "additional liabilities" referred to in CPR rule 43.2(1)(m) form part of the costs of the action, as defined in rule 43.2(1)(a). Thus, if the receiving party had both an enforceable CFA and ATE insurance, then (as envisaged by sections 27 and 29 of the Access to Justice Act 1999) the CPR enable the court to order the paying party to pay (a) the success fee due under the CFA and (b) the ATE premium (subject to reasonableness of amount).

3. WHAT ARE THE ECONOMIC CONSEQUENCES OF SUCCESS FEES AND ATE PREMIUMS BEING RECOVERABLE?

(i) Individual consequences

3.1 Nature of success fee. A success fee compensates a solicitor or counsel in any given CFA case for the risk of losing another case. The theory is that the total of the success fees in all the "won" cases constitutes proper remuneration for all the "lost" cases.[232] Although either party can retain lawyers on a CFA, in practice CFAs are generally used by claimants (especially in personal injury litigation) and much less frequently used by defendants. In the course of Phase 1, claimant lawyers have emphasised to me the amount of irrecoverable costs which they incur on CFA cases which are lost. Defendant lawyers have urged upon me (particularly in respect of publication cases) the high percentage of cases which claimants win. It is a refrain of defendant lawyers that success fees are too high and over-compensate claimant lawyers for the modest number of cases which they lose. In relation to this issue, Professor Paul Fenn (economist assessor to the Costs Review) points out that there is no effective market pressure on success fees. Claimants have no incentive to shop around for the lowest success fee, as they will never have to pay it.

3.2 Effect of recoverable success fees. Leaving aside the statistical question of whether success fees are currently set at the right level, the effect of recoverable success fees in any area where CFAs are the norm is plain. The claimants' costs of all cases in that area are transferred from claimants to defendants, regardless of the outcome of any individual case. In those cases which they win, claimants recover their costs under the "loser pays" rule. In those cases which they lose, claimants' legal representatives recover their costs through the mechanism of success fees in other cases.

3.3 Nature of ATE premiums. ATE insurance covers a party against liabilities which he will incur if a case is lost. ATE insurance is normally taken out in conjunction with a CFA. The liabilities covered are (a) (usually) own disbursements and (b) any liability to the other party under an adverse costs order. The disbursements covered under limb (a) may include counsel's fees, but I am told that in practice this is rare.[233] Although either party can take out ATE insurance, in

[232] Professor Paul Fenn (economist assessor to the Costs Review) comments that success fees under CFAs are akin to insurance provided by solicitors. The solicitor accepts the same "insurer's risk" as is discussed in the footnote to paragraph 3.10 below in relation to ATE premiums.

[233] Both the Personal Injuries Bar Association and the Professional Negligence Bar Association inform me that if solicitors are acting on a CFA, normally they will only instruct a barrister who is also prepared to act on a CFA.

practice ATE insurance is generally taken out by claimants (especially in person injury litigation) and almost never taken out by defendants. Although ATE insurance comes in all shapes and sizes (as set out in chapter 14 above), I understand that in the vast majority of cases claimants and their lawyers use the so-called "magic bullet". This is a form of policy whereby the premium itself is insured and payment of the premium is deferred until the outcome of the action is known. If the action is lost, then no premium is payable. If the action is won, then the premium is payable in a slightly larger amount, in order to compensate for the risk that no premium would have been payable if the action had been lost. This enlarged premium is recoverable from the other side under the provisions set out in section 2 above. Thus the claimant never makes any payment in respect of his or her ATE insurance, but is insured against all liabilities for costs.

3.4 Effect of recoverable ATE premiums. The first effect of recoverable premiums in any area where ATE insurance is the norm is plain. Defendants end up bearing their own costs of all cases in that area, regardless of the outcome of any individual case. In those cases which defendants lose they bear their own costs in the ordinary way. In those cases which defendants win, they nominally recover their costs, but they pay in full for that privilege by reason of their liability for ATE premiums in many other cases.

3.5 The second effect of recoverable premiums in any area where ATE insurance is the norm is also plain. The claimants' disbursements of all cases in that area are transferred from claimants to defendants, regardless of the outcome of any individual case. In those cases which they win, claimants get their disbursements under the "loser pays" rule. In those cases which they lose, claimants get their disbursements through the mechanism of recoverable ATE premiums in other cases.

3.6 Is there an effective market in ATE insurance? In *Callery v Gray (Nos 1 and 2)* [2002] UKHL 28; [2002] 1 WLR 2000 Lord Hoffmann expressed the view that market forces no restrain the levels of ATE premiums. At paragraphs 43-44 he said this:

> "43. ...ATE insurers do not compete for claimants, still less do they compete on premiums charged. They compete for solicitors who will sell or recommend their product. And they compete by offering solicitors the most profitable arrangements to enable them to attract profitable work. There is only one restraining force on the premium charged and that is how much the costs judge will allow on an assessment against the liability insurer.
>
> 44. Again, the costs judge has absolutely no criteria to enable him to decide whether any given premium is reasonable. On the contrary, the likelihood is that whatever costs judges are prepared to allow will constitute the benchmark around which ATE insurers will tacitly collude in fixing their premiums."

3.7 Seven years have elapsed since Lord Hoffmann delivered that speech. There appears to have been a substantial growth in ATE insurance during that period. Whether or not market forces now exert any effective control over premium levels is very much a live issue, which I have touched upon in chapter 14 above. It is a fair point made by defendants that claimants have no interest in the level of ATE insurance premiums, because – win or lose – the claimants are never going to have to pay those premiums. In his submissions for Phase 1 of the Costs Review, the Treasury solicitor wrote as follows:

> "Inevitably, as insurance is not a charitable undertaking, those offering ATE will calculate their premiums so as to ensure that they are not out of pocket overall. Such premiums tend therefore to be high and add significantly to the costs of litigation. We, as the Government's solicitors, find ourselves increasingly faced with claims for premiums of quite staggering amounts but are unable to challenge them because they are what the market has shown it will support and therefore we cannot point to cheaper alternatives."

On the other hand, claimant solicitors say that they strike the best bargains that they can achieve with ATE insurers.[234] The alternative would be to go forward with no ATE insurance, which would be a disaster for both parties.

3.8 No doubt there will be further submissions and evidence on this issue during Phase 2 of the Costs Review. I shall not therefore express a provisional view on the issue at this stage.

(ii) Overall effect

3.9 All costs transferred to defendants. If one leaves aside all arithmetical issues and doubts over the beneficial effect of market forces and if one assumes that success fees and ATE premiums are set at the "perfect" level in every case (i.e. not favouring either claimant or defendant), then the overall effect of CFAs and ATE insurance in any given area of litigation is this: the total costs of all parties in all cases, regardless of which side wins, is borne by the defendants.

3.10 Additional costs transferred to defendants. In addition to the costs mentioned in the previous paragraph, the administrative costs and profits of insurers must also be taken into account.[235] These factors will be reflected in the premiums charged by ATE insurers, even if those premiums are always set at a perfect level (as defined above).

3.11 Position if the system works perfectly. Thus even if the system works perfectly, defendants in the areas of litigation affected are in practice paying out under costs orders more than the total costs of both sides in all cases.

3.12 But is the system working perfectly? I have already touched upon the issues concerning the levels of success fees and ATE premiums. Defendant representatives have urged upon me that both success fees and ATE premiums are far too high. In relation to excessive costs, liability insurers point to the "largesse" within the system, for example the referral fees paid to claims management companies and middlemen. On the claimants' side it is urged that there is no largesse; all the fees now paid are necessary; the genie cannot be put back into the bottle and anyway marketing costs are saved by the payment of referral fees.

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[234] Having read this paragraph in draft, Senior Costs Judge Peter Hurst commented: "*If ATE premiums are to be successfully challenged, the court needs either evidence of similar products offered at lower premiums, or expert evidence demonstrating how the premium claimed is wrong.*"

[235] Professor Paul Fenn, the economist assessor to the Costs Review, comments that the premium must also reflect "*the insurer's risk*", *viz* the risk that some years will be good and some years will be bad. This risk is particularly significant for insurers operating in areas with relatively small numbers of high value cases, such as defamation claims.

4. SHOULD SUCCESS FEES AND ATE PREMIUMS CONTINUE TO BE RECOVERABLE?

4.1 There can be no doubt that the decision taken by Parliament and implemented by the Rule Committee to make success fees and ATE premiums recoverable has (a) promoted access to justice for claimants and (b) massively increased the costs burden upon defendants. Claimants can now litigate at no cost and at no personal risk. If successful, they retain the entirety of the damages awarded or agreed. If unsuccessful, they walk away with no liability.

4.2 The question must now be asked as to whether the correct balance has been struck. In considering this question, regard must be had to the interests of claimants, defendants, liability insurers, others involved and, of course, the public interest.

4.3 As can be seen from Part 11 of this report, in other jurisdictions where conditional fee agreements or contingency fee agreements are allowed, the additional costs of such arrangements are not transferred to other parties. I am told that the approach adopted in England and Wales is the source of some surprise overseas.

4.4 If success fees and ATE premiums cease to be recoverable, then the question arises as to how the interests of individual claimants (most of whom could not sensibly afford the costs of litigation) might be protected. In the field of personal injury litigation, possible measures might include:

(i) Introducing one way cost shifting.

(ii) Capping the proportion of damages which the claimant's lawyers might take in respect of success fees. Prior to April 2000 the cap was in practice[236] 25% of damages. I am told by Michael Napier QC and Senior Costs Judge Peter Hurst (both assessors to the Costs Review) that this arrangement worked satisfactorily and did not give rise to complaint.[237]

(iii) Providing that no element of damages referable to future care costs could be subject to any deduction.

(iv) Raising the level of damages. This might be perfectly feasible if some of the huge transaction costs could be reduced, as discussed in chapter 26.

(v) Introducing a CLAF or a SLAS for personal injury claims, as discussed in chapters 18 and 19.

4.5 In areas away from personal injury litigation similar measures might need to be considered to promote access to justice, if ATE premiums and success fees become irrecoverable. At the moment CFAs are seldom used in Commercial or Mercantile litigation. Therefore, special measures would probably not be necessary in that area, in the event that success fees and ATE premiums become irrecoverable.

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[236] The Law Society recommended that practitioners should agree not to deduct more than 25% from damages in respect of success fee and ATE premium. This recommendation was set out in the Law Society Model CFA Agreement and in the Law Society Guidebook on CFAs. A similar restriction was set out in the APIL/PIBA model agreement covering barristers. Solicitors followed the recommendations almost universally.

[237] Professor Paul Fenn tells me that his research found no real access to justice drawbacks to non-recoverable CFAs. See Fenn, Gray, Rickman and Carrier "*The impact of conditional fees on the outcome of personal injury cases*" (2002) Journal of Insurance Research and Practice, 41.

4.6 Professor Paul Fenn points out that if success fees and ATE premiums become irrecoverable (as they were before April 2000), then market forces would once more come into play. Claimants would have incentives to shop around for low success fees and low ATE premiums. "*While there might be costs then faced by claimants to come out of their damages, it is possible that the increased efficiency of the system could lead to reductions in these costs as well as knock-on reductions in liability insurance premiums.*"

5. REVIEW

5.1 During Phase 2 of the costs inquiry I look forward to receiving further evidence, data and comment upon:

(i) The appropriateness of the levels of success fees currently set in different types of litigation.

(ii) The appropriateness of the levels of ATE premiums currently charged in different types of litigation.

(iii) Whether success fees and ATE premiums should continue to be recoverable under costs orders.

(iv) If not, (a) what steps should be taken to provide for the funding of personal injuries litigation; (b) what other steps should be taken to preserve access to justice for those who currently depend upon success fees and ATE insurance.

CHAPTER 48. COSTS MANAGEMENT

1. INTRODUCTION

1.1 The meaning of costs management. Over the past decade case management by the court has become a concept with which we have all become familiar. It was one of the central features and recommendations of Lord Woolf's Final Report in July 1996 on "*Access to Justice*". The ills of the civil justice system were then thought mainly to be due to procedural distortions arising out of the adversarial design of the system.

1.2 The focus on reducing the cost and delay of civil litigation was on case management. It was considered necessary, as indeed it was, for judges to assert greater control over the preparation for and conduct of hearings. This need for effective case management was embraced as one of the central features of the Woolf reforms leading to the introduction of the Civil Procedure Rules 1998 ("CPR").

1.3 CPR rule 1.4, defines the elements of case management and makes "*active case management*" the court's duty, forming part of the overriding objective of the CPR:

> "(1) The court must further the overriding objective by actively managing cases.
>
> (2) Active case management includes –
>
> (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
>
> (b) identifying the issues at an early stage;
>
> (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
>
> (d) deciding the order in which issues are to be resolved;
>
> (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
>
> (f) helping the parties to settle the whole or part of the case;
>
> (g) fixing timetables or otherwise controlling the progress of the case;
>
> (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
>
> (i) dealing with as many aspects of the case as it can on the same occasion;
>
> (j) dealing with the case without the parties needing to attend at court;
>
> (k) making use of technology; and

(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently."

1.4 There is no mention made in CPR rule 1.4 of *costs* management. Indeed, unlike case management, costs management is not a concept that is expressly recognised by the CPR. These observations beg the question as to what is costs management.

1.5 Costs management may manifest itself in different ways, but broadly speaking it is an instrument of case management, where the principal criterion or emphasis is on controlling costs.

1.6 Costs management is concerned with ensuring that the incidence of costs is actively controlled by the court as the case moves from inception to its conclusion. Successful costs management might however, also have a part to play in avoiding detailed assessment hearings in all but the most exceptional cases. Specific approval or sanction of the incidence of costs at stated or approved levels throughout the life of the case ought to have the effect of removing or reducing the need for an *ex post facto* examination of whether the costs incurred should have been incurred or were reasonably incurred.

2. RELEVANT COSTS MANAGEMENT RULES WITHIN THE CPR

2.1 The jurisdiction for costs management. Although not spelt out in terms within the CPR, the jurisdiction for costs management already exists. Within the CPR judges are given an armoury of powers which collectively enable cases to be managed not only by reference to the steps that may be taken in the given proceedings, but also by reference to the level of costs to be incurred. Chapter 45 "Costs capping" is just one manifestation of the court's ability to manage costs under the guise of case management.

2.2 CPR rule 1.1. CPR rule 1.1 is the starting point. That rule provides:

"1.1 The overriding objective

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

(2) Dealing with a case justly includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

2.3 CPR rule 1.1 imports two essential overriding objectives which directly lend themselves to costs management: saving expense and dealing with cases in ways which are proportionate. Within these two overriding objectives underpinning the court's case management powers, it is axiomatic that the court has the jurisdiction actively to costs manage.

2.4 Rule 1.2. CPR rule 1.2 provides that the court must seek to give effect to the overriding objective when it (a) exercises any power given to it by the Rules; or (b) interprets any rule.

2.5 Costs management rules. Rule 3.1 sets out the court's general powers of management. Rules 3.1 (2)(ll) and (m) provide that the court may:

"(ll) order any party to file and serve an estimate of costs;

(m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective."

2.6 The jurisdiction on the part of a court to order a party to file an estimate of costs, at any stage of the proceedings, is a costs management tool.

2.7 CPR rule 3.1(3)(a) further supports the existence of costs management orders. That rule provides:

"(3) When the court makes an order, it may –

(a) make it subject to conditions, including a condition to pay a sum of money into court; and

(b) specify the consequence of failure to comply with the order or a condition."

2.8 The conditions anticipated by CPR rule 3.1(3) do not exclude costs management conditions.

2.9 Rule 44.2. CPR rule 44.2 is an important rule in the context of costs management. That rule provides that where a court makes a costs order against a legally represented party, and the party is not present when the order is made, the party's solicitor must notify his client in writing of the costs order no later than seven days after the solicitor receives the notice of the order. This is an express recognition of the desire within the CPR for the client to be kept advised of costs liabilities within the proceedings. Chapter 7, paragraphs 27-29 of Lord Woolf's Final Report sets out the genesis of this rule:

"**Control by the client**

27. The Chief Taxing Master has suggested to me:

"that the most effective and simple method of keeping costs under control is to keep the client informed at all times as to what is proposed in his name."

28. I agree this is extremely important. I have recommended in the interim report that it should be a mandatory requirement for a solicitor

to tell prospective clients how fees are to be calculated and what the overall costs might be; and to give reasonable notice when that estimate is likely to be exceeded and the reasons. If, in the past, the uncertainty of what might occur in proceedings provided justification for not making this a mandatory requirement, that justification would no longer exist under the more predictable system which I am proposing.

29. For the same reason I am recommending that clients should be present at case management conferences and pre-trial reviews, where the judge will be informed about the level of costs incurred to date and the likely amount of future costs that would be incurred by the programme of work that he is setting at the conference. The presence of the client should be a powerful incentive to adopt a realistic approach."

2.10 There is no requirement within the CPR for the solicitor to tell the client how fees are calculated. Mandatory requirements in that regard are imposed on solicitors by the Solicitors Code of Conduct 2007.[238] However, the CPR does introduce the concept of costs estimates along the lines envisaged by the Final Report and there are requirements within the CPR for costs estimates to be provided to clients – see section 6 of the Costs Practice Direction ("CPD") to CPR Part 43. In chapter 7, paragraph 7 of the Final Report Lord Woof concluded:

"7. On the multi-track I recommended that at case management conferences and pre-trial reviews, the information available for the hearing should include an estimate of the amount of costs already incurred and the costs which would be incurred if the case proceeded to trial. I also recommended that it should be a professional obligation for lawyers to explain their charges to clients, including the potential overall cost of a case, and to give reasonable notice where an estimate is likely to be exceeded; and that legal professional bodies should encourage their members to undertake litigation, where this is practical, on fixed fees either for stages of the proceedings or for the proceedings as a whole."

2.11 These sentiments were translated into section 6 of the CPD. This section of the CPD has been progressively revised and expanded over recent years. It now provides:

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

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

(a) an estimate of costs of –

(i) base costs (including disbursements) already incurred; and

(ii) base costs (including disbursements) to be incurred,

[238] See chapter 3, paragraph 2.3.

which a party, if successful in the proceedings, intends to seek to recover from any other party under an order for costs; or

(b) in proceedings where the party has pro bono representation and intends, if successful in the proceedings, to seek an order under section 194(3) of the Legal Services Act 2007, an estimate of the sum equivalent to –

(i) the base costs (including disbursements) that the party would have already incurred had the legal representation provided to that party not been free of charge; and

(ii) the base costs (including disbursements) that the party would incur if the legal representation to be provided to that party were not free of charge.

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

6.3 The court may at any stage in a case order any party to file an estimate of costs and to serve copies of the estimate on all other parties. The court may direct that the estimate be prepared in such a way as to demonstrate the likely effects of giving or not giving a particular case management direction which the court is considering, for example a direction for a split trial or for the trial of a preliminary issue. The court may specify a time limit for filing and serving the estimate. However, if no time limit is specified the estimate should be filed and served within 28 days of the date of the order.

6.4(1) When –

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

(b) a party to a claim which is being dealt with on the fast track or the multi track, or under Part 8, files a pre-trial check list (listing questionnaire), he must also file an estimate of costs and serve a copy of it on every other party, unless the court otherwise directs. Where a party is represented, the legal representative must in addition serve an estimate on the party he represents.

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

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

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

6.5A(1) If there is a difference of 20% or more between the base costs claimed by a receiving party on detailed assessment and the costs

shown in an estimate of costs filed by that party, the receiving party must provide a statement of the reasons for the difference with his bill of costs.

(2) If a paying party –

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

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

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

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

(2) In particular, where –

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

(b) it appears to the court that –

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

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

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

2.12 CPD section 6, as now formulated, provides the clearest example of the notion of costs management within the CPR.[239] In summary the court is given the power to costs manage by reference to the exchange of estimates of costs.

2.13 CPD section 6.3 anticipates the court receiving costs estimates at any stage and it assumes that the court will have regard to the estimate when making case management decisions. However, the CPD does not expressly entitle the court to limit the recoverable costs to the estimates provided or to set boundaries within which levels of costs may be incurred.[240]

2.14 CPD section 6.5A. Under CPD 6.5A the court is entitled, *ex post facto*, to require an explanation for a departure of 20% or more from an earlier estimate. Where no such explanation is given or the paying party demonstrates that he reasonably relied on the estimate, then the court may regard the difference between

[239] See also CPR rule 44.15(3) " *Where paragraph (2) applies, and a party has already filed (a) an allocation questionnaire, or (b) a pre-trial check list (listing questionnaire), he must file and serve a new estimate of costs with the notice*".
[240] Chapter 45 examines the jurisdiction of costs capping.

the costs claimed and the costs shown in the estimate as evidence that the costs are unreasonable or disproportionate.

2.15 Form H. The requirement to serve an estimate of costs pursuant to section 6 of the CPD is a requirement to serve a document substantially in the form illustrated in Precedent H in the Schedule of Costs Precedents annexed to the CPD.

2.16 CPD and not CPR. The provisions about costs estimates and their relevance in relation to the assessment of costs appear in practice directions, and not in the rules themselves. In practice, scant attention is paid to those provisions during the course of case management hearings.[241] It may be that consideration should now be given to:

(i) strengthening the costs management powers within CPD section 6;

(ii) elevating those provisions into the CPR; and

(iii) expressly using the term "costs management", which currently does not feature in the CPR or the CPD.

2.17 Breakdown of costs estimate. The costs estimates provided by each party must in practice be based upon a detailed budget prepared by the solicitors.[242] It is therefore proposed that the rules should require a more detailed breakdown of costs to be filed, rather than a bare statement of the total sum. I first canvassed this proposal at the Mercantile judges' conference on 27th February 2009, where the proposal was unanimously supported.

2.18 Having reviewed the jurisdiction I now turn to consider what costs management entails.

3. WHAT DOES COSTS MANAGEMENT ENTAIL?

3.1 An analysis of the above rules and practice directions reveals that currently the court may make the following costs management orders:

(i) Require a party to file and serve an estimate of costs in the Form H at any stage of the proceedings. (CPD section 6/CPR rule 3.1(3)(ll)).

(ii) Take the amount of an estimate into account when making case management orders. (CPR rule 1.2).

(iii) Make case management decisions with conditions attached including conditions as to costs. (CPR rules 3.1(2)(m) and 3.1(3)(a)).

(iv) Require costs estimates served in the proceedings to be provided to the client. (CPD section 6.4(b)).

(v) Limit prospectively the amount of recoverable costs for a given step in the proceedings. (costs capping).[243]

(vi) Retrospectively limit a receiving party to an estimate of costs that he has previously provided if the costs exceed the estimate by 20% or more, where the paying party has relied on the estimate or where no satisfactory explanation is

[241] This is certainly the case in the vast majority of all case management hearings.
[242] At least they should be based upon a detailed budget. The Senior Costs Judge tells me that on occasions this appears not to have been done.
[243] See chapter 45.

provided for the difference between the amount incurred and the estimate. (CPD sections 6.5A and 6.6).

As previously mentioned, it appears that first instance courts make relatively little use of the powers conferred by these rules.

3.2 Judicial decisions on costs estimates. In *Leigh v. Michelin Tyre Plc*[244] the Court of Appeal was asked to determine what effect an estimate contained within the receiving party's allocation questionnaire had on the receiving party's recoverable costs. The claimant's solicitors filed an allocation questionnaire in which they said that they estimated the claimant's profit costs to date at £3,000 plus VAT, and their overall profit costs as likely to be £6,000 plus VAT. The practice direction in force at the time (February 2000) did not state that the estimate should include disbursements. The practice direction has since been changed to spell out that estimates must include disbursements. The claimant's solicitors did not revise their estimate. In the event the underlying proceedings were settled and the claimant's solicitors lodged a bill of costs in which they claimed £21,741.28. This comprised £14,482.80 in respect of profit costs and £4,314.70 for disbursements and £2,943.78 for VAT. At paragraph 15, 16 and 22 of the judgment, Lord Justice Dyson commented:

> "15. The provisions relating to the giving of estimates of costs at significant stages of litigation are important in assisting the court to achieve the overriding objective stated in CPR r. 1.1 and to control the costs of litigation. The purpose of requiring costs estimates is, as is made clear by CPR 43 PD paragraph 6.1, to keep the parties informed about their potential liability in respect of costs, and to assist the court to decide what, if any, order to make about costs and case management. Realistic costs estimates will also enable the parties to settle costs issues: they should therefore reduce the need for assessments of costs...
>
> 16. Costs estimates are an important part of the machinery of case management. At the first case management conference, the court will have the parties' statements of case, and will therefore be aware of the issues in the case. The allocation questionnaires will inform the court how many witnesses, and in particular how many expert witnesses, each party wishes to call at the hearing. The parties' costs estimates are part of the material that is placed before the court at this early stage of the litigation to enable it to form a view as to what measures it should take in order to manage and control the case in the interests of what is reasonable and proportionate...."
>
> "22. The judge questioned the purpose of the provision of costs estimates. As we have said, it is to enable all parties to the litigation to know what their potential liability for costs may be. That enables them to decide whether to attempt to settle the litigation, or to pursue it, and (in the latter case) what resources to apply to the litigation. But at least as importantly, it also enables the court to take account of the likely costs in determining what directions to give. In so far as the judge was suggesting that costs estimates are unnecessary, and will merely add to the costs of the litigation, he was wrong to do so. The practice direction is expressed in clear mandatory terms: costs estimates must be provided. It is also to be noted that it requires the legal representatives to serve the costs estimates on their clients. Apart perhaps from cases

[244] [2003] EWCA Civ 1766; [2004] 1 WLR 846.

such as the present where a solicitor acts for a client who makes it clear that he or she does not require such estimates, it is also part of a solicitor's ordinary professional duty to provide the client with an estimate of future costs."

3.3 The Court of Appeal did not in the end hold the claimant to his costs estimate, given that the defendant had not sought to contend that he had relied on the estimate provided. Subsequent to the *Leigh v. Michelin* case, the CPD was amended (with the introduction of a new paragraph 6.5A) to permit the court to treat costs claimed in excess of an estimate as evidence of unreasonable or disproportionate costs where the difference is 20% or more.

3.4 In *Douglas Tribe v. (1) Southdown Gliding Club Ltd (2) Robert Adam (3) Estate of Ron King*, Sup Ct Costs Office (Master Gordon-Saker) 4/6/2007, the claimant sought a declaration that costs in the case should be limited to an estimate provided by the defendants in an allocation questionnaire. Following the instruction of experts it appeared that the claimant's claim was not strong and he served notice of discontinuance. The defendants were therefore entitled to their reasonable costs. The allocation questionnaire served by the defendants prior to the commencement of proceedings estimated that costs would be in the region of £50,000. The claimant therefore entered into a conditional fee agreement at the outset of the proceedings and purchased after-the-event insurance coverage for costs up to £100,000. In the event the defendants served bills totalling approximately £260,000, which was nearly five times the amount estimated in the allocation questionnaire. The costs judge found that that the claimant had relied on the estimate in the questionnaire. The defendants failed to provide a satisfactory explanation for the difference between the estimate and he limited the defendant's recoverable costs to £70,000.

3.5 <u>What is costs budgeting?</u> Costs budgeting is not a term found in the CPR. It is a term that has been derived from consultation papers and reviews that have taken place over the past decade. The essence of costs budgeting is that the costs of litigation are planned in advance; the litigation is then managed and conducted in such a way as to keep the costs within the budget. Professor Zuckerman has written extensively about the benefits of controlling costs before they are incurred, rather than simply assessing them afterwards.[245]

3.6 Costs budgeting has been aligned in the past to a form of costs capping. At paragraph 30 of the *Leigh v. Michelin Tyre* case referred to above, Lord Justice Dyson said:

> "Nor is there any justification for interpreting the provisions in the CPR as equating costs estimates with costs budgets or caps. There is, however, much to be said for costs budgeting and the capping of costs. Some judges have made prospective costs cap orders exercising the general power conferred by section 51(1) of the Supreme Court Act 1981: see, for example, Gage J in *AB v Leeds Teaching Hospitals NHS Trust (in the matter of the Nationwide Organ Group Litigation*) [2003] EWHC 1034. This is not the place to review these decisions. Suffice it to say that, whatever the scope of the jurisdiction to make such orders, it is quite different from the jurisdiction that is exercised retrospectively at the stage of costs assessment, and when the court is required to decide the amount of reasonable and proportionate costs. Costs estimates can also alert the judge responsible for case

[245] See e.g. *Zuckerman on Civil Procedure* (Sweet & Maxwell, second edition, 2006), chapter 26; Professor Zuckerman's editorial note at (2007) 26 CJQ 271.

management to the need to take appropriate action to prevent disproportionate costs from being incurred."

3.7 Lord Justice Dyson was aligning costs budgeting more with costs capping than with estimates. This is understandable by reference to the genesis of costs budgeting as a concept. Costs budgeting can be traced back to Lord Woolf's Final Report on Access to Justice where at paragraph 32 he said: [my emphasis added]

> "32. It is important that the court is aware of the parties' estimate of the expenditure which has been or will be incurred when considering the future conduct of a case. The parties' estimates will be dependent on how they are proposing that the case should be conducted. If one method of dealing with the case would be beyond the resources of one of the parties, then dealing with the case justly may involve not adopting that procedure. This could be particularly important where, for example, one party wishes a case to remain on the fast track but the other is arguing for the case to be transferred to the multi track.
>
> 33. Estimates need not go into detail and would therefore not disclose confidential information which might be of tactical value to an opponent. That would fall far short of the radical proposal set out by Adrian Zuckerman in the issues paper. The estimates would be indications to help the procedural Judge decide the best course of action ***rather than budgets which limited what parties could recover***. My other recommendations need to be "bedded down" before proceeding further in this direction on costs."

3.8 Budgeting was there equated to costs capping, where the court would limit the parties to the amount of their budgets. I have discussed costs capping in chapter 45. As the rules currently stand such orders will only be made in "exceptional circumstances."

3.9 At paragraph 34 of the *Leigh v. Michelin* case Lord Justice Dyson said:

> "We recognise that the use of CPR 43 PD paragraph 6.6 to control costs by taking costs estimates into account at the assessment stage is not the most effective way of controlling the cost of litigation. It seems to us that the prospective fixing of costs budgets is likely to achieve that objective far more effectively. The question of costs budgets was raised before the Civil Procedure Rule Committee in June 2001. It is contentious and important. The committee decided to explore the issue, but has not reached any conclusion about it. We invite the committee to re-examine the provisions relating to costs estimates to see whether they should be amended to make them more effective in the control of costs; and also to reach a conclusion on the issue of cost budgets."

3.10 <u>Rejection of Costs Budgeting by Lord Woolf.</u> Costs budgeting was not adopted as a recommendation within Lord Woolf's Final Report. This reflected a response to an issues paper by Professor Adrian Zuckerman discussing a number of mechanisms for controlling costs in *advance*, such as budget setting. At paragraphs 16 and 17 of the Final Report (July 1996) Lord Woolf stated:

> "16. In order to explore the issue of costs further, the Inquiry published an issues paper by Adrian Zuckerman, which discussed a number of mechanisms for controlling costs in advance, such as

budget-setting, fixed fees related to value, fixed fees related to procedural activity or a mixture of the two.

17. The paper occasioned a general outcry from the legal profession. Prospective budget-setting was seen as unworkable, unfair and likely to be abused by the creation of inflated budgets. The ability of judges to be involved in the hard detail of matters such as cost was generally doubted. The imposition of fixed fees, even relating only to *inter partes* costs, was seen as unrealistic and as interference with parties' rights to decide how to instruct their own lawyers. There was widespread concern that these suggestions heralded an attempt to control solicitor and own client costs. The restrictions were generally seen as "artificial and unworkable".

3.11 Lord Woolf's response was that if budgeting were unacceptable, then the problem of costs would be attacked by case management rather than by orders limiting the expenditure of recoverable costs.

3.12 Developments since 1996. Of course, there have been considerable developments since 1996 in the field of costs capping and predictable costs, which now enable mature reflection as to whether costs budgeting is a form of costs management that should be developed. All low value motor accident personal injury cases that settle without the need for proceedings are now subject to fixed costs. Success fees are now fixed in much personal injury litigation. Indeed the fixing of all costs in the fast track is now actively on the agenda: see chapter 22. Furthermore, judges have become more familiar with the assessment of costs than was the position when Lord Woolf promulgated his Final Report. So, some of the legitimately held concerns pertaining a decade ago may no longer be apposite.

3.13 Costs management – a form of project management. In a very instructive article entitled "*Predictability and Budgeting*"[246] Professor John Peysner[247] sought to introduce the concept of project management into the litigation arena. He pointed out that project management involved a defined project and the teamwork necessary to achieve the project. He observed that a "project" was a defined task with a beginning and an end, made up of a series of separate activities, each of which absorbs time and money, but which can occur in parallel or subsequently. He concluded that this was akin to litigation and as such litigation was suitable for project management.

3.14 Professor Peysner observed that the creation of project management tools for the litigation project did not need to be highly technical. He concluded that the key was to break down the steps in the project, for example taking witness statements, attaching a price or cost to the step by using average hours from a database, multiplied by an appropriate fee earner rate. He pointed out that modern case management systems produce this type of information automatically. These discrete steps could then be aggregated to produce a complete schedule. At the end one would be left with a costed overall project plan.

3.15 One possible approach. Through an application of a combination of the court's powers to require costs estimates to be provided at regular intervals, alongside the exercise of the more exceptional powers bestowed on judges to cap costs, the court retains a very wide armoury of possible orders or approaches that it can take to costs management in any given case.

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[246] [2004] 23 CJQ 15.

[247] Former member of the Costs Committee of the Civil Justice Council.

3.16 It would be open for example, even under the existing rubric of the CPR, for the court to require parties to file detailed costs estimates or budgets at regular intervals during the proceedings. They could be provided at the following intervals:

(i) at the outset with the claim form;

(ii) at the first and all subsequent case management conference hearings;

(iii) at all interim hearings;

(iv) at trial.

3.17 Indeed, in some cases it may be appropriate for costs estimates/budgets to be filed and served at fixed intervals (e.g. every six months) throughout the life of a case from inception to the final hearing.

3.18 When making any case management decision it would be possible for a costs management order to be made at the same time as the case management directions. A costs management order could include the following:

(i) Approving the parties' budgets. Budgets would be rolling budgets added to as the case progressed but for which approval was obtained prospectively.

(ii) Requiring the budget to be certified by a statement of truth or belief by the legal representative. This will reinforce a message of significance that has to be attached to the budget and it will avoid opportunities for the abuse of costs management orders.

(iii) A direction that if costs incurred exceed the budget by 20% or more, notice to that effect shall be given to the other party.

(iv) Directions limiting future recoverable costs when the (restrictive) criteria for cost capping are satisfied.

3.19 When issues arise as to the extent of disclosure, amendments of pleadings and the like, it may be helpful if detailed costs breakdowns are available. The rules might provide for example, that in determining such issues, the court should have specific regard to the costs consequences and proportionality.

3.20 Orders of the sort contemplated above obviously require further consideration and consultation, but it is not difficult to see how such costs management orders would greatly assist in reducing the risk or exposure of costs becoming unreasonable and disproportionate. Such orders would also achieve the objective of reducing the incidence of detailed assessment hearings at the conclusion of the particular proceedings.

3.21 Taking costs management one stage further. It would be possible to develop the proposals discussed above by making it the norm for the court to cap the costs of each stage of the litigation process. So when giving directions for disclosure, service of witness statements, service of expert reports etc., the court would attach a price tag to each activity. These price tags could either be agreed by the parties or fixed by the court after argument. The maximum recoverable cost of each stage of the litigation would be that specified by the court in advance. If this course were adopted, there would need to be radical revision of the present cost capping rules. This course would have one obvious disadvantage and two obvious advantages.

3.22 The disadvantage would be that the winning party would not make a full recovery of its costs. The "full cost shifting" rule which is currently part of our legal culture would be modified by successive judicial interventions during the course of the litigation.

3.23 The principal advantages of the course proposed in paragraph 3.21 above would be twofold:

(i) Each party would have certainty about the extent of its costs liability in the event of losing the action.

(ii) The parties and their lawyers would have an incentive to keep costs down at each stage of the action.

The second of these two points is critical. Professor Zuckerman, in commenting on an earlier draft of this chapter, pointed out that all economic activity follows the most rewarding path. Lawyers are paid by the hour and have an incentive to do more work at each stage of the action. The client perceives that (a) the cost of additional work will be recoverable if he wins and (b) the chances of winning are improved by undertaking yet more work. So the "ratcheting mechanism" forces costs ever upwards, unless incentives can be reversed.

3.24 Whether the more Draconian form of costs management would be welcomed by court users I do not know. It may possibly be welcomed by litigants in business disputes[248] of the kind that are managed and tried in the Mercantile Courts and the Technology and Construction Court. There are clear indications that some such mechanism to control recoverable costs would be welcomed by users of the Patents County Court: see chapter 29, paragraph 5.9. Whether or not other categories of court users would welcome such a form of costs management I do not know. This is a matter which I shall explore in the course of Phase 2 of the Costs Review.

3.25 The cost of costs management. Costs management, where no costs capping order is made, does not involve, or ought not to involve, the kind of expense and waste that practitioners have experienced in the exercise of costs capping. Solicitors are required, in any event, to prepare for their clients costs estimates in accordance with their professional obligations under the Solicitors Code of Conduct 2007.[249] Much of the work required to prepare a budget in advance of making a costs management order or in order to comply with a costs management order should have

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[248] See chapter 29, section 5. Many SMEs engaged in litigation are more concerned about the risk of an open ended costs liability if they lose, than about the failure to make full costs recovery if they win.

[249] **"2.02 Client care**

(1) You must: (a) identify clearly the client's objectives in relation to the work to be done for the client; (b) give the client a clear explanation of the issues involved and the options available to the client; (c) agree with the client the next steps to be taken; and (d) keep the client informed of progress, unless otherwise agreed. (2) You must, both at the outset and, as necessary, during the course of the matter: (a) agree an appropriate level of service; ..... (d) ensure that the client is given, in writing, the name and status of the person dealing with the matter and the name of the person responsible for its overall supervision; and....

2.03 Information about the cost

(1) You must give your client the best information possible about the likely overall cost of a matter both at the outset and, when appropriate, as the matter progresses. In particular you must: (a) advise the client of the basis and terms of your charges; (b) advise the client if charging rates are to be increased; (c) advise the client of likely payments which you or your client may need to make to others; ...".

already been undertaken or will be readily capable of being met by modern time recording systems.

3.26 Are judges capable of costs management? When I have canvassed the question of costs management at meetings during Phase 1, the response of some solicitors has been that this is a task which judges are not equipped to undertake. By and large judges are retired barristers, who knew little about costs when they were in practice and now know even less. There are, I believe, five answers to these concerns:

(i) An increasing number of judges have been solicitors: for example most district judges, two of the specialist circuit judges at Birmingham and many other judges hearing civil cases.

(ii) If costs management becomes part of the judicial function, judges should receive proper training in that regard. Such training might also have the additional benefit of increasing judicial expertise in respect of summary assessments.[250]

(iii) The evidence and skeleton arguments lodged by the parties should provide all the material which the judge would need to costs manage any case.

(iv) Judges are trusted to determine many matters which are more complex than costs management issues and in respect of which they have no prior expertise. There is no reason why judges should not perform this function extremely well, if it becomes part of their remit.

(v) Once costs management becomes embedded in the legal culture, it is reasonable to expect that in the vast majority of cases the respective solicitors will agree appropriate costs management orders and submit them to the court for approval (as currently happens with many case management directions).[251]

3.27 What rule changes would be necessary? In very large measure it would be possible for judges to undertake costs management on the basis of the existing rules. Nevertheless, it would obviously be helpful to set out in the rules what judges are expected to do. The rules should also incorporate a requirement for costs estimates to include breakdowns. The costs capping rules would need amendment to facilitate a costs management regime. If the more radical proposal canvassed in paragraph 3.21 is to be pursued (probably limited to business litigation) then the costs capping rules would require some radical amendments.

3.28 The argument that costs management is alien to our legal culture. It is often said that during the life of a case it is a matter for the parties what they wish to spend. It is not for the judge to tell them. They are entitled to "take their chance" upon what will be allowed at the end. Whilst there is considerable force in this point of view, there is a counter-argument to consider, *viz*:

(i) Litigation is in many instances a "project",[252] which both parties are pursuing for purely commercial ends.

(ii) Any normal project costing thousands (or indeed millions) of pounds would be run on a budget. Litigation should be no different.

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[250] As to which see chapter 52.

[251] The Senior Costs Judge comments that this is not a reasonable expectation if one party is on a CFA. I see the force of that point. However, possibly this would become a reasonable expectation if CFAs were re-structured, e.g. so that additional liabilities were not recoverable. Furthermore, even under the present CFAs, all that solicitors would be attempting to do would be to agree the likely order to be made by the court.

[252] See paragraphs 3.13 – 3.14 above and Professor Peysner's article.

(iii) The peculiarity of litigation is that at the time when costs are being run up, no-one knows who will be paying the bill. There is sometimes the feeling that the more one spends, the more likely it is that the other side will end up paying the bill. This gives rise to a sort of "arms race".

(iv) Under the present regime, neither party has any effective control over the (potentially recoverable) costs which the other side is running up.

(v) In truth both parties have an interest in controlling total costs within a sensible original budget, because at least one of them will be footing the bill.

(vi) The parties' interests may, in truth, be best served if the court (a) controls the levels of recoverable costs at each stage of the action, or alternatively (b) makes less prescriptive orders (e.g. requiring notification when the budget for any stage is being overshot by, say, 20% or more).

4. COSTS MANAGEMENT AND ITS APPLICATION

4.1 Costs management and the cases to which it can be applied. Some civil actions will be more obviously suitable for case management. In particular:

(i) Small claims track. Costs management will obviously not feature here where there is no entitlement, other than in rare cases, for the *inter partes* recovery of costs.

(ii) Fast track cases. If costs are fixed for fast track cases, the need for costs management will evaporate.

(iii) Multi-track cases. Multi-track cases are an obvious candidate for the greater use and application of costs management. Each case will dictate its own timeline, but across the board there ought not to be any good reason why budgets could not be exchanged at every case management hearing. At all case management hearings costs management orders of the kind envisaged above might be considered.

(iv) In the specialist courts, especially where cases are managed by a single judge from beginning to end, the full panoply of costs management may well be appropriate.

4.2 In relation to the specialist courts, the needs of the users of each court would have to be considered separately. From all the indications that I have received to date, it seems that costs management would have no place in the general run of cases in the Commercial Court

4.3 Cases involving litigants in person. Separate consideration may be given by the court to a case where one or all of the parties are litigants in person. Where both parties are litigants in person costs management is unlikely to be an issue for the court. Where one party is a litigant in person and the other is represented by solicitors, there would seem to be no good reason why the legal representative should not provide costs estimates/budgets as part of the court's desire to costs manage the case.

5. ISSUES FOR CONSULTATION

5.1 The future. A more effective and direct application of costs management may possibly be viewed as desirable in order to achieve a better and more effective way of

controlling costs. It has the advantage that it can be used without undermining or affecting alternative methods of control through, for example, overall costs capping in those exceptional cases where that becomes necessary.

5.2 Review. The following issues arise for further consideration and consultation during Phase 2 of the Costs Review:

(i) Should costs management become a feature of or adjunct to case management?

(ii) Should section 6 of the CPD or any equivalent be "elevated" to a rule?

(iii) Should those provisions (whether in the rules or in a practice direction) be strengthened, to give the court greater power to manage and control costs?

(iv) What further amendments are required to the rules to enable the court to carry out effective costs management?

(v) What improvements, if any, should be made to Form H? In particular should a detailed breakdown of costs estimate/budget be required?

(vi) Should the more Draconian form of costs management canvassed in paragraphs 3.21 to 3.24 be introduced for any categories of litigation, e.g. business disputes?

PART 9: REGIMES WHERE THERE IS NO COST SHIFTING

CHAPTER 49. SMALL CLAIMS TRACK

1. INTRODUCTION

1.1 Small claims. "Small claims" are generally claims up to £5,000 in value.[1] They proceed upon the small claims track, where hearings are conducted with a measure of informality. However, personal injury claims are excluded from the small claims track if general damages claimed for the injury exceed £1,000.[2] Claims for housing disrepair are excluded if the estimated cost of repair exceeds £1,000 or the financial value of any other damages claim exceeds £1,000.[3]

1.2 Features of the small claims track. The small claims track offers a speedy process from issue to trial. In most cases there is no preliminary hearing. The trial is relatively informal and the rules of evidence are relaxed. The trial is generally referred to as the "hearing" and takes place before a district judge.[4] Parties usually present their cases without the assistance of lawyers. A party may engage a lawyer if he/she wishes, but generally cannot recover the costs of such representation. The use of expert evidence is limited on the small claims track and permission must be obtained in advance. Parties may submit their cases in writing instead of appearing at the hearing, if they choose.

1.3 Court fees on the small claims track. Court fees on the small claims track are lower than on other tracks. The issue fee is between £30 and £108, depending upon the size of the claim. The allocation questionnaire fee is between nil and £35. The hearing fee is between £25 and £300. Persons of limited means may obtain relief from court fees.

1.4 Costs on the small claims track. Because the small claims track is intended primarily for litigants in person, the costs of each side are generally modest. The right of the winning party to recover costs is limited to such an extent that, effectively, there is no cost shifting on the small claims track. The costs rules are explained in greater detail in section 2 below.

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[1] CPR rule 26.6(3). This is discussed further in chapter 24.
[2] CPR rule 26.6(1)(a). This is discussed further in chapter 31.
[3] CPR rule 26.6(1 (b).
[4] Or deputy district judge. In this chapter I use "district judge" to mean district judge or deputy district judge.

2. RELEVANT RULES AND LEGISLATION

(i) General provisions

2.1 Primary legislation. The small claims track is not the subject of primary legislation. Section 64 of the County Courts Act 1984, which provided the basis for small claims "arbitration" in the county court prior to April 1999, does not underpin the small claims regime of the Civil Procedure Rules. The rules concerning the small claims track have been made by the Rule Committee in the exercise of its powers under sections 2 and 3 of the Civil Procedure Act 1997.

2.2 Rules governing the small claims track. The rules governing the small claims track are set out in CPR Part 27. Rule 27.4 enables the court to give directions (either standard or tailor-made directions) leading up to the hearing. Rule 27.5 provides that permission must be given for expert evidence (in practice this is seldom required in small claims). Rule 27.6 provides for preliminary hearings. In practice a preliminary hearing is only held if (a) it is really necessary to get the case in order or (b) it is likely to lead to an early resolution of the case. Rule 27.8 governs the conduct of the hearing. This rule provides that the hearing will be informal; that the strict rules of evidence do not apply; that the court need not take evidence on oath and may limit cross-examination; and that the court must give reasons for its decision. Rule 27.9 permits a party to submit a written case instead of attending the hearing in person.

2.3 Rules disapplied. Rule 27.2 provides that a number of the more onerous provisions of the CPR have no application on the small claims track, in particular:

- Part 25: interim remedies, except injunctions.
- Part 31: disclosure and inspection.
- Part 32: evidence, except the court's power to control evidence.
- Part 35: expert evidence, except (a) the court's duty to restrict expert evidence, (b) the expert's overriding duty to the court, (c) provisions re single joint experts.
- Part 36: offers to settle.

The purpose behind disapplying the above rules is (a) to remove technical complexity and (b) to enable the court to do justice with reasonable flexibility as between litigants who are often unrepresented.

2.4 Practice direction. The practice direction to CPR Part 27 supplements the above rules. The practice direction provides that a circuit judge may conduct a small claims track hearing, but in practice this seldom happens because of the potential difficulty re any appeal. Appendix A to the practice direction identifies the information which the court usually needs in common types of case on the small claims track.

2.5 Appeals. Appeal lies from the district judge's decision to a circuit judge, subject to the restrictions set out in Part 52. Permission to appeal will only be granted where (a) the appeal would have a real prospect of success or (b) there is some other compelling reason why the appeal should be heard.[5]

[5] CPR rule 52.3(6)

(ii) Provisions re costs

2.6 Strict limitation on costs recovery. Rule 27.14 strictly limits the costs which may be recovered by the winning party on the small claims track. The principal recoverable costs[6] identified are:

- court fees;
- travelling expenses of that party or his witnesses;
- loss of earnings (capped at £50).

In the relatively rare cases where there is expert evidence, the recoverable expert fees are capped at £200.

2.7 Exception for unreasonable conduct. CPR rule 27.14(2)(g) permits the court to award:

> "such further costs as the court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably."

Thus where one party behaves unreasonably the "cap" may be lifted and the court may order the unreasonable party to pay some or all of the actual costs of the other side. Mere refusal of an offer which later turns out to have been sufficient does not constitute unreasonable behaviour, but the court may take this into account when considering unreasonableness.

2.8 Costs on small claims track appeals. Until October 2006 the costs of small claims appeals used to be at large. Now, however, the recoverable costs on appeal are restricted to the same extent as the recoverable costs of the original hearing. [7]

3. INTERPRETATION BY THE COURTS

3.1 No guideline cases. There appear to be no guideline cases as to the interpretation or application of CPR Part 27. The rules are clear and they are applied by district judges in a common sense way.

3.2 Unreasonable conduct. I understand from district judges that the "unreasonable conduct" exception[8] is very rarely applied in practice. District judges do not generally regard it as unreasonable for a party to pursue a hopeless claim or defence. The parties are generally unrepresented and without legal advice. They are entitled to the court's decision upon their case in which – rightly or wrongly – they believe. Nevertheless the power to make an additional costs order in an appropriate case is a valuable one. It may be used, for example, where one party's conduct necessitates an adjournment.

[6] CPR rule 27.14(2)(b) provides for the cost of legal advice (capped at £260) to be recoverable in proceedings which include claims for specific performance or an injunction. Such an award is extremely rare. The district judges to whom I have spoken do not recall ever encountering such a case.
[7] CPR rule 27.14(2).
[8] In CPR rule 27.14(2)(g), discussed above.

4. PRACTICAL CONSEQUENCES

4.1 Hearing. In the majority of cases the hearing is concluded within one to one-and-a-half hours. It is not daunting and the unrepresented party is able to have his or her "day in court".

4.2 Parties not deterred by level of costs. The court fees (set out in section 1 above) are an unwelcome burden, but are proportionate to the sums in issue. Apart from court fees, the costs incurred by each party are usually modest. The costs order made against the losing party is quite often in the region of £60 plus the court fees[9] (if any) paid by the winning party.

4.3 Relatively few appeals go forward. It is not unusual for the losing party to seek to appeal. In practice, however, because of the high hurdles set by CPR Part 52, [10] permission to appeal is granted in relatively few cases. In practice, therefore, the great majority of small claims begin and end with the hearing before the district judge.

4.4 Level of customer satisfaction. I understand from "Which?" (the consumers association)[11] and from district judges that, by and large, litigants are satisfied with the procedures on the small claims track. In a survey of 1,000 consumers who had used the small claims track, 85% said that they would or might use it again.[12] Although no-one likes to lose a case (and litigants with claims below £5,000 are no exception), generally litigants on the small claims track (a) feel that they have had a chance to state their case and (b) are not deterred by the risk of an adverse costs order.

4.5 Issue for consideration. Is the costs regime on the small claims track suitable for introduction into any other part of the civil justice system? Or should it be confined to the small claims track?

[9] There will be no court fees due to a successful defendant who has not counterclaimed.
[10] Summarised in section 1 above.
[11] See chapter 10 above.
[12] "*Improving the Small Claims Track for Personal Injury*" published by the Association of British Insurers in July 2006.

CHAPTER 50. EMPLOYMENT TRIBUNALS

1. INTRODUCTION

1.1 Employment tribunals (formerly known as industrial tribunals[13]) were initially created in the 1960s to hear disputes relating to industrial training levies.[14] However, since their inception, the jurisdiction of employment tribunals has expanded greatly and they now hear a wide range of employment disputes relating to over 60 different areas.[15] Such areas include, for example, claims relating to the failure to pay a redundancy payment[16] and unfair dismissal claims.[17] Disputes are usually heard in front of a panel comprising an Employment Judge[18] and two lay members[19], although in certain circumstances disputes may be heard by an Employment Judge sitting alone.[20] In this chapter I shall use the term "employment tribunal" to mean either an Employment Judge sitting alone or an Employment Judge sitting with two lay members.

1.2 The procedural rules governing the operation of employment tribunals (including the provisions relating to costs) are set out in the schedules to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004[21] (the "2004 Regulations"). The principal rules of procedure are set out in Schedule 1 and are referred to as the Employment Tribunals Rules of Procedure (the "Employment Tribunal Rules" or the "Rules").[22] The 2004 Regulations (and the Rules) entered into force on 1st October 2004.[23]

1.3 The overriding objective of the 2004 Regulations and the Employment Tribunal Rules is to enable employment tribunals to deal with cases justly.[24] Dealing with cases justly includes, *inter alia*: ensuring that the parties are on an equal footing; dealing with cases in a manner which is proportionate to the complexity or importance of the issues; and saving expense.[25] This overriding objective is similar to that set out in rule 1.1 of the Civil Procedure Rules.

1.4 The provisions relating to costs in employment tribunals are set out in the Employment Tribunal Rules. The costs regime applicable to proceedings before

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[13] The term "industrial tribunal" was replaced by the term "employment tribunal" pursuant to the Employment Rights (Dispute Resolution) Act 1998, section 1(1).
[14] Industrial Training Act 1964, section 12.
[15] The current jurisdiction list is available at http://www.employmenttribunals.gov.uk/FormsGuidance/jurisdictionList.htm.
[16] Employment Rights Act 1996, section 163.
[17] *Ibid*, section 111.
[18] The term "Employment Judge" was introduced by section 3A of the Employment Tribunals Act 1996. This section was inserted by section 48(1) (and Schedule 8, paragraphs 35 and 36) of the Tribunals, Courts and Enforcement Act 2007. The term "Employment Judge" has effectively replaced the previous term "Chairman".
[19] Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861), regulations 8 and 9.
[20] Employment Tribunals Act 1996, sections 4(2) and 4(3); see also the jurisdiction list referred to at footnote 15.
[21] SI 2004/1861.
[22] Schedules 2, 3, 4, 5 and 6 contain specific rules applicable to certain types of proceedings and are not considered further.
[23] Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861), regulation 1(2).
[24] *Ibid*, regulation 3(1).
[25] *Ibid*, regulation 3(2).

employment tribunals differs from that in conventional litigation. In particular, the general rule in civil litigation that the unsuccessful party will pay the costs of the successful party[26] is not a feature of employment tribunals. Furthermore, the default position is that costs (or specifically costs orders) are the exception rather than the rule. This position, and the rationale for it, was summarised by Sedley LJ in the case of *Gee v Shell (UK) Ltd*:[27]

> "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that – in sharp distinction from ordinary litigation in the United Kingdom – losing does not ordinarily mean paying the other side's costs."

1.5 The position as regards costs in employment tribunals was summarised by Pill LJ in *Lodwick v Southwark London Borough Council*:[28]

> "Costs are rarely awarded in proceedings before an employment tribunal...Costs remain exceptional (*Gee v Shell (UK) Ltd* [2003] IRLR 82) and the aim is compensation of the party which has incurred expense in winning the case, not punishment of the losing party (*Davidson v John Calder (Publishers) Ltd* [1985] ICR 143)."

1.6 However, in a more recent case (and in the context of the power to award costs where a party's conduct has been unreasonable or misconceived – see below) it was held that:

> "The power, in other words, is a disciplinary power, not a compensatory one...But it is not there simply to penalise a party who has fought a heavy case and lost heavily."[29]

2. RELEVANT RULES AND LEGISLATION

2.1 The provisions regarding costs in employment tribunals are set out in rules 38 to 48 of the Employment Tribunal Rules. Under these rules a tribunal can make three types of order: (1) a costs order; (2) a preparation time order; and (3) a wasted costs order. This section will deal with each of these orders in turn.

(i) Costs orders

2.2 Costs orders. The general power to order the payment of costs is set out in rule 38 of the Employment Tribunal Rules. Rule 38(1) provides:

> "...[A] tribunal or [Employment Judge] may make an order ("a costs order") that- (a) a party ("the paying party") make a payment in respect of the costs incurred by another party ("the receiving party"); (b) the paying party pay to the Secretary of State, in whole or in part, any allowances (other than allowances paid to members of tribunals) paid

[26] Civil Procedure Rules, rule 44.3(2)(a).
[27] [2002] EWCA Civ 1479; [2003] IRLR 82 at 86.
[28] [2004] EWCA Civ 306; [2004] ICR 884 at 891 and 892.
[29] *Scott v Inland Revenue Commissioners* [2004] EWCA Civ 400; [2004] ICR 1410 at 1422 to 1423.

by the Secretary of State ... to any person for the purposes of, or in connection with, that person's attendance at the tribunal."

2.3 The meaning of "costs". Costs in this context are defined as fees, charges, disbursements or expenses incurred by or on behalf of a party in relation to the proceedings.[30]

2.4 Procedural matters. The Rules expressly state that any costs order will be payable by the paying party and not by that party's representative.[31] A party may apply for a costs order at any time during the proceedings or at the end of a hearing.[32] A costs order cannot be made unless the party against whom the order may be made has been given the opportunity to provide reasons as to why the order should not be made.[33]

2.5 The receiving party must be legally represented. A costs order may only be made where the receiving party was legally represented[34] (a) at the hearing or (b) if the proceedings are determined without a hearing, at the time the proceedings are determined.[35] If the receiving party was not legally represented the tribunal cannot make a costs order but may make a preparation time order (see below).

2.6 The circumstances. Rules 39, 40 and 47 of the Employment Tribunal Rules set out the circumstances in which an employment tribunal can make a costs order. The Rules set out both mandatory circumstances where an order must be made and discretionary circumstances where an order may be made.

2.7 Mandatory costs orders. Rule 39 of the Employment Tribunal Rules relates to unfair dismissal proceedings. It provides that a costs order must be made in certain defined circumstances,[36] essentially where the respondent attempts to thwart reinstatement.

2.8 Discretionary costs orders. Rule 40 sets out three situations in which an employment tribunal has discretion to make a costs order:

(i) Under rule 40(1) an employment tribunal may make a costs order when acceding to an application for an adjournment or postponement of a hearing or pre-hearing review.

(ii) Under rule 40(2) an employment tribunal may make a costs order in certain defined circumstances. Rule 40(3) sets out these circumstances:

> "where the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived."

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[30] Employment Tribunal Rules, rule 38(3).
[31] *Ibid*, rule 38(6).
[32] *Ibid*, rule 38(7).
[33] *Ibid*, rule 38(9).
[34] Pursuant to Rule 38(5), a person is legally represented if that person has the assistance of a person who has a general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990 (e.g. a barrister or a solicitor). Employees of the receiving party (e.g. an in-house lawyer) are expressly included in the definition.
[35] Employment Tribunal Rules, rule 38(2).
[36] *Ibid*, rule 39(1)(a) and (b).

In this context, misconceived includes "*having no reasonable prospect of success.*"[37]

(iii) Under rule 40(4) an employment tribunal may make a costs order against a party who has not complied with an order or practice direction.

2.9 Rule 47 specifies additional circumstances, peculiar to employment tribunal proceedings, in which a costs order may be made.[38] Essentially, this is where a party has previously been ordered to pay a deposit as a condition of proceeding under rule 20[39] and he has unreasonably pressed on.

2.10 The amount. The Employment Tribunal Rules provide for the calculation of the amount of the costs order. Accordingly, the amount of the costs order must be determined in one of the following ways:

(i) the tribunal may specify the sum to be paid provided it does not exceed £10,000;

(ii) the parties may agree on the sum to be paid; or

(iii) the tribunal may stipulate that the amount to be paid be determined by way of detailed assessment in a county court in accordance with the Civil Procedure Rules.[40]

The Employment Tribunal Rules expressly state that the amount calculated pursuant to paragraphs (ii) and (iii) above may exceed £10,000.[41]

2.11 Ability to pay. Contrary to earlier case law,[42] the Employment Tribunal Rules stipulate that the tribunal "*may have regard to the paying party's ability to pay when considering whether … [to] make a costs order or how much that order should be.*"[43] Although it is not mandatory for a tribunal to consider a party's ability to pay, the view has been expressed that in many cases it will be desirable to take into account the party's ability to pay.[44]

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[37] Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861), regulation 2(1).

[38] An employment tribunal must consider making a costs order against a party on the ground that the party conducted the proceedings unreasonably in persisting to have the matter determined by the tribunal, when: (a) that party has been ordered to pay a deposit under rule 20 as a condition of being permitted to continue to participate in proceedings; (b) the tribunal has found against that party; and (c) no award of costs has been made. However, the tribunal must not make a costs order unless the grounds which caused the tribunal to find against that party are substantially the same as the grounds recorded in the rule 20 order for considering that the party had little reasonable prospect of success.

[39] Pursuant to rule 20(1) of the Employment Tribunal Rules, if at a pre-hearing review an Employment Judge considers that the contentions put forward by any party in relation to a matter have little reasonable prospect of success, the Employment Judge may make an order requiring that party to pay a deposit as a condition of that party being permitted to continue to take part in the proceedings relating to that matter. The Rules provide that the deposit must not exceed £500.

[40] Employment Tribunal Rules, rule 41(1).

[41] *Ibid*, rule 41(3).

[42] See *Kovacs v Queen Mary and Westfield College and another* [2002] EWCA Civ 352; [2002] ICR 919. In particular, see paragraph 33 at 930 where Chadwick LJ states: *"…ability to pay is not a factor which an employment tribunal is required or entitled to take into account when deciding whether or not to make [a costs] order…*".

[43] Employment Tribunal Rules, rule 41(2).

[44] See *Jilley v Birmingham & Solihull Mental Health NHS Trust and others*, EAT 0584/06/DA, paragraph 53 of the official transcript.

(ii) Preparation time orders

2.12 Remedy available for unrepresented parties. Preparation time orders were introduced by the 2004 Regulations (and the Rules). Preparation time orders allow parties without legal representation to recover certain costs of preparing for employment tribunal hearings. The rules governing preparation time orders are set out in rules 42 to 47 of the Employment Tribunal Rules. Rule 42(1) sets out the general power:

> "...[A] tribunal or [Employment Judge] may make an order ("a preparation time order") that a party ("the paying party") make a payment in respect of the preparation time of another party ("the receiving party")."

2.13 The meaning of "preparation time". For the purpose of the Rules, preparation time means: (a) time spent by the receiving party or his employees carrying out preparatory work directly relating to the proceedings; and (b) time spent by the receiving party's legal or other advisers relating to the conduct of the proceedings, in both cases up to but not including time spent at any hearing.[45]

2.14 The circumstances. The circumstances in which a preparation time order can be made are set out in rules 43, 44 and 47 of the Employment Tribunal Rules. These rules are identical to rules 39, 40 and 47 (discussed above) which govern the circumstances when a costs order may or must be made.

2.15 The amount. The Employment Tribunal Rules provide for the calculation of the amount of the preparation time order. Specifically, the tribunal is required to make an assessment of the number of hours spent on preparation time on the basis of: (a) information from the receiving party; and (b) the tribunal's own assessment of what is a reasonable and proportionate amount of time to spend on such preparatory work.[46] The complexity of the proceedings, the number of witnesses and the documentation required are examples of the factors that should be taken into consideration in the tribunal's assessment.[47] Once the number of hours has been ascertained the amount of the award is calculated by applying an hourly rate. The hourly rate was initially set at £25.[48] The hourly rate is presently £28 and will increase to £29 from the 6th April 2009.

2.16 The Employment Tribunal Rules expressly state that no preparation time order may exceed £10,000.[49] The tribunal may consider the paying party's ability to pay when considering whether to make a preparation time order or the amount of such order.[50]

(iii) Wasted costs orders

2.17 Rule 48(1) of the Employment Tribunal Rules provides that an employment tribunal may make a wasted costs order against a party's representative. The provisions relating to wasted costs in the Employment Tribunal Rules are based on the wasted costs provisions applicable in the civil courts pursuant to sections 51(6)

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[45] Employment Tribunal Rules, rule 42(3).
[46] *Ibid*, rule 45(1).
[47] *Ibid*.
[48] *Ibid*, rule 45(2).
[49] *Ibid*, rule 45(2).
[50] *Ibid*, rule 45(3).

and 51(7) of the Supreme Court Act 1981. Accordingly, the civil court authorities relevant to wasted costs will be applicable in the employment tribunal context.[51]

3. INTERPRETATION BY THE COURTS

3.1 In this section I will discuss how the Rules relating to costs orders and preparation time orders have been interpreted by the courts. Specifically, I will focus on the interpretation of rules 40(3) and 44(3).

3.2 Vexatiously. The term "vexatiously" in the context of a claimant's conduct was discussed in the case of *E. T. Marler Ltd. v Robertson*.[52] In that case Sir Hugh Griffiths stated that:

> "If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously..."[53]

3.3 Sir Hugh Griffiths went on to state that a finding that an applicant has been vexatious is:

> "...a serious finding to make against an applicant, for it will generally involve bad faith on his part..."[54]

3.4 Similarly, albeit in the context of a respondent's conduct, the term vexatiously was defined as:

> "the doing of something over and above that which is necessary for the conduct of the litigation, and suggests the existence of some spite or desire to harass the other side to the litigation, or the existence of some other improper motive."[55]

3.5 It is clear from the case law that for a party's conduct to amount to "vexatious" there must be evidence of spite, a desire to harass the other side or some other improper motive. In practice, a finding of vexatious conduct (and accordingly an award of costs) has been found (or confirmed) where a claimant pursued a claim primarily to disrupt the respondent's business[56] and where a claimant's claim was groundless and the claimant's intention was simply to harass the respondent.[57]

3.6 Abusively, disruptively. In the context of rule 40(3) and 44(3), the term "disruptively" refers to disruptive behaviour by a party and "abusively" refers to abusive language, as opposed to an abuse of process.[58]

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[51] See Harvey on Industrial Relations and Employment Law, Butterworths (2008), Division T, paragraph 1076.
[52] [1974] ICR 72.
[53] *Ibid*, at 76. This case considered rule 13 in the Schedule to the Industrial Tribunals (Industrial Relations etc) Regulations 1972 (SI 1972/38).
[54] *Ibid*.
[55] *Cartiers Superfoods Ltd v Laws* [1978] IRLR 315 at 317.
[56] See *Wrenhurst v Catholic Herald Ltd* EAT 312/81.
[57] See *French v Brent Walker Ltd* EAT 746/86.
[58] See Walker DJ and Carstairs C: *Employment Tribunals: The Complete Guide to Procedure* (Third Edition), EMIS Professional Publishing (2007), paragraph 13.8.5.

3.7 By way of illustration, a finding of, *inter alia*, disruptive conduct was found (and upheld by the Employment Appeals Tribunal) in a case where a claimant repeatedly requested an adjournment of proceedings, failed to attend interlocutory hearings and, at the fourth and final hearing, failed to attend following a brief adjournment to allow him to consider his position.[59]

3.8 Otherwise unreasonably. The term "unreasonable" bestows on employment tribunals a discretion to order costs as a result of the conduct of the parties and, in practice, awards of costs are more often made on the basis of unreasonable conduct than on the other grounds. However, two scenarios are particularly relevant to the criterion of unreasonable conduct: (a) withdrawal of a claim; and (b) rejection of an offer to settle.

3.9 Withdrawal of a claim. The Employment Tribunal Rules do not contain a provision equivalent to rule 38.6 of the Civil Procedure Rules whereby a claimant who discontinues a claim may be liable for the defendant's costs incurred prior to the notice of discontinuance. In *McPherson v BNP Paribas (London Branch)* Mummery LJ (with whom the other members of the Court substantially agreed) identified the opposing positions as regards the withdrawal of a claim in the context of disputes before employment tribunals.[60] On the one hand it was noted that it would be unfortunate if claimants were deterred from dropping a claim by the prospect of a costs order being made against them on withdrawal, which might not be made if they fought on to a full hearing and lost. On the other hand, tribunals should not follow a costs practice which might encourage speculative claims whereby claimants pursue cases in the hope of receiving an offer of settlement and, failing such an offer, withdraw the claim without the risk of costs sanctions. Accordingly, Mummery LJ held that the crucial question is:

> "...whether, in all the circumstances of the case, the claimant withdrawing the claim has conducted the proceedings unreasonably. It is not whether the withdrawal of the claim is in itself unreasonable."[61]

Accordingly, the mere withdrawal of the claim itself does not amount to unreasonable conduct.[62]

3.10 In the *McPherson* case, the Court of Appeal held that the claimant's conduct of the proceedings had been unreasonable. For example, the claimant failed to comply with orders of the tribunal and the claimant continued to give the impression that he was pursuing the claims, allowing the respondent to incur considerable expense, while on the claimant's own evidence (and unknown to the respondent and the tribunal) he had been considering abandoning the proceedings on health grounds some five months before the notice of his intention to withdraw the claims.[63]

3.11 Mummery LJ also stated that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct when deciding whether to exercise its discretion to award costs.[64] Mummery LJ further held that the unreasonable conduct

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[59] *Garnes v London Borough of Lambeth and anor* EAT 1237/97. See also *Employment Tribunal Practice and Procedure: Employment Law Handbook*, IDS (2006), page 565.
[60] *McPherson v BNP Paribas (London Branch)* [2004] EWCA Civ 569; [2004] ICR 1398 at 1405.
[61] *Ibid*.
[62] See *Unegbu v Newman Stone Ltd* EAT 0157/08/ZT.
[63] *McPherson v BNP Paribas (London Branch)* [2004] EWCA Civ 569; [2004] ICR 1398 at 1406.
[64] *Ibid*, at 1408.

was a relevant factor to be considered by the tribunal when deciding on, *inter alia*, the form of the order.[65] In the *McPherson* case, the tribunal ordered the claimant to pay the costs of the whole of the proceedings. However, the Court of Appeal varied the costs order so that the claimant was only liable to pay the costs of the proceedings incurred after the claimant's conduct became unreasonable.

3.12 Rejection of an offer to settle. If a party makes an offer to settle on a "without prejudice save as to costs" basis and the other party rejects that offer and either (a) loses the case or (b) wins the case but is awarded a sum less than that offered by way of settlement, an employment tribunal could, at least in theory, make an order for costs against that other party on the basis that the other party acted unreasonably in refusing the offer to settle. It is important to note, however, that a failure by a party to beat such a settlement offer should not, by itself, lead to an order for costs against that party.[66] The employment tribunal must first conclude that the conduct of the party in rejecting the offer was unreasonable before the rejection becomes a relevant factor in the exercise of the tribunal's discretion to make an order for costs.[67] In the case of *Kopel v Safeway Stores Plc*, the Employment Appeals Tribunal upheld an award of costs against the claimant on the basis of her unreasonable conduct, where the claimant refused a "generous" settlement offer and included in her claim "manifestly misconceived" claims under the European Convention of Human Rights.[68] In practice, however, costs orders are rarely made on the basis of a rejection of an offer to settle.

3.13 Misconceived. The term "misconceived" replaced the term "frivolous" used in previous versions of the employment tribunal rules. In *E. T. Marler Ltd. v Robertson*,[69] Sir Hugh Griffiths defined the meaning of "frivolous" as follows:

> "If the employee knows that there is no substance in his claim and that it is bound to fail, or if the claim is on the face of it so manifestly misconceived that it can have no prospect of success, it may be deemed frivolous..."[70]

3.14 Conversely, "misconceived", as defined in the 2004 Regulations, includes having no reasonable prospect of success.[71] The addition of the misconceived criterion in recent iterations of the Rules has lowered the threshold for a costs order (or preparation time order) in that for an award to be made the tribunal no longer has to satisfy itself that the case had been bound to fail, but rather that the case had no reasonable prospect of success.[72] In *Scott v Inland Revenue Commissioners*, Sedley LJ confirmed that the correct question was not whether the party, in bringing or conducting the proceedings, thought he was in the right, but whether he had reasonable grounds for thinking he was.[73]

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[65] *Ibid*.
[66] *Kopel v Safeway Stores Plc* [2003] IRLR 753 at 755.
[67] *Ibid*.
[68] *Ibid*.
[69] [1974] ICR 72.
[70] *Ibid*, at 76.
[71] Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861), regulation 2(1).
[72] *Gee v Shell (UK) Ltd* [2002] EWCA Civ 1479; [2003] IRLR 82 at 85: Scott Baker LJ, commenting on the 2001 amended employment tribunal rules, stated that *"[t]his regulation therefore lowered the threshold [for a costs order to be made] by the addition of the criterion of the misconceived bringing or conducting of proceedings."*
[73] [2004] EWCA Civ 400; [2004] ICR 1410 at 1423.

4. PRACTICAL CONSEQUENCES

(i) The costs regime

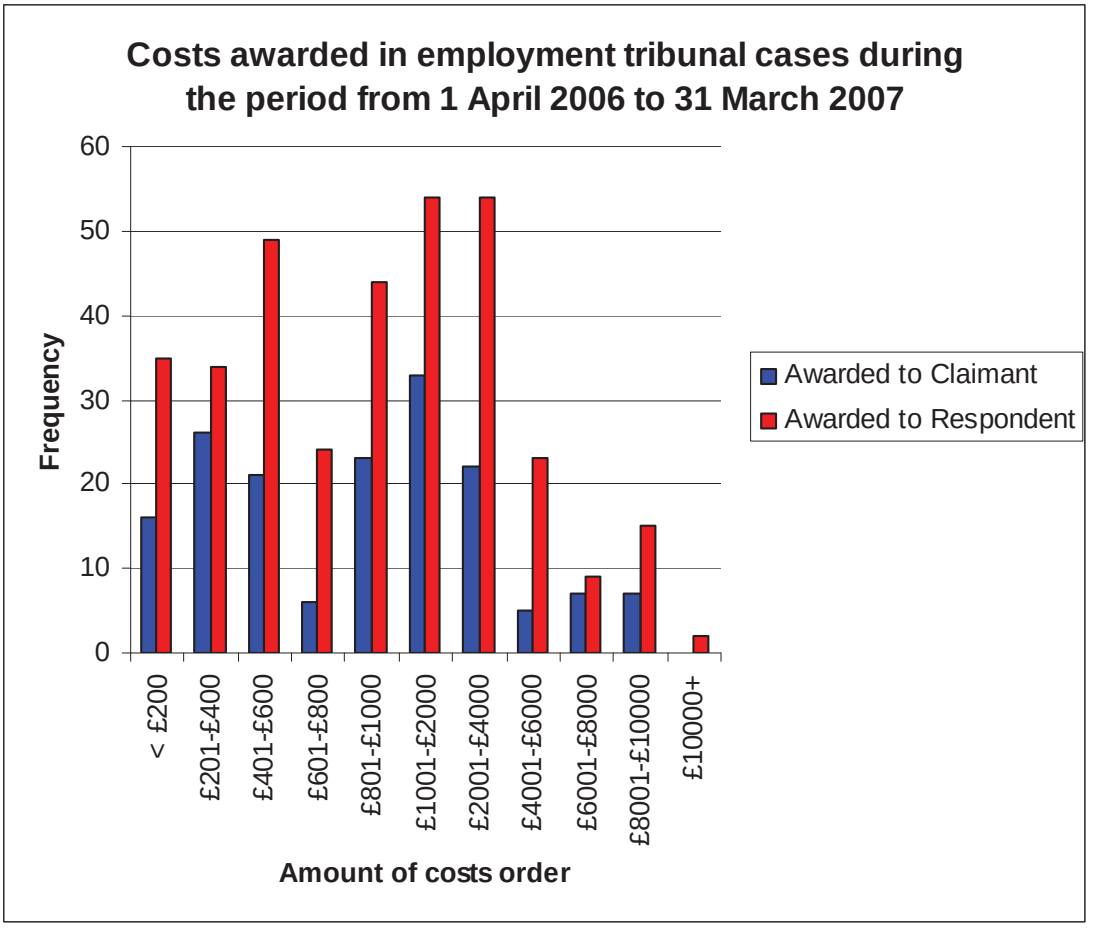
4.1 In this section I will discuss how the Employment Tribunal Rules are working in practice and what the practical consequences of the costs regime are.

4.2 Frequency of orders. Although employment tribunals have the power to make costs orders, in practice the power is rarely exercised. It is, therefore, unusual for a successful party to recover its costs from the losing party. Where tribunals do make costs orders (rather than the parties agreeing the costs or the tribunal referring the assessment to the county courts), the costs awarded tend to be much less than the £10,000 maximum sum prescribed by the Rules. It is rare for employment tribunals to refer the assessment of costs to the county courts with a view to orders being made in excess of £10,000.

4.3 Similarly, preparation time orders are rarely made in practice. For example, in a survey conducted by the Employment Lawyers Association in 2006, it was found that only 6% of practitioner respondents had experience of preparation time orders.[74]

4.4 The Employment Tribunal and Employment Appeals Tribunal Annual Statistics for the period from 1 April 2006 to 31 March 2007[75] demonstrate the infrequency with which costs are awarded by employment tribunals. Between 1st April 2006 and 31st March 2007, 132,577 claims were accepted by employment tribunals; however, only 509 costs orders[76] were made. Of the 509 costs orders, costs were awarded to the claimant in 166 cases and to the respondent in 343 cases. The average award of costs during that period was £2,078.88, the median award of costs was £1,000 and the largest award was £65,000.[77] The graph below illustrates the frequency and amount of the costs orders awarded by employment tribunals to both claimants and respondents in the period from 1 April 2006 to 31 March 2007.[78]

[74] Employment Lawyers Association (ELA) Employment Tribunal Monitoring Survey 2006.
[75] Available at: http://www.employmenttribunals.gov.uk/Documents/Publications/AnnualStatictics0607.pdf.
[76] This does not include wasted costs orders and preparation time orders.
[77] In two cases the parties agreed a sum exceeding £10,000 and this was confirmed by the tribunal.
[78] Source: The Employment Tribunal and Employment Appeals Tribunal Annual Statistics for the period from 1 April 2006 to 31 March 2007. For the location of the report see footnote 75.



4.5 The rarity with which employment tribunals make costs orders and the fact that, as a result, each party bears its own costs, has a variety of consequences. On the basis of soundings taken by my judicial assistant and myself it appears that these include the following:

- Successful parties tend to be dissatisfied with the costs regime as they cannot recover their costs.
- As neither the claimant nor the respondent are usually able to recover their costs, both parties have an incentive not to incur excessive costs.
- The costs regime creates an incentive for respondents to settle claims (see below), even where the claim is speculative.
- The costs regime promotes access to justice as claimants are not deterred by the possibility of a costs order being made against them if their claim is unsuccessful.
- The corollary to the above point is that speculative claims are not deterred.

4.6 Suitability of the costs regime to the claims brought before employment tribunals. Employment tribunals were established to provide swift and informal access to justice in respect of straightforward, low value claims. Such claims were often conducted by litigants-in-person without legal representation. The absence of a costs shifting rule and the infrequency with which costs orders are made is particularly suited to this objective. While employment tribunals still deal with straightforward and low value claims, more complex and costly claims where both the claimant and the respondent have sophisticated legal representation are increasingly

being brought before employment tribunals. The current costs rules are considered by some to be unsuitable to this type of claim.

4.7 Settlement of claims. Respondents are unlikely to recover the costs of defending a claim if they are successful. Consequently, respondents will often take a commercial decision as to whether to defend the claim or not. Respondents may settle a claim at an early stage in order to avoid incurring the (irrecoverable) costs of defending the claim. This may be the case even where the claim is spurious, as employment tribunals rarely award costs against claimants on the grounds that the bringing of the claim was misconceived (see below). Respondents may, however, choose to defend a claim where, for example, (1) they wish to establish a principle or precedent, (2) the respondent wishes to preserve its reputation or "clear its name" or (3) the respondent seeks to defend an unconscionable claim by the claimant.

4.8 Unreasonable or misconceived conduct. Rules 40(2) and (3) of the Employment Tribunal Rules provide employment tribunals with the power to award costs against a party on the basis that the party's conduct was unreasonable or misconceived. In practice, this power is rarely exercised by employment tribunals and is considered a power of "last resort". In particular, employment tribunals rarely award costs against a claimant on the basis that the bringing or conducting of the proceedings was misconceived. As a result, this power is limited in its ability to deter speculative claims.

4.9 Costs threats. Concern has been expressed as to the use of costs threats by respondents,[79] although the extent of the problem is unclear. The term "costs threats" describes the practice by respondents (or their representatives) of using unjustified threats to seek costs orders against claimants with the objective of intimidating the claimant into withdrawing the claim. This practice may be successful when used against unrepresented claimants.[80] Claimants who receive such threats may be deterred from pursuing their claims or may choose to accept lower offers of settlement. As a solution to the problem, it has been suggested that unjustified costs threats should be treated as an abuse of process and accordingly attract costs sanctions.[81]

(ii) Contingency fees

4.10 Contingency fees. The employment tribunal's jurisdiction is characterised as non-contentious and so the use of contingency fees by solicitors is not prohibited by either law or professional conduct rules.[82] I shall use the term "contingency fees" to describe a fee arrangement whereby solicitors are paid nothing for their costs if they lose and a fee based on the percentage of the client's damages if they win. Some commentators describe such remuneration as "damage-based contingency fees".

4.11 Research on contingency fees. A study of the use of contingency fees in employment tribunal cases was conducted by Moorhead and Cumming. The study involved a telephone survey of 191 employment specialists and draws several conclusions. When considering the conclusions it is important to bear in mind that,

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[79] See, for example, the CAB Evidence Report "*Employment Tribunals: The intimidatory use of costs threats by employers' legal representatives*", March 2004, available at http://www.citizensadvice.org.uk/index/campaigns/policy_campaign_publications/evidence_reports/er_employment.htm.

[80] *Ibid*, page 2.

[81] *Ibid*, page 7.

[82] Conversely, barristers are prohibited from entering into contingency fee arrangements. See http://www.barcouncil.org.uk/about/instructingabarrister/fees/.

as Moorhead and Cumming[83] note, the survey data has limitations and that this is an area that requires further research. The conclusions include the following:

- Most practitioners surveyed (66%) did not use contingency fees. Only 11% of practitioners used contingency fees in more than 50% of their cases.
- Of those respondents using contingency fee arrangements, 89% did so with an arrangement that charged a percentage of the client's compensation received or awarded. The average (mean) fee charged was 31% and the most common (modal) fee charged was 33%. Factors influencing the level of the percentage included case duration, the amount of compensation, the prospects of success and the case complexity.
- The survey suggests (although it is noted that this is not conclusive) that contingency fees are less profitable than cases conducted on an hourly rate basis.
- Furthermore, the survey identifies certain consumer protection issues related to the use of contingency fees. In particular, the survey notes that contingency fee agreements may be more complex than they initially appear (e.g. the survey identified divergent practices relating to: (a) the calculation of the percentage fee; and (b) whether VAT or disbursements are included or excluded in the fee) and that the quality of service may be reduced.
- It is also noted that contingency fees appear to encourage earlier settlement of cases. While it is noted that there are benefits to early settlement, the evidence generated by the survey suggests that there is a risk that the contingency fee arrangement promotes under settlement. This could be due to a conflict between the interests of the practitioner and the client, in that the client wishes to maximise the recovery whereas the solicitor needs to balance the damages recovered against the cost incurred.
- The survey indicates, from a practitioner perspective, a general dissatisfaction with contingency fee arrangements, with 74% of practitioners, who use such arrangements, preferring fees calculated on an hourly basis.
- The survey identifies various perceived advantages to practitioners in using contingency fee arrangements. These include the potential to generate extra business and greater profit. Conversely, the survey identifies various perceived disadvantages to practitioners, including risk (e.g. if a case is lost no fee will be gained and even if the case is won the fee may be less than the cost incurred), poor profitability, cash flow problems and a negative impact on reputation.
- In terms of access to justice, the survey concluded that contingency fees are likely to have made only a modest contribution to access to justice by providing some claimants with access to advice and representation which they might not otherwise have had. However, any contribution to access to justice is not uniform. The survey notes that low value claims, high risk claims and claims associated with high levels of costs are all less likely to be brought under a contingency fee arrangement.
- Finally, the study did not find that the use of contingency fees led to an increase in spurious claims.

[83] Moorhead R and Cumming R (2008); *Damage-Based Contingency Fees in Employment Cases: A Survey of Practitioners*, available at: http://www.law.cf.ac.uk/research papers/papers/6.pdf.

4.12 The use of contingency fees in practice. My judicial assistant and I have had discussions with a small number of solicitors who regularly practise in employment tribunals. The following matters emerged:

- Contingency fees have been a feature of the employment tribunal regime for over 10 years.
- Prior to offering a client a contingency fee arrangement, solicitors will assess whether the case is suitable for contingency fee funding. Such an assessment may consider the strength of the claim, the value of the claim and the resources required to pursue the claim.
- While it is possible to do so, contingency fee agreements are rarely entered into with employer clients. This may be because such clients are not faced with the same funding issues faced by employee clients and the difficulties in accurately defining "success" for such clients.
- Contingency fee arrangements can be structured in a variety of ways. While there is considerable scope as to the precise form of the contingency fee, the following structures are commonly used:
  - A fixed percentage of all monies recovered by the client either by settlement or by judgment.
  - A variable percentage of all monies recovered by the client either by settlement or by judgment. The percentage may vary according to various criteria, including the stage in the proceedings at which the money is received or the amount received (or both).
  - The contingency fee agreements frequently contain a settlement clause. Such a clause provides that if the client refuses to accept the solicitor's advice to settle the claim, the client may continue to instruct the solicitor and proceed with the claim; however, the client may be liable for the hourly rate cost of the services supplied by the solicitor.
  - Contingency fee arrangements can be well received by clients. Indeed, some solicitors found that their clients often request such arrangements and rarely complain about their use.

4.13 Conversely, the following appear to be areas where opinions are divided:

- The solicitors we spoke with had differing views on whether contingency fee arrangements are profitable for solicitors. It was suggested that contingency fee arrangements are more remunerative for the solicitor than hourly rate fee arrangements. However, some expressed the opinion that contingency fees are not generally as profitable as cases conducted on an hourly rate basis, but that contingency fees did generate additional business opportunities.
- While it was generally accepted that some cases are more suited to contingency fee arrangements than others, there were divergent views on what constitutes an "acceptable" case. For example, it was suggested that a contingency fee would not usually be offered if the claim was worth less than £25,000-£30,000. Conversely, other solicitors suggested that there was no minimum value. Some solicitors were of the opinion that contingency fees are not suited to non-financial awards (e.g. reinstatement). However, other solicitors noted that contingency fees could be structured so that fees are calculated by reference to certain non-financial awards (e.g. in the case of reinstatement, by reference to a percentage of the client's salary on reinstatement).

- There were differing views as to whether the use of contingency fee arrangements created a conflict of interest between the solicitor and his client or whether there was a greater risk of a conflict of interest under an hourly rate fee.
- There were also differing views regarding settlement clauses in contingency fee agreements. Most solicitors were of the opinion that such clauses were necessary; however, there were divergent views on whether such clauses could lead to under settlement of claims and a conflict of interest between the solicitor and his client. One practitioner we spoke to put in place an appeals system alongside the settlement clause in the contingency fee agreement. Accordingly, if the client was unhappy with the solicitor's settlement advice, the client could seek a second opinion.

4.14 Perceived advantages of contingency fees. The solicitors we spoke to identified a range of advantages and disadvantages to the use of contingency fees. The perceived advantages included:

- Contingency fees facilitate access to justice.
- Contingency fees are welcomed by some clients. Indeed, some clients may request contingency fee funding and rarely complain about the arrangement.
- Contingency fees may reduce the number of speculative claims brought before employment tribunals, as practitioners are unlikely to offer contingency fee funding to claimants with speculative claims.

4.15 Perceived disadvantages of contingency fees. By contrast, contingency fees are perceived to be disadvantageous for several reasons, including the following:

- Contingency fee arrangements may create a conflict of interest between solicitors and their clients.
- The use of contingency fees in the employment tribunals jurisdiction is unregulated and is open to abuse.
- Contingency fee agreements frequently contain settlement clauses that may "financially handcuff" clients to the settlement advice of their solicitors. The use of such clauses raises the possibility of a conflict between the solicitor's interests and his professional duties and may affect the settlement of disputes.

(iii) Conclusions regarding access to justice

4.16 The costs regime. The lack of a costs shifting rule and the infrequency with which costs orders are made by employment tribunals facilitates access to justice for claimants. The employment tribunals jurisdiction is frequently, although not exclusively, utilised by claimants who may have low incomes or have lost their jobs. Such individuals may be deterred from pursuing claims if there is a possibility that costs could be awarded against them. Conversely, there is a concern that the costs regime may facilitate speculative claims and may be inappropriate for complex and high cost cases where both parties have sophisticated legal representation.

4.17 Contingency fees. The availability of contingency fee arrangements provides claimants with an alternative form of funding and enables some claimants to pursue claims that they would not otherwise have been able to pursue. However, the access to justice benefits of contingency fees should not be exaggerated. It is likely that certain claims will not benefit from contingency fee funding (e.g. low value claims).

CHAPTER 51. ANCILLARY RELIEF PROCEEDINGS

1. INTRODUCTION

1.1 The meaning of ancillary relief. Following the presentation of a petition for divorce, nullity of marriage or judicial separation an application may be made to the court for ancillary relief. The relief is "ancillary" in that the dissolution of the marriage is the primary remedy. Ancillary relief is predominantly a financial remedy and is defined in the Family Proceedings Rules 1991[84] as:

(a) an avoidance of disposition order;

(b) a financial provision order;

(c) an order for maintenance pending suit;

(ca) an order for maintenance pending outcome of proceedings;

(d) a property adjustment order;

(e) a variation order; or

(f) a pension sharing order.[85]

1.2 The family proceedings rules. The provisions concerning costs in ancillary relief proceedings are set out in the Family Proceedings Rules 1991 (SI 1991/1247). I shall refer to these rules collectively as the "FPR". Unless otherwise stated in this chapter, all references to a rule or rules are references to the FPR (as amended).

1.3 Changes to the costs regime. On the 3rd April 2006 the costs regime applicable to ancillary relief proceedings was dramatically altered. In particular, a new rule, rule 2.71, replaced the previous costs regime.[86] CPR rule 2.71 provides that, in the absence of litigation misconduct, the general rule in ancillary relief proceedings is that the court will not make an order requiring one party to pay the costs of another party. Furthermore, the use of "without prejudice save as to costs" settlement offers, also know as *Calderbank* letters,[87] in ancillary relief proceedings was restricted under the new regime. *Calderbank* letters must now be disclosed at the financial dispute resolution hearing,[88] but are otherwise no longer admissible in the context of ancillary relief proceedings.[89]

1.4 The rule relating to costs estimates, rule 2.61F, was also amended.[90] The new regime applies provided the application for ancillary relief is made on or after the 3 April 2006.[91] It is important to note that the old costs regime may apply in certain circumstances, but such circumstances are beyond the scope of this report. CPR rule 2.71 and rule 2.61F are discussed below.

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[84] (SI 1991/1247).
[85] Family Proceedings Rules 1991 (SI 1991/1247), rule 1.2 (1).
[86] Rule 2.71 was inserted by the Family Proceedings (Amendment) Rules 2006 (SI 2006/352), rule 7.
[87] As introduced in the case of *Calderbank v Calderbank* [1975] 3 WLR 586.
[88] See Rule 2.61E(3) and (4).
[89] See Rule 2.71(6) which states that: "*[n]o offer to settle which is not an open offer to settle shall be admissible at any stage of the proceedings, except as provided by rule 2.61E*".
[90] Rule 2.61F relating to costs estimates was amended by the Family Proceedings (Amendment) Rules 2006 (SI 2006/352), rule 5.
[91] See Family Proceedings (Amendment) Rules 2006 (SI 2006/352), rule 10.

1.5 Rationale for the change. The rationale behind the introduction of rule 2.71 was set out in the Consultation Paper produced by the Department for Constitutional Affairs ("the Consultation Paper") in advance of the introduction of the new costs regime.[92] The Consultation Paper states that:

> "[t]he purpose of applying a 'no order for costs' principle in ancillary relief proceedings is to stress to the parties, and to their legal advisers, that running up costs in litigation will serve only to reduce the resources that the parties will have left to support them in their new lives apart."[93]

The Consultation Paper also notes that the making of costs orders can lead to costly and time consuming satellite litigation.[94]

1.6 Accordingly, the proposed amendments to the costs regime were intended to establish the principle that, in the absence of litigation misconduct, the normal approach of the court to costs in ancillary relief proceedings should be to treat such costs as part of the parties' reasonable financial needs and liabilities.[95] Costs will be paid from the "matrimonial pot" and the court will then apportion the remainder between the parties. As envisaged by the Consultation Paper, there is, therefore, a powerful incentive for the parties not to incur costs unnecessarily because, in the absence of litigation misconduct, each party is liable for its own costs.[96] Conversely, there is an incentive for the parties to behave reasonably and focus on settlement.[97]

1.7 The Consultation Paper also recognised that the use of *Calderbank* offers in ancillary relief proceedings was problematic for two reasons.[98] First, as *Calderbank* offers were produced after the court had carefully constructed any financial settlement, such offers were seen to have a destabilising effect on the court's order. Secondly, the use of *Calderbank* offers had introduced "a degree of procedural gamesmanship" and an "undesirable element of gambling" into ancillary relief proceedings where the failure to beat a *Calderbank* offer by a relatively small margin may mean that one party is liable for the costs of the other party. This situation often produced unfair results.

2. RELEVANT RULES AND LEGISLATION

(i) Costs orders

2.1 The general rule. CPR rule 2.71 provides that rules 44.3(1) to 44.3(5) shall not apply to ancillary relief proceedings.[99] Accordingly, the general rule that the unsuccessful party should pay the costs of the successful party[100] does not apply to ancillary relief proceedings. Instead, rule 2.71 (4)(a) states that:

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[92] Consultation Paper: Costs in Ancillary Relief Proceedings and Appeals in Family Proceedings (CP (L) 29/04) dated 20 October 2004. The Consultation Paper is available at http://www.dca.gov.uk/consult/family/ancillarycp29-04.htm.
[93] *Ibid*, page 9, paragraph 27.
[94] *Ibid*, page 8, paragraph 24.
[95] *Ibid*, page 9, paragraph 27.
[96] See *ibid*, page 10, paragraph 29.
[97] *Ibid*, page 10, paragraph 31.
[98] *Ibid*, page 8, paragraphs 22 and 23.
[99] FPR, rule 2.71(1).
[100] CPR rule 44.3(2)(a).

> "[t]he general rule in ancillary relief proceedings is that the court will not make an order requiring one party to pay the costs of another party..."

2.2 Litigation conduct. However, CPR rule 2.71(4)(b) provides that the court may make an order for costs when it considers it appropriate in the light of a party's litigation conduct. CPR rule 2.71(4)(b) is set out below:

> "...the court may make [a costs] order at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them)."

2.3 The circumstances. In determining what costs order (if any) to make, the court must have regard to the circumstances set out in CPR rule 2.71(5). The circumstances are as follows:

(i) any failure by a party to comply with the FPR, any court order or any practice direction which the court considers relevant;

(ii) any open offer to settle made by a party;

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

(iv) the manner in which a party has pursued or responded to the application or a particular allegation or issue;

(v) any other aspect of a party's conduct in relation to the proceedings which the court considers relevant; and

(vi) the financial effect on the parties of any costs order.[101]

2.4 The President's Practice Direction accompanying the new rules makes it clear that the court will only have the power to make a costs order when it is justified by the litigation conduct of one of the parties and, when determining whether to make an order for costs, the court must consider the above factors.[102]

(ii) Costs estimates

2.5 Costs estimates at every hearing or appointment. Rule 2.61F provides that at every hearing or appointment each party must produce to the court in the prescribed form an estimate of the costs incurred by that party up to the date of the hearing or appointment.[103]

2.6 Costs estimates at the final hearing. Furthermore, not less than 14 days before the final hearing of an application for ancillary relief, each party must file with the court (and serve on each other party) a costs estimate in the prescribed form.[104] The form must give full particulars of all costs incurred or expected to be incurred by each party in respect of the proceedings in order to enable the court to take account of each party's liability for costs when determining what order (if any) to make for ancillary relief.[105] Indeed, the President's Practice Direction which accompanies rule

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[101] FPR, rule 2.71(5).
[102] President's Practice Direction (Ancillary Relief: Costs) [2006] All ER (D) 114 (Apr) dated 20 February 2006, paragraph 2.
[103] FPR, rule 2.61F(1).
[104] FPR, rule 2.61F(2).
[105] *Ibid*.

2.61F confirms that the purpose of this form is to provide the court with accurate details of the costs incurred by each party in order to enable the court to take into consideration the impact of each party's costs liability on their financial situation.[106]

2.7 Overall, rule 2.61F enables the courts to scrutinise and monitor each party's costs.

3. INTERPRETATION BY THE COURTS

3.1 Adverse costs orders are rarely made against litigants as a result of litigation misconduct. Examples of the type of behaviour that may be considered litigation misconduct include material non-disclosure by a party (e.g. concealing significant assets from the court and the other side) and repeated breaches of court orders. It is likely that a party's behaviour will need to be severe before a costs order is made.

3.2 There is at the moment no guideline decision of the Court of Appeal putting a gloss on CPR rules 2.71(4)(b) and (5), or indicating the circumstances in which adverse costs orders should be made.

4. PRACTICAL CONSEQUENCES

4.1 In February 2009, my judicial assistant attended meetings with two experienced solicitors[107] who practise in the ancillary relief jurisdiction, in order to understand their experiences of the costs regime in ancillary relief proceedings. The matters that emerged are set out below. Importantly, a clear consensus on some issues did not emerge and this may be due to the differing client base of the practitioners.[108] In so far as they are relevant to the Costs Review, I welcome further views on the issues below from practitioners during Phase 2.

4.2 Why so few costs orders are made. From discussions with both practitioners, it is clear that the courts rarely make costs orders against parties on the basis of their litigation misconduct (e.g. one practitioner had experience of only two such orders since the new rules came into force). One practitioner surmised that this was due to the fact that litigation misconduct is difficult to prove and that judges are reluctant to become embroiled in arguments relating to costs. The other practitioner noted that, rather than make a costs order, a judge may take litigation misconduct into account in the financial award. For example, if one party has incurred additional costs as a result of the misconduct of the other party, the "innocent" party's financial award may be positively adjusted to reflect the increased costs.

4.3 Effect of the no costs shifting regime. One of the practitioners we spoke to was of the opinion that the new costs regime provided significant advantages over the previous regime. In particular, the new regime provides parties with certainty from the outset as to their potential exposure to costs. Both practitioners noted that, as each party is likely to bear its own costs, the parties are encouraged to avoid incurring excessive or unnecessary costs (e.g. by pursuing irrelevant issues). Indeed, one practitioner believed that under the new regime parties are more likely to give serious

[106] See President's Practice Direction (Ancillary Relief: Costs) [2006] All ER (D) 114 (Apr) dated 20th February 2006, paragraph 3.
[107] One of whom is a deputy District Judge who deals with family proceedings.
[108] One practitioner specialised in high value ancillary relief proceedings, whereas the other practitioner focused on lower value, often legally aided, cases.

consideration to any reasonable offer to settle given that refusing a settlement offer means that the party will have to continue the proceedings and incur the additional expenditure this will entail, with no possibility of recovering such sums. However, the incentive to settle may be diminished in cases where the parties have "deep pockets" and can keep fighting the case regardless of the costs involved. As practitioners are no longer required to address the issue of costs, significant time and expenditure has been saved in this regard. Finally, the costs regime encourages a proportionate approach from the parties.

4.4 Effect of the removal of *Calderbank* letters from the regime. Both practitioners mentioned that the removal of "without prejudice save as to costs letters" (so called *Calderbank* letters) from the ancillary relief jurisdiction has removed one method of encouraging settlement. In particular, there is no incentive for litigants to accept reasonable offers as such offers are no longer backed by costs sanctions. Indeed, one practitioner noted that, since the commencement of the new costs regime, settlement offers had decreased by a significant amount. The practitioner suggested that this was because: (a) there is now no tactical incentive to make settlement offers; and (b) as only open offers are admissible at the final hearing, the parties are reluctant to disclose their settlement offers to the judge. However, one practitioner felt that the implications of the removal of *Calderbank* letters from the regime are lessened by the fact that the other changes to the costs regime encourage careful consideration of any reasonable offer to settle.

4.5 Costs estimates: accuracy and effectiveness. It was noted that, where proportionate to do so, firms may take a very scientific approach to the preparation of costs estimates. The practitioner will consider factors such as the assets in issue, the nature of the dispute, the amount of work required and the conduct of the client (e.g. the level of solicitor client contact the client is likely to demand) in determining the costs estimate. Firms may also collate their own internal know-how as to the typical costs in different categories of case to assist with the preparation of costs estimates. Practitioners will frequently seek to build a contingency into the estimate. In lower value or legally aided cases, it may be disproportionate to adopt such a rigorous approach to calculating costs estimates and, accordingly, a more broad brush approach may be adopted. In any event, accurately estimating potential costs is both extremely difficult and time consuming.

4.6 It would appear that the courts do not use the estimates as a method of controlling the costs in ancillary relief proceedings, although the judge may criticise the practitioner if the costs estimates prove to be inaccurate. One significant advantage of costs estimates, however, is that costs issues are brought to the fore and clients are constantly aware of the costs that have been incurred and the costs that are likely to be incurred at each stage of the proceedings. As clients are better informed (and clients are responsible for their own costs), clients are encouraged to conduct the proceedings in a more proportionate manner.

4.7 The overall effect of the costs regime on the costs incurred. While some costs may be saved as a result of the introduction of the new regime, the main benefit is that parties are encouraged to behave reasonably and only to incur proportionate costs. One practitioner felt that access to justice has been improved under this regime, as parties have greater certainty as to their costs exposure and are unlikely to be visited with an adverse costs order at the end of the proceedings.

4.8 However, access to justice problems still exist in relation to economically weak parties, who may find it difficult to fund a claim notwithstanding the new costs regime.

PART 10: THE ASSESSMENT OF COSTS

CHAPTER 52. SUMMARY ASSESSMENT

1. INTRODUCTION

1.1 The extension of summary assessment. Summary assessment was a not a new concept in 1999,[1] but its use was substantially extended when the Woolf reforms came into effect on 26th April 1999. Before that date almost all costs had been determined by a process of detailed assessment,[2] if not agreed between the parties. Summary assessment is the procedure whereby the costs of a hearing (whether interlocutory or final) are dealt with at the conclusion of the hearing by the trial (or hearing) judge. Summary assessment can be contrasted with the process of post-trial detailed assessment which is discussed further in chapter 53. The basis of assessment (i.e. standard or indemnity) and the factors the court will consider in awarding costs are dealt with in detail in chapter 3.

1.2 The power to make summary assessment – CPR rule 44.7. The power to assess costs summarily is provided by rule 44.7 (a) of the Civil Procedure Rules ("CPR"). CPR rule 44.7 provides that where a court makes a costs order against one party (other than an order for fixed costs), it may either (a) make a summary assessment of the amount of those costs or (b) order detailed assessment by a costs officer.[3]

1.3 When will summary assessment be made? The court should consider assessing costs on a summary basis whenever it makes an order for costs which does not include fixed costs.[4] The general rule is that the court should make a summary assessment of costs in the following circumstances:

- at the conclusion of the trial of a fast track claim;[5]
- at the conclusion of any other hearing which has lasted not more than one day;[6] or
- in certain Court of Appeal hearings.[7]

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[1] See RSC Order 62 rule 7(4)(b).
[2] Known as "taxation".
[3] Unless any CPR rule, practice direction or enactment provides otherwise.
[4] Costs Practice Direction ("CPD") paragraph 13.1.
[5] In which case the order will deal with the costs of the whole claim.
[6] In which case the order will deal with the costs of the application or the matter to which the hearing related or the costs of the entire claim (where the hearing disposes of the claim).
[7] CPD paragraph 13.2.

The courts have held that, although the general rule applies to hearings lasting no more than one day, there is no presumption against summary assessment where the hearing lasts more than one day.[8] However, the general rule will not apply if there is a good reason why costs should not be summarily assessed.[9] For example, the issue of costs cannot be dealt with summarily (e.g. if the assessment of costs requires consideration of complex legal arguments) or there is insufficient time. The court will not summarily assess costs in certain defined circumstances (e.g. where the receiving party is a child or protected party).[10]

1.4 Who will undertake the summary assessment? Summary assessment of the costs will be carried out by the trial (or hearing) judge. Summary assessment cannot be delegated to a costs officer (i.e. costs judge, district judge etc).[11] If summary assessment is appropriate but there is insufficient time, the court must give directions for a further hearing before the same judge.[12]

1.5 The statement of costs. Pursuant to the provisions of the Costs Practice Direction ("CPD"), it is the duty of the parties (and their legal representatives) to assist the judge in making a summary assessment of costs.[13] To that end, each party intending to claim costs must submit a written statement of the costs he intends to claim in the prescribed form (Form N260).[14] The statement of costs claimed (which may have a schedule attached) must show separately the following:

- the number of hours to be claimed;
- the hourly rate to be claimed;
- the grade of fee earner;
- the amount and nature of any disbursement to be claimed;
- the amount of solicitor's costs to be claimed for attending or appearing at the hearing;
- the fees of counsel to be claimed in respect of the hearing; and
- any VAT to be claimed.[15]

1.6 The failure to comply with these provisions, without a reasonable explanation, will be taken into account by the court in deciding what order to make about costs, and the costs of any further hearing or detailed assessment that is necessitated by reason of that failure.[16] Furthermore, in *1-800 Flowers Inc v Phonenames Ltd*[17] the court held that, in conducting summary assessment, judges should not apply their own judicial tariffs, but rather summarily assess costs by reference to the detailed breakdown of costs in the statement of costs. Jonathan Parker LJ (with whom Peter Gibson and Buxton LJJ agreed) held:

> "However general the approach which the court chooses to adopt when assessing costs summarily, and however broad the brush which the

[8] *Q v Q (Family Division: costs: summary assessment)* [2002] All ER (D) 07 (Jul).
[9] CPD paragraph 13.2.
[10] CPD paragraph 13.11 (1).
[11] CPD paragraph 13.8.
[12] CPD paragraph 13.8.
[13] See CPD paragraph 13.5 (1).
[14] CPD paragraph 13.5.
[15] CPD paragraph 13.5 (2).
[16] CPD paragraph 13.6.
[17] *1-800 Flowers Inc v Phonenames Ltd* [2001] All ER (D) 218 (May).

court chooses to use, the assessment must in my judgment be directed to and focused upon the detailed breakdown of costs contained in the receiving party's statement of costs."[18]

1.7 Summary assessment and CFAs. Costs may still be summarily assessed notwithstanding the fact that a party has entered into a CFA. Indeed, paragraph 14.1 of the CPD provides that the existence of a CFA or other funding agreement is not by itself a sufficient reason for not summarily assessing costs. However, CPR rule 44.3A(1) provides that the court will not assess any additional liability (i.e. success fee) until the conclusion of the proceedings or the part of the proceedings to which the arrangement relates. In such a case, the court should nonetheless make a summary assessment of the base costs of the interim hearing or application unless there is a good reason not to.[19]

1.8 Payment. Following summary assessment, the paying party will usually be required to make payment within 14 days of the judgment or order specifying the assessed sum to be paid, although the court may specify a later date for payment.[20]

2. GUIDELINE HOURLY RATES

2.1 Hourly rates before April 1999. Before the days of summary assessment, taxing masters used to arrive at hourly rates by means of a two stage process. This entailed, first, ascertaining the cost to the receiving party's solicitors of the time which was reasonably spent by appropriate fee earners on the case (the "A" factor);[21] secondly assessing a reasonable addition for care and conduct relating to the difficulty of the matter (the "B" factor). The solicitors' profit was derived from the B factor. For a full exposition of how these two factors were assessed see *Re Eastwood (Deceased), Lloyd's Bank Ltd v Eastwood* [1975] 1 Ch 112; *Leopold Lazarus Ltd v Secretary of State for Trade and Industry* (1976) 120 SJ 268; and the article by HH Michael Cook "*Solicitors' Hourly Rates*".[22]

2.2 Guideline hourly rates required for summary assessment. If costs were going to be summarily assessed by all judges at the end of hearings, a simpler scheme of identifying rates would be required. This was necessary because (a) the judges doing summary assessments would often have less expertise than the former taxing masters and (b) summary assessment was intended to be a rough and ready process, to be carried out more swiftly than "taxations" under the RSC or "detailed assessments" under the CPR. Accordingly it was decided that guideline hourly rates should be issued for the assistance of judges doing summary assessments.

2.3 Guideline hourly rates issued by the Supreme Court Costs Office. In the early days of the CPR the Supreme Court Costs Office ("SCCO") started to publish

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[18] *Ibid*, paragraph 115.
[19] CPD paragraph 13.12(1).
[20] See CPR rules 3.1(2)(a) and 44.8.
[21] The solicitor submitted what he considered to be the appropriate hourly cost and the number of hours spent by each fee earner on the case. To this was added an uplift for care and conduct. The court assessed the reasonableness of each element. Various courts up and down the country developed their own going rates for the hourly cost. The Association of Law Costs Draftsmen collected these together and published them, so that it was possible to look at the level of costs generally allowed in a particular place. The going rate figure for hourly rate would then be taken as the A factor.
[22] [2005] CJQ 142.

guideline hourly rates for the summary assessment of costs.[23] The Senior Costs Judge arrived at those rates by consulting with Designated Civil Judges throughout the country, who in turn consulted with their district judges and court users. Thereafter those hourly rates were subject to percentage adjustments over the years and the revised rates were published in booklets distributed to all judges. The constituent elements of the hourly rates and how those rates were apportioned as between costs and profit were unknown.

2.4 Guideline Rates for 2007 – the last guideline rates set by the SCCO. The final version of hourly rates set by the SCCO was contained in the "*Guide to the Summary Assessment of Costs 2007 Edition*".[24] Those guideline rates were as follows:

Table 52.1: Guideline hourly rates prevailing during 2007

	Band A	Band B	Band C	Band D
London 1	380	274	210	129
London 2	292	222	181	116
London 3	228	184	152	111
	(210-246)	(158-210)		
National 1	195	173	145	106
National 2	183	161	133	101
National 3	167	150	128	95

Band A	-	Solicitors, over 8 years qualified experience.
Band B	-	Solicitors or Legal Executives, over 4 years qualified experience.
Band C	-	Other qualified Solicitors or Legal Executives.
Band D	-	Trainee solicitors, paralegals and equivalent.

2.5 In the above table "London 1" means solicitors in the City, i.e. EC1, EC2, EC3 and EC4. "London 2" means solicitors in Central London, i.e. W1, WC1, WC2 and SW1. "London 3" means solicitors in Outer London, i.e. all other London postcodes plus Bromley, Croydon, Dartford, Gravesend and Uxbridge. "National 1", "National 2" and "National 3" mean solicitors in the areas identified below:

National 1

Aldershot, Farnham, Bournemouth (including Poole)

[23] These unified rates replaced the former rates, which were built up using the A and B factors. Senior Costs Judge Peter Hurst tells me that this change was instructed by the then Lord Chancellor (acting on advice). "*The actual effect was that the hourly rates increased overnight by 50%. We therefore have a situation where the guideline hourly rates are effectively two thirds solicitors overheads and one third profit. If a 100% success fee is added to that, the profit element becomes distorted. There may be an argument for going back to the original base rate A figure, and allowing solicitors an uplift for care and conduct on that base rate, and allowing in addition a success fee based on the A figure, rather than the A + B figure.*"

[24] SCCO, January 2007.

Birmingham Inner
Bristol
Cambridge City, Harlow
Canterbury, Maidstone, Medway & Tunbridge Wells
Cardiff (Inner)
Chelmsford South, Essex & East Suffolk
Fareham, Winchester
Hampshire, Dorset, Wiltshire, Isle of Wight
Kingston, Guildford, Reigate, Epsom
Leeds Inner (within 2 kilometres radius of the City Art Gallery)
Lewes
Liverpool, Birkenhead
Manchester Central
Newcastle - City Centre (within a 2 mile radius of St Nicholas Cathedral)
Norwich City
Nottingham City
Oxford, Thames Valley
Southampton, Portsmouth
Swindon, Basingstoke
Watford

National 2

Bath, Cheltenham and Gloucester, Taunton, Yeovil
Bury
Chelmsford North, Cambridge County, Peterborough, Bury St E, Norfolk,
Lowestoft
Chester & North Wales
Coventry, Rugby, Nuneaton, Stratford and Warwick
Exeter, Plymouth
Hull (City)
Leeds Outer, Wakefield & Pontefract
Leigh
Lincoln
Luton, Bedford, St Albans, Hitchin, Hertford
Manchester Outer, Oldham, Bolton, Tameside
Newcastle (other than City Centre)
Nottingham & Derbyshire
Sheffield, Doncaster and South Yorkshire
Southport
St Helens
Stockport, Altrincham, Salford
Swansea, Newport, Cardiff (Outer)
Wigan
Wolverhampton, Walsall, Dudley & Stourbridge
York, Harrogate

National 3

Birmingham Outer
Bradford (Dewsbury, Halifax, Huddersfield, Keighley & Skipton)
Cumbria
Devon, Cornwall
Grimsby, Skegness

Hull Outer
Kidderminster
Northampton & Leicester
Preston, Lancaster, Blackpool, Chorley, Accrington, Burnley, Blackburn,
Rawenstall & Nelson
Scarborough & Ripon
Stafford, Stoke, Tamworth
Teesside
Worcester, Hereford, Evesham and Redditch
Shrewsbury, Telford, Ludlow, Oswestry
South & West Wales

2.6 Establishment of the Advisory Committee on Civil Costs. During 2007 the Advisory Committee on Civil Costs ("ACCC") was established under the chairmanship of Professor Stephen Nickell. Professor Nickell is Warden of Nuffield College, Oxford and Professor of Economics at Oxford University.

2.7 Guideline rates for 2008, set in December 2007. The ACCC commenced work during 2007, but did not have time to carry out any detailed investigation. In the circumstances the ACCC recommended that the existing rates should be retained, but subject to a 4% increase to keep them in line with average earnings in private sector services.[25] That recommendation was accepted by the Master of the Rolls. By letter dated 14th December 2007 the Senior Costs Judge communicated that decision to all judges. Attached to his letter was a table setting out the new rates (i.e. the 2007 rates duly increased by 4%).

2.8 Work of the ACCC during 2008. During 2008 the ACCC carried out a survey of solicitors, insurers, local authorities and trade unions in order to ascertain current rates for civil legal work. The ACCC also received written and oral evidence from numerous bodies. The ACCC published its conclusions in a document entitled "*The Derivation of the New Guideline Rates*", which I shall refer to as "the Derivation". The ACCC was not assisted by the low response rate to its survey. Furthermore the ACCC encountered certain specific difficulties. First, the responses by solicitors to the survey tended simply to reflect the existing guideline rates. Secondly, there was considerable controversy as to why in personal injury and clinical negligence litigation the rates charged by defendant solicitors were 20-35% below claimant solicitor rates.[26] Thirdly, there was controversy as to whether (a) claims management companies only prospered because the guideline rates were too high, thus generating cash to fund the "claims management industry" or (b) claims management companies were vital on "access to justice" grounds, with the consequence that referral fees paid to those companies served a useful social purpose.

2.9 The ACCC felt unable to reach any conclusion in respect of the problems identified above. In relation to the third matter the ACCC stated:

> "These are deep waters. However, the Committee intends to pursue these issues by, initially, investigating the role of claims management companies and other introducers as well as their profitability and the extent to which they influence legal charges. ... We shall, however,

[25] The ACCC used the ONS Average Earnings Index for Private Sector Service Industries, excluding bonuses, seasonally adjusted.
[26] The ACCC "*intend to pursue this issue further by gathering further information*": see page 3 of the Derivation.

return to this issue when we have gathered further information and undertaken more analysis along the lines described above."[27]

2.10 A further difficulty which exercised the ACCC was why the average hourly rates charged by London solicitors were below the current guideline rates, whereas the average hourly rates charged by solicitors outside London were above the current guideline rates. The ACCC heard conflicting arguments on this issue, but did not have sufficient evidence to choose between those arguments. Therefore it plans to gather further evidence.[28]

2.11 Guideline rates for 2009. The ACCC acknowledged that there were important unresolved issues of principle. It decided as an interim measure to set rates for 2009 by the following two-stage process:

Stage 1: Revert to the 2007 rates and make the following adjustments (based on the evidence gathered by the ACCC):

(i) Reduce London 1 rates by 2%.

(ii) Reduce London 2 and London 3 rates by 1%.

(iii) Raise National 1 rates by 1%.

(iv) Leave National 2 rates unchanged at the 2007 level.

(v) Raise National 3 rates to National 2 level.

Stage 2: Raise all of the figures calculated in Stage 1 by 8%, in order to reflect the rise in average earnings in private sector services since 2007.[29]

Having carried out this exercise the ACCC arrived at the following guideline rates:

Table 52.2: New guideline hourly rates (2009 levels)

	Band A	Band B	Band C	Band D
London 1	402	291	222	136
London 2	312	238	193	124
London 3	244	197	162	119
	(225-263)	(169-225)		
National 1	213	189	158	116
National 2/3	198	174	144	109

2.12 The guideline rates are, undoubtedly, of great assistance to judges in carrying out summary assessments. Nevertheless, the process by which those rates have progressively emerged over the last decade does raise a number of issues. This observation is no criticism of the ACCC, which has only recently been set up and which is being forced to grapple with some very far-reaching problems. The simple description of the ACCC's work as "*advising on guideline rates for summary*

[27] The Derivation page 4.
[28] The Derivation page 4.
[29] The ACCC again used the ONS Average Earnings Index for Private Sector Service Industries, excluding bonuses, seasonally adjusted.

assessment" conceals the very substantial nature of the task which that committee has been set.

3. THE BENEFITS AND DRAWBACKS OF THE PRESENT SUMMARY ASSESSMENT REGIME

3.1 Introduction. During Phase 1 of the review I had many meetings with court users and stakeholders.[30] I also received a significant number of submissions from various interested persons. Summary assessment was an issue that arose with some frequency. Views as to the usefulness of the summary assessment procedure are strongly held and polarised. I summarise some of the opposing views below.

(i) The benefits of summary assessment

3.2 Speed and cost. In contrast to the detailed assessment procedure, the summary assessment of costs represents a swift and efficient method of resolving the issue of costs after a trial or hearing. The procedure is likely to be cheaper than detailed assessment and avoids unnecessary delay. Indeed there are distinct advantages to summary assessment over detailed assessment in that there is an immediate order (usually) at the conclusion of the hearing with no further argument. The receiving party then receives reimbursement almost immediately.

3.3 Raising awareness. Summary assessment brings the issue of costs to the fore as costs may be addressed throughout the proceedings (i.e. at interim hearings). It follows that a greater awareness of the costs being incurred should encourage settlement discussions. CPR rule 44.2 requires the solicitor to notify the client when the court makes an adverse costs order. The court has no method of policing this rule and therefore it is not known to what extent the rule is observed. I would be interested to receive any available information on this matter.

3.4 Promotes reasonable behaviour. As the costs of interim applications are dealt with at the conclusion of the interim hearing, any applications which are unreasonable or lack merit will attract immediate costs consequences for the paying party. This focuses the minds of the parties and discourages a party from "grinding down" an opponent through the use of tactical (meritless) interim applications. Some submissions I have received note that the summary assessment procedure engenders sensible pre-trial behaviour by the parties as a result.

3.5 The trial judge's knowledge. Some of those I spoke to expressed the view that the trial judge is well placed to conduct a summary assessment of costs at the end of a trial as the judge is fully immersed in the intricacies of the case (i.e. the trial judge possesses a detailed knowledge of the case that a costs judge cannot have).

(ii) The drawbacks of summary assessment

3.6 Summary assessment is arbitrary, rushed and inconsistent. The view has been expressed that summary assessment is a "rough and ready" procedure, often conducted at the conclusion of the hearing when insufficient time is available for a satisfactory assessment. Some of those I spoke with during Phase 1 expressed concern that there appears to be an inconsistent approach to summary assessment by the judiciary (with presumably inconsistent outcomes).

[30] For greater detail see chapter 10.

3.7 Inexperience and a lack of information. The trial judge undertaking the summary assessment and the counsel arguing it may lack the requisite costs expertise. Furthermore they may not have the necessary information to address adequately the process of summary assessment. Indeed, many practitioners mentioned to me that the current statement of costs used in summary assessment lacks sufficient detail, notwithstanding the fact that it may be time consuming to prepare. Importantly, it has been suggested that lack of sufficient costs expertise is less of a problem with regard to district judges, many of whom were formerly solicitors.

3.8 Summary assessment increases costs. The preparation required for summary assessment and the associated costs mean that the procedure may not be as cost effective as was initially hoped. Inevitably, the work undertaken by one side in preparing a written statement of costs is wasted. If the judge does not carry out a summary assessment (e.g. because the hearing is adjourned or the judge orders a detailed assessment) the work of all parties is wasted.

3.9 Reluctance to criticise counsel's fees. I am told by the Senior Costs Judge and others that advocates are often reluctant to criticise the amount of counsel's fees on summary assessment. This reluctance on the part of the advocates increases the difficulty of the judge in doing justice to both parties at summary assessment.

4. OPTIONS FOR REFORM

4.1 The summary assessment of costs is not an easy subject to address given the strongly held and polarised views on the issue. However, it seems to me that three possible options need to be considered. I describe each possible option below.

4.2 Option 1: make no change. One school of thought which has been put to me is that the present rules work well and no change is required. This proposition must be seriously considered. It is not the function of this review to make change for change's sake.

4.3 Option 2: abolition.[31] Another possible course of action is to abolish the summary assessment procedure. Instead of summary assessment, judges could be encouraged to order (where appropriate) the paying party to make an interim payment on account of costs. The outstanding balance of any costs would then be agreed between the parties or assessed by post-trial detailed assessment. Alternatively, the judge could make a provisional assessment of, for example, 70% or 75% of the costs claimed at the hearing. Thereafter, that assessment becomes final, unless either party requires a detailed assessment. If a detailed assessment is required, whichever party does worse than the provisional assessment bears the costs of the detailed assessment.

4.4 Option 3: restructure. A less drastic alternative would be to keep the summary assessment procedure, but revise the rules governing its use. For example, the CPR provisions could be redrafted to encourage judges to only consider summary assessment where: (1) they have sufficient expertise (including the relevant training); (2) there is sufficient time available to undertake the assessment properly; and (3) all those involved in the summary assessment have the necessary information and have had sufficient opportunity to consider it. Further changes could include improving

[31] It is argued that summary assessment should be abolished at pages 403-404 of Cook on Costs (2009 edition) by HH Michael Cook.

the usefulness of the statement of costs and imposing more extensive costs training requirements on judges who undertake summary assessment. If, notwithstanding such rule changes, the judge is still unable to conduct the summary assessment of costs, the judge would be encouraged to order the paying party to make a payment on account with the balance of costs to be agreed or subject to detailed assessment.

4.5 If option 3 is the preferred route, I request that practitioners inform me during Phase 2 what further information it would be appropriate to include in costs schedules for the purpose of summary assessment.

4.6 The current practice of Mercantile judges. At the mercantile judges' conference on 27th February 2009 I was told that it is normal practice for Mercantile judges in heavy one day cases to order post-trial detailed assessment of costs (with a hefty interim payment on account of costs) instead of summary assessment. The subsequent inquiries made by Mercantile judges confirm that in practice detailed assessments very seldom follow the making of such orders. In other words the precise assessment of costs is agreed between the parties, either in the amount of the interim assessment or in some other amount. It may be helpful to bear in mind the experience of the Mercantile judges, when considering the options discussed above.

4.7 Possible revision of the *Mars* guidelines. In the light of comments made during Phase 1 would suggest that consideration be given to modifying the guidance given in *Mars (UK) Ltd v Teknowledge Ltd* [1999] 2 Costs LR 44. This guidance has been followed in a number of later decisions and has the effect of restricting the amount of an interim payment on account of costs. One possible option would be for the interim payment to be, not a conservative sum which will inevitably be exceeded on detailed assessment, but instead the judge's best estimate of the likely final figure less a modest discount of, say, 10%.[32] An interim payment on this basis may be more likely to promote settlement, whilst safeguarding the positions of both parties. If the judge has fallen into error and the solicitors cannot agree the correct figure, they can still go to detailed assessment.

4.8 Rates for summary assessment. I have set out in section 2 above the genesis of the present guideline rates for summary assessment. The question now arises whether this review should have any input into the deliberations of the ACCC in relation to rates or whether I should treat that as "no go" area, being entirely within the province of Professor Nickell and his colleagues. I shall seek the views of Professor Nickell on this issue, once he and his colleagues have had an opportunity to consider this Preliminary Report.

5. REVIEW

5.1 During Phase 2 I look forward to receiving comments on the three options identified above and the other matters raised. I should also be pleased to receive any further statistical or other data concerning summary assessment.

5.2 In addressing these issues, it is important to bear in mind that reforms suggested elsewhere in this working paper may have an effect upon summary assessment. For example, extending the scope of the fixed costs regime in the fast track (see chapter 22) would inevitably reduce the number of cases requiring

[32] Subject to possible reduction in cases where the paying party is of limited means or there are doubts about the solvency of the receiving party. In either of these situations the risk of an interim payment turning out to be too high may be unacceptable.

summary assessment, or at least make the process of summary assessment[33] a purely mechanistic one.

[33] If the parties cannot agree figures.

CHAPTER 53. DETAILED ASSESSMENT

1. INTRODUCTION

1.1 Detailed assessment is the process by which the court decides the appropriate amount of costs payable by one party to another in litigation, payable out of the Community Legal Service Fund in respect of legally aided parties, and payable by a client to his or her solicitor under Part III of the Solicitors Act 1974.

1.2 If the court orders a detailed assessment the receiving party must, amongst other things, prepare a bill setting out the work done and, ultimately, the court will go through that bill, hearing argument from both sides as to what items and amounts should and should not be allowed.

1.3 Bases of assessment. The court may order costs between the parties to be assessed on either the *standard basis* or the *indemnity basis*. The court will not allow costs which have been unreasonably incurred or which are unreasonable in amount.

1.4 On the *standard basis*, the court will only allow costs which are proportionate to the matters in issue and will 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: (CPR rule 44.4(2)).

1.5 Where the court assesses costs on the *indemnity basis* it 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 (CPR rule 44.4(3)).

1.6 In LSC funded cases, costs are payable to solicitors and counsel on the *standard basis* subject to the LSC's contract with solicitors which prescribe the amounts to be allowed in most cases.

1.7 In respect of costs payable to a solicitor by his client, the basis of assessment is the *indemnity basis* to which certain presumptions and limitations apply (see CPR rule 48.8 and CPD Section 54).

1.8 The indemnity principle. The principle is that a successful party cannot recover from an unsuccessful party more by way of costs than the successful party is liable to pay his or her legal representatives. There are several exceptions to the principle including the statutory exceptions concerning legal aid and conditional fee agreements. There have been calls for the total abolition of the principle. Unless and until that occurs the following propositions continue to apply:

(i) A party in whose favour an order for costs has been made may not recover more than he is liable to pay his own solicitors.[34]

(ii) The signature of a bill for detailed assessment by a solicitor is in normal circumstances sufficient to enable the court to be satisfied that the indemnity principle has not been breached in respect of costs payable under a conventional bill.[35] However, the same may not be true in respect of costs payable under a conditional fee agreement.[36]

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[34] *Harold v Smith* [1865] H&N 381 at 385 and *Gundry v Sainsbury* [1910] 1KB 645 CA.
[35] *Bailey v IBC Vehicles Ltd* [1998] 3 All ER 570 CA.
[36] *Hollins v Russell* [2003] 1 WLR 2487.

2. PRESENT PROCEDURE

2.1 Form and layout of bills. Each bill starts with the full title of the proceedings, the name of the party whose bill it is and a description of the order for costs or other document giving the right to detailed assessment (CPD 40.4).

2.2 The bill should then give some background information about the case including a brief description of the proceedings, a statement of the status of the fee earners in respect of whom costs are claimed, the rates claimed for each such person and a brief explanation of any agreement or arrangement between the receiving party and his legal representatives which affects the costs claimed in the bill.

2.3 After the title and background information, the bill is set out in several columns headed: item number, date and description of work done, VAT, disbursements, profit costs.

2.4 The bill concludes with a summary showing the total costs claimed and any relevant certificates.

2.5 Detailed items. In each part of a bill all the items claimed are consecutively numbered and set out under such of the following heads as are appropriate:

(i) Attendances at court and on counsel,

(ii) Attendances on and communications with the receiving party.

(iii) Attendances on and communications with witnesses, including any expert witness.

(iv) Attendances to inspect any property or place.

(v) Attendances on and communications with other persons.

(vi) Communications with the court and with counsel.

(vii) Work done on documents.

(viii) Work done in connection with negotiations with a view to settlement if not already covered in the heads listed above.

(ix) Attendances on and communications with London and other agents and work done by them.

(x) Other work done which was of or incidental to the proceedings which is not already covered in any of the heads listed above.

2.6 Certificates in bills of costs. The final part of the bill of costs should contain any relevant certificates signed by the legal representative. These certificates give information on matters such as any rulings made as to entitlement to interest on costs, any payments made by the paying party on account of costs included in the bill and as to the receiving party's entitlement to recover from the paying party the VAT he is or has been liable to pay on the costs claimed.

2.7 Commencement of detailed assessment proceedings. Except where a summary assessment is carried out by the court, costs payable between the parties are not assessed until the conclusion of the proceedings out of which the order for costs arises, unless the court expressly orders an earlier detailed assessment (CPR rule 47.1). A costs judge or district judge may make an order allowing detailed assessment proceedings to be commenced where there is no realistic prospect of the claim continuing (CPD paragraph 28.1).

2.8 An appeal against an order for costs or an order for detailed assessment does not by itself operate as a stay of those proceedings unless the court so orders (CPR rule 47.2).

2.9 Detailed assessment proceedings must be commenced within three months after the judgment, order or event giving rise to the right to costs (CPR rule 47.7). The parties may agree between themselves to extend or shorten the time specified by the rule for commencing detailed assessment proceedings. A party may apply for an order to extend or shorten the period of three months, but permission is not required to commence detailed assessment proceedings out of time.

2.10 If the receiving party fails to commence detailed assessment proceedings within the period specified by the rule, or by order of the court, the paying party may apply for an order under CPR rule 47.8(1) requiring the receiving party to commence the proceedings within a specified time. The court may direct that unless the receiving party does commence the detailed assessment proceedings within the time specified by the court, all or part of the costs will be disallowed.

2.11 Where the receiving party commences proceedings for detailed assessment out of time but the paying party has not made an application under CPR rule 47.8(1), the court may disallow all or part of the interest otherwise payable to the receiving party but the court will not impose any other sanction unless there has been misconduct (CPR rule 47.8(3)).

2.12 Detailed assessment proceedings are commenced by the receiving party serving on the paying party a notice of commencement[37] and a copy of the bill of costs. The notice of commencement shows the total amount of costs claimed in the bill and the extra sum which will be payable by way of fixed costs and court fees if a default costs certificate is obtained (CPR 47.6).

2.13 Documents to accompany the notice of commencement. If the detailed assessment is in respect of costs without any additional liability, the receiving party serves copies of the fee notes of counsel and of any expert, and written evidence as to any other disbursement claimed which exceeds £250, and a statement of parties giving the name and address for service of any person upon whom the receiving party intends to serve the notice of commencement (CPD paragraph 32.3).

2.14 If the detailed assessment includes an additional liability the receiving party serves the relevant details of the additional liability (CPD paragraph 32.4).

2.15 Cases in which notices of commencement are unnecessary. In the following cases detailed assessment proceedings are commenced by the filing in court of a request for a detailed assessment hearing:

(i) Costs of a LSC funded client which are payable only out of the Community Legal Service Fund (CPR rule 47.17 and see Form N258A).

(ii) Costs payable out of a fund other than the Community Legal Service Fund (CPR rule 47.17A and see Form N258B).

(iii) Costs to be assessed pursuant to an order under Part III of the Solicitors Act 1974 (CPR rule 48.8 and see Form N258C).

[37] In Form N252.

2.16 In these cases there is no requirement to serve a notice of commencement on any party and there is no entitlement to the issue of a default costs certificate in respect of the assessment.

2.17 Time for points of dispute and consequences of not serving. The paying party may dispute any item in the bill by serving points of dispute on the receiving party and every other party to the detailed assessment proceedings. This must be done within 21 days after the date of service of the notice of commencement (CPR rule 47.9(2)), unless the parties agree to extend or shorten the time specified by the rule. A party may apply to the court for the time to be extended or shortened.

2.18 If the receiving party is not served with any points of dispute and the period for doing so has expired, he may apply for a default costs certificate (CPR rule 47.9(4)).

2.19 Form and contents of points of dispute. Points of dispute should be short and to the point and should identify each item in the bill of costs which is disputed; state concisely the nature and grounds of the dispute and, where practicable, suggest a figure to be allowed instead of the figure which has been claimed.

2.20 Default costs certificate. The deadline for serving points of dispute is 21 days after the date of service of notice of commencement (see paragraph 5.1, above). A receiving party who is not served with points of dispute on or before that deadline can request the issue of a default costs certificate (CPR rule 47.9(4)) unless the case is one of those described below.

2.21 A request for a default costs certificate is made in Form N254 and must be accompanied by a copy of the order giving the right to detailed assessment.

2.22 Cases in which the default costs certificate procedure does not apply. If there is more than one paying party, the receiving party has no right to a default costs certificate if one or more of the paying parties serves points of dispute. However, paying parties who serve points of dispute late or who fail to serve them at all have no right to be heard at the subsequent detailed assessment unless the court gives permission (CPR rules 47.9 and 47.14).

2.23 The default costs certificate procedure does not apply to costs of a LSC funded client which are payable out of the Community Legal Service Fund, costs payable out of a fund other than the Community Legal Service Fund, or costs to be assessed pursuant to an order under Part III of the Solicitors Act 1974.

2.24 The amount certified in the default costs certificate must be paid within 14 days of the date of the certificate unless, upon an application made by either party, the court has specified some other date (CPR rule 44.8).

2.25 Requests for a detailed assessment hearing. The request for detailed assessment is filed in the court in which the case was being dealt with when the judgment or order for costs was made or when the event occurred which gave rise to the right to assessment, in all other cases the request must be filed in the SCCO (CPR rule 47.4).

2.26 The request should be filed within six months after the judgment, order or event giving rise to the right to costs. In cases in which it is not necessary to give notice of commencement the request should be filed within three months after the judgment, order or event giving rise to the right to costs.

2.27 Interim costs certificate. At any time after the receiving party has filed the request for a detailed assessment hearing, that party may apply for the issue of an interim costs certificate.

2.28 In determining what, if any, interim certificate to make, the court will consider, amongst other things, the bill of costs, points of dispute and any reply and the certificate in the bill as to any payments on account which have already been made.

2.29 The interim costs certificate,[38] specifies the amount which must be paid, the time within which payment must be made and specifies whether the payment should be made to the receiving party or into court to await the issue of a final costs certificate.

2.30 An application to amend, cancel or stay enforcement of an interim costs certificate may be made to a costs judge and applications to stay enforcement may also be made to any court which has jurisdiction to enforce the certificate. Proceedings for enforcement of an interim costs certificate may not be issued in the SCCO.

2.31 Lodging papers in support of the bill. Unless the court otherwise directs the receiving party must file with the court the papers in support of the bill not less than seven days before the date for the detailed assessment hearing.

2.32 The papers to be filed are as follows:

(i) instructions and briefs to counsel together with all advices;

(ii) reports and opinions of medical and other experts;

(iii) a full set of any relevant pleadings;

(iv) correspondence, files, attendance notes and any other relevant papers;

(v) where the claim also includes a claim in respect of an additional liability any papers relevant to that claim.

2.33 The detailed assessment hearing. The general rule is that all hearings are in public (CPR rule 39.2).

2.34 No person other than the receiving party, the paying party and any party who has served points of dispute may be heard at the detailed assessment hearing unless the court gives permission (CPR rule 47.14).

2.35 The parties are limited to the points of dispute and the replies and are not permitted to introduce fresh points unless the court permits them to do so.

2.36 Having considered the evidence, both oral and written, and having heard argument, the court will normally give a decision orally in respect of each item as and when it deals with it. On any complicated matter that may arise, the costs judge may reserve the decision and, if so, the decision on that matter will be handed down at a later date.

2.37 Costs of detailed assessment proceedings. As a general rule the receiving party is entitled to the costs of the detailed assessment proceedings (CPR rule 47.18).

[38] Form N257.

2.38 In deciding whether to depart from the general rule, the court must have regard to all the circumstances including the conduct of the parties, the amounts, if any by which the bill of costs has been reduced and whether it was reasonable for a party to claim or dispute any item.

2.39 The costs of the detailed assessment proceedings are usually assessed at the end of the hearing.

2.40 Offers to settle. Either party may make an offer to settle the claim for costs which is expressed to be "*without prejudice, save as to the costs of the detailed assessment proceedings*." Such an offer may relate to any issue in dispute between the parties. Its main purpose is to enable the parties to explore the possibility of negotiating a compromise which will not damage the subsequent presentation of their case if no compromise is reached.

2.41 Offers made after 14 days from notice of commencement or points of dispute are likely to be given less weight, unless there is good reason for the offer not having been made until the later time

2.42 The terms of the offer must be clear and unless the offer states otherwise, it will be treated as including the costs of the preparation of the bill, interest and VAT.

2.43 If an offer to settle is accepted an application may be made for an agreed final costs certificate.

2.44 The existence of an offer to settle must not be communicated to the costs judge conducting the hearing until the question of costs of the detailed assessment proceedings falls to be decided (CPR rule 47.19).

2.45 When an offer to settle is properly brought to the attention of the court, the court may take it into account when deciding what, if any, order for costs to make.

2.46 Final costs certificates. The receiving party must, after the hearing, re-calculate the summary of the bill.

2.47 The final costs certificate will include an order to pay the costs to which it relates, unless the court orders otherwise (CPR rule 47.16).

2.48 As a general rule the amount shown as payable in a final costs certificate will be the amount payable after taking into account the amount payable under any interim certificate already given and/or the amount payable under any order to pay costs on account.

2.49 The paying party must comply with the order for the payment of costs within 14 days of the date of the certificate or within such later date as the court may specify (CPR rule 44.8).

2.50 Appeals against decisions in detailed assessment proceedings. From a decision of an authorised court officer in a High Court case there is a right of appeal (no permission to appeal is needed) to a costs judge with a further appeal (for which permission is required) to a High Court judge.

2.51 From a decision of a costs judge in a High Court matter parties may, if permission is granted, bring an appeal to a High Court Judge with a further appeal to the Court of Appeal.

2.52 From a decision of a costs judge in a county court the parties may, if permission is granted, bring an appeal to a circuit judge in that county court with a further appeal to the Court of Appeal.

2.53 Interest on costs. In respect of costs payable by order the receiving party is entitled to interest under section 17 of the Judgments Act 1838 or section 74 of the County Courts Act 1984. The entitlement to interest begins on the date upon which the order for costs was made (not the date upon which the costs were assessed) unless the court otherwise orders (CPR rules 40.8 and 44.3(6)(g)). However:

(i) In respect of the costs of the detailed assessment proceedings, the interest begins to run from the date of the default, interim or final costs certificate, as the case may be; and

(ii) Under CPR rule 44.3(6)(g) the court has power to order interest on costs to run from a date other than the date of judgment.

2.54 In respect of costs payable by contract (e.g. costs payable to a solicitor by his client or former client) the entitlement to interest normally depends upon the terms of that contract. However a statutory right to interest may arise under the Solicitors (Non Contentious Business) Remuneration Order 1994 or the Late Payment of Commercial Debts (Interest) Act 1998.

2.55 In respect of costs payable to a solicitor by his client or former client the final costs certificate will record neither the date of entitlement to any interest nor the amount of any interest accrued or accruing.

3. CONCERNS ABOUT THE PRESENT SYSTEM

3.1 Cost of detailed assessment. The most frequently expressed view is that the costs of detailed assessment and the court fees charged for it are often disproportionate to the amounts at stake in the main proceedings.

3.2 Bill format. The format of bills used today is based on the style of a Victorian account book. That format is not necessarily appropriate or helpful in the 21st century. What is required is a bill which gives relevant information to the court and to the paying party and which is transparent. The current form of bill makes it relatively easy for a receiving party to disguise or even hide what has gone on.

3.3 In *General of Berne Insurance Co Ltd v Jardine Reinsurance Management Ltd*[39] the Court of Appeal decided that the indemnity principle required that the principle had to be applied to every item in the bill individually so that if solicitors billed their client on a regular basis throughout the litigation, each section of the bill between the parties could amount to no more than the client had been charged by the solicitors, and only those items which had been charged to the client could be recovered from the paying party. Whilst this decision is no doubt a correct application of the principle it caused not only a lengthening of bills of costs which had to be drawn in sections to correspond with the bills delivered to the client, but also gave a greater opportunity to paying parties to argue about each individual item. Prior to this decision of the Court of Appeal it was generally felt that if the total costs claimed from the paying party did not exceed the total costs paid by the client the indemnity principle as satisfied. Although that approach may have been flawed, it

[39] [1998] 1 WLR 1231 CA.

had the advantage of relative simplicity and avoided the often disproportionate effect of applying the decision in *General of Berne*.

3.4 Points of dispute. Section 35 of the Costs Practice Direction ("CPD") states that points of dispute should be short and to the point. However, the CPD goes on to state that the points of dispute should identify each item in the bill of costs which is disputed, and in each case state concisely the nature and grounds of the dispute. This has led to a points of dispute "industry" and points of dispute have become unnecessarily prolix. Whilst detailed points of dispute may be necessary in high value complex cases, there is no such necessity in low value, straightforward bills.

3.5 Costs of Preparation of the Bill. The actual process of preparing the bill is expensive. Bills are normally drawn by costs draftsmen, who have to go through the solicitor's file and time records and record every step in the action: attendances on clients, witnesses, counsel, etc., and the numbers of letters, emails and telephone calls. The costs draftsman also prepares points of dispute, and, if required, points of reply.

3.6 Delay. It has been suggested that there may be a delay of several months before the date of hearing for an assessment. The rules require that the parties be given a minimum of 14 days notice of the hearing, and the experience is that the parties leave it until the last minute before attempting to negotiate a settlement. In the event that the matter is settled, this is usually too late to enable another case to be listed in place of the settled case.

3.7 Complexity. The law relating to the allowance of costs and disbursements is complex and, particularly in relation to CFAs and ATE insurance premiums, can be very complex. The revocation of the Conditional Fee Agreement Regulations 2005 will eventually mean a decrease in the number of technical challenges. However, the liability insurers are constantly on the lookout for new points which will enable them to reduce the amount which they have to pay out. A reduction of a modest amount (say £100) in a bill may in fact save the insurer many hundreds of thousands of pounds. Furthermore, sometimes the rules or the statute bring opportunities for windfalls for claimant lawyers.[40] Liability insurers struggle to resist such claims, often unsuccessfully.

3.8 Disclosure. The court may direct the receiving party to produce any document which, in the opinion of the court, is necessary to enable it to reach its decision. These documents will in the first instance be produced to the court, but the court may ask the receiving party to elect whether to disclose the particular document to the paying party in order to rely on the contents of that document, or whether to decline disclosure and instead rely on other evidence (CPD rule 40.14).

3.9 The court's power to order production to the court of documents which the receiving party does not wish to produce is not used to require production of those documents to the paying party. Because many of the documents in support of a bill are confidential and/or privileged there is no disclosure stage in detailed assessment hearings as there is in other civil proceedings.

3.10 Late offers to settle. A major problem in the SCCO is the fact that many detailed assessment cases settle very late in the day when it is too late to appoint another case in place of the settled case. Over-listing and floating lists have both

[40] E.g. *U v Liverpool City Council* [2005] EWCA Civ 475; [2005] 1 WLR 2657; *Lamont v Burton* [2007] EWCA Civ 429; *Crane v Cannons Leisure Centre* [2007] EWCA Civ 1352; [2008] 1 WLR 2549.

been tried in the past without success. The only factor which affected the parties' behaviour was when the fee for assessment was high enough to enable a refund to be made if the case settled far enough ahead of the hearing date to enable another case to be listed in its place. Appendix 20 is an analysis of cases handled by one costs drafting firm since 2003 covering the work of nine solicitor clients. Of the 1,182 cases dealt with only 23 reached assessment hearing, the remainder (98.1%) settled before the hearing. 100 (8.5%) settled after the case had been lodged for assessment.

3.11 Hourly rates. There is an increasing, indeed now almost universal, tendency to use at detailed assessment hearings the published guideline rates for summary assessment. There are several problems inherent in this approach. First, as noted in chapter 52, there are a number of issues relating to their calculation which need to be resolved. Secondly, the rates were developed as an aid to the "rough and ready" process of summary assessment. There has been no formal consideration of whether they are suitable to be adopted for detailed assessment. The guideline rates do not appear to be derived from actual costs, in the manner that hourly rates were derived prior to 1999.

4. OPTIONS FOR REFORM

4.1 Fast track. If a matrix, scale or tariff is in place for fast track cases there is no need for points of dispute or any reply. Depending on the structure of the fast track costs scheme it may be possible to do away with detailed assessment of such cases altogether. In order to cater for exceptional cases there should be an escape clause enabling a receiving party [or paying party] who feels that the scale allowance is too low [or too high] to apply to the court for a detailed assessment subject to a costs risk, e.g., if the assessment does not result in an increase [or decrease] of 20% or more the party applying will bear the costs of the detailed assessment.

4.2 Limit the length of points of dispute. Given that it may take some time before a predictable costs scheme on the Fast Track is in operation it is suggested that the Costs Practice Direction should be amended to the effect that in fast track cases points of dispute should not extend to more than three pages. Points of dispute should state any general points only once (e.g., hourly rate, grade and number of fee earners, number of conferences, etc.). If it is necessary to identify a discrete point in respect of an item this should be done briefly. In low value cases it may be possible to dispense with points of dispute altogether, or at least to limit them to points of principle rather than quantum.

4.3 Compulsory offer procedure. There should be a requirement that the paying party should make an offer in respect of the costs at the same time as serving points of dispute. Where the points of dispute assert that no costs should be payable, e.g., because of a breach of the CFA Regulations, a provisional offer should be made on the basis that the preliminary issue is decided in favour of the receiving party.

4.4 Part 36. There appears to be no reason why Part 36 should not apply to detailed assessment proceedings in the same way as it applies to the substantive proceedings. This would provide greater certainty than the present provision in the rules that any offer to settle "may be taken into account".

4.5 New bill format. During the preparation of this chapter a meeting was held between the Senior Costs Judge, Jeremy Morgan QC, the Chairman of ALCD and representatives of two costs drafting firms. The possibility of new bill formats was discussed, and it became clear from the discussion that many costs draftsmen already

rely on bill drafting software and the more sophisticated firms of solicitors are able to separate out and analyse different features of the work they have undertaken. Equally, if provided with the appropriate information, they are able to carry out such an analysis of an opponent's costs for the purposes of negotiation. There are clearly many possibilities for the way in which bills could be drawn for the future. The objective should be, as stated above, to provide clear and unambiguous information to the paying party and to the court.

4.6 Although the present computer system used by the court cannot accept unauthorised material from outside, the electronic transfer of information is so clearly the future that this possibility has to be addressed, even though its implementation may be some way off. To this end those attending the meeting were asked to prepare a joint view as to the possible way in which bills might be dealt with electronically in the future. I have requested that when the report of this group becomes available, it is published separately as a contribution to Phase 2 of the Costs Review.

4.7 Disclosure. The law relating to disclosure on detailed assessment is settled. Query whether any change is necessary.

4.8 Time for appeal. The decision in *Kasir v Darlington* [2001] 2 Costs LR 228 means that appeals must be commenced within the prescribed time limit (21 days) of the decision being made. In detailed assessment proceedings, which may take several days spread over a number of weeks), this decision, although no doubt a correct interpretation of the CPR rules, causes unnecessary complications and applications to appeal out of time. It is suggested that the time for appeal should run from the conclusion of the final hearing (not the issue of the final certificate).

4.9 Provisional assessment. For bills of up to say £50,000 it may be possible to have a system of provisional assessment whereby the costs officer considers the bill and supporting papers in the light of the points of dispute. A provisional view can then be taken and parties notified of the provisional decision. If either party is unhappy with the provisional assessment the matter can then be listed for hearing. The possible disadvantage with this proposal is that the time expended by the costs judge could well be greater than if the matter were listed for a hearing in the normal way. In respect of bills up to say £10,000 it might be possible to deal with these without a hearing. Bills at this level and the underlying litigation are usually extremely straightforward and throw up similar arguments time after time. There should be a right of appeal from such assessments, although permission would be required.

4.10 Intermediate procedure. An alternative approach[41] is that there should be an "intermediate procedure", which falls some way between the current procedures for detailed assessment and summary assessment. Their proposal is as follows:

> "It is possible to envisage a procedure which takes a more broad-brush approach to assessing costs than the detailed assessment system but which applies more broadly than the current summary assessment procedure. We would imagine that, given the advantages in cost and time efficiency, commercial parties would readily accept the trade-off that such a system would necessarily be more "rough and ready"."

[41] Suggested by a City firm in their written submissions for Phase 1.

Senior Costs Judge Peter Hurst comments that this proposal represents what judges in commercial cases attempt to do. He adds that it is difficult to distinguish the proposed intermediate procedure from summary assessment.

4.11 Costs of detailed assessment hearing. The decision in *Crane v Cannons Leisure Centre* [2007] EWCA Civ 1352; [2008] 1 WLR 2549 means that on detailed assessment (whether attended by the conducting solicitor or a costs draftsman) a success fee is recoverable at the same rate as the substantive action. It was argued that by the time matters reach detailed assessment, the action had been won by the paying party and the risk of losing no longer existed. There may, of course, be some risk involved in the detailed assessment itself. The Court felt it could not interfere in the contract between solicitor and client in a CFA and the statute provides for "a success fee". The Court of Appeal had previously held in *U v Liverpool City Council* [2005] EWCA Civ 475; [2005] 1 WLR 2657 that the intention of Parliament was that there should be one success fee, although it could be staged. It was not open to the court to impose its own view. In the written submissions received during Phase 1, there has been some criticism of the Court of Appeal decisions in both of the above cases.

4.12 The question arises as to whether the effect of *Crane* should be reversed. My assessors have advised (and I agree) that this would probably require primary legislation.

4.13 Hourly rates. In relation to hourly rates there are several possible ways forward. One option would be to revert to the pre-1999 regime whereby hourly rates have to be justified by the receiving party, by reference to the "A" and "B" factors formerly used. This would entail that more attention would be paid to CPR rule 44.5(3) than is currently the case. An alternative option would be for the ACCC to set guideline rates for detailed assessment. These could either be the same as or alternatively more detailed than the guideline rates for summary assessment. Whichever option is adopted would, it is submitted, be preferable to the present situation, whereby guideline rates expressly limited to summary assessment are in practice and by default used for detailed assessment.

5. REVIEW

5.1 I look forward to hearing comments on all the above issues during Phase 2.

PART 11: REVIEW OF COSTS REGIMES IN OTHER JURISDICTIONS

CHAPTER 54. SCOTLAND

1. INTRODUCTION

1.1 The Scottish legal system. The Scottish legal system belongs to the legal family of mixed systems. Its system comprises a mixture of the civil law system derived from Roman law and medieval canon law and the Anglo American common law system. Scotland's system is unique in that it only became a mixed system through indigenous development, whereas all other mixed systems, e.g. South Africa, Louisiana, Israel, were the result of a transfer of sovereignty from a civilian to a common law colonial power.[1] In order properly to appreciate costs (or "expenses" as costs are commonly referred to in litigation in Scotland) it is apposite to highlight the essential elements of the structure and jurisdiction of the Scottish courts. In Scotland the court structure consists of the sheriff court and Court of Session.

1.2 Sheriff Court Structure. There are six sheriffdoms within which are located sheriff court districts. In total there are 49 sheriff court districts. The location of individual sheriff courts is determined by centres of population. For example, there is only one sheriff court within the Sheriffdom of Glasgow & Strathkelvin, whereas the Sheriffdom of Grampian, Highlands & Islands has 16 sheriff courts. Each sheriffdom is presided over by a sheriff principal who has responsibility for ensuring the effective disposal of business within the sheriffdom. Sheriffs generally handle both civil and criminal cases. The number of sheriffs within each sheriff court depends upon the volume of business. For example, Glasgow Sheriff Court currently has approximately 30 full time sheriffs, whereas the Sheriff Court at Wick has a single sheriff who sits on one or two days a week. Pressure of business dictates that temporary sheriffs are appointed to handle both criminal and civil cases. There is a right of appeal from the sheriff to the sheriff principal and from the sheriff principal to the Inner House of the Court of Session. Alternatively an appellant can appeal from the sheriff directly to the Court of Session.

1.3 The Court of Session. The supreme civil court in Scotland is the Court of Session which sits only in Edinburgh and which is presided over by the Lord President who is the most senior judge in Scotland. At present there are approximately 35 judges in the Court of Session. Their workload straddles both civil and criminal cases. When handling civil business these judges sit as members of the High Court of Justiciary. In relation to civil business the Court of Session sits as both

[1] See generally Gloag & Henderson 12th Edition "*The Law of Scotland*", pages 8 and 9.

a court of first instance and a court of appeal. The court is split between the Outer House and the Inner House. There are approximately 24 judges allocated to the Outer House, with the remaining senior judges sitting in the Inner House. Outer House judges sit alone. There is a right of appeal from the Outer House to the Inner House, which is split into two divisions. These consist of the First Division (consisting of 3 judges presided over by the Lord President, the most senior judge in Scotland) and the Second Division (also consisting of 3 judges and presided over by the Lord Justice Clerk, the second most senior judge in Scotland). Each division has equal authority. Where necessary an Extra Division of 3 judges can be established. There is a right of appeal from the Inner House of the Court of Session to the House of Lords.

1.4 Jurisdiction. Currently the sheriff court and Court of Session have concurrent jurisdiction in respect of actions for payment of money where the sum claimed, exclusive of interest and expenses, exceeds £5,000.[2] The privative jurisdiction of the sheriff court is essentially in respect of actions where the sum claimed, exclusive of interest and expenses, does not exceed £5,000. There is a small claims procedure for actions up to £3,000 and a more formal procedure (known as summary cause) for actions between £3,000 and £5,000. Personal injury actions cannot be raised under the small claims procedure.

1.5 The Court of Session currently has exclusive jurisdiction for certain actions, such as actions of reduction, proving the tenor of documents, the winding-up of companies where the paid up share capital exceeds £120,000, the *nobile officium* (an inherent equitable power of the Court of Session to grant a legal remedy where none otherwise exists), and devolution issues under the Scotland Act 1998.

1.6 Pleadings. Civil litigation is conducted in Scotland via a system of written pleadings, which are designed to focus concisely the factual and legal issues in dispute and to provide fair notice to each side with a view to avoiding unnecessary evidence and argument. Documentary evidence relevant to the issues in the case may be recovered by order of the court via a procedure known as commission and diligence.

1.7 Commercial litigation. In the Court of Session there are special (optional) rules for commercial actions under Chapter 47 of the Rules of the Court of Session. These were introduced in 1994 and were designed to provide an expeditious procedure for resolving commercial disputes essentially through judicial case management hearings. A compulsory pre-action protocol procedure was introduced in 2005.

1.8 In the Sheriff Court new rules for commercial actions were introduced in 2001 (Chapter 40 of Ordinary Cause Rules). This procedure is currently available in Glasgow, Aberdeen, Inverness and a few other outlying courts. This procedure encourages early focussing of the issues in dispute by effective judicial case management.

1.9 Personal injury actions. In the Court of Session personal injury actions are required to be raised under Chapter 43 of the Rules of the Court of Session. This procedure involves abbreviated pleadings and a form of case flow management whereby a procedural timetable is issued at an early stage in proceedings.

[2] The threshold was increased by an Act of Sederunt which took effect on 14th January, 2008.

1.10 There is an ongoing pilot within the Glasgow Sheriff Court for certain personal injury cases. This involves an element of case management.

1.11 Adversarial system with increasing judicial control. Scotland's litigation system is adversarial in nature, akin to that of England and Wales. In Scotland, as in England and Wales, greater judicial control of cases has developed since the early 1990's.[3] The introduction of case management and case flow management has led to a front end loading approach to cases, the net result of which has been that the life span of cases has been reduced.

1.12 Rights of Audience. Generally solicitors have rights of audience to appear in sheriff courts (including appeals to the sheriff principal) throughout Scotland. Members of the Faculty of Advocates and suitably qualified solicitor advocates have rights of audience in every civil court in Scotland, including appeals to the House of Lords.

1.13 Rules of civil procedure. There are separate rules governing procedures in the sheriff court and in the Court of Session. These rules are made by Acts of Sederunt of the Court of Session. The rules of these courts are under regular review by the Sheriff Court Rules Council and the Court of Session Rules Council. The relative powers are contained in the Sheriff Courts (Scotland) Act 1971 and the Court of Session Act 1988. The Rules Councils are made up of judges and practitioners. The Councils provide advice on changes to the rules.

2. RELEVANT RULES AND LEGISLATION

2.1 Taxation. Where expenses are awarded in any cause, in general terms they must be taxed before decree (judgment) is granted for payment. These expenses consist of the amount of charges which are recoverable by the party in whose favour the award is made from the party against whom the award is made. These charges comprise fees to counsel and solicitors and outlays. Outlays include court dues, also fees and expenses to expert and other witnesses. Counsel's fees are honoraria and are at the discretion of counsel and his clerk. There are no official guidelines available and, if a fee charge is considered to be unreasonable, the matter can be referred to the Auditor of the Court of Session. Special (reduced) rates apply where Legal Aid has been granted.

2.2 Solicitors' fees. Solicitors' fees in litigation in Scotland are regulated by Acts of Sederunt which prescribe regulations and tables for both the sheriff courts and the Court of Session. These tables regulate the taxation of accounts between (a) party and party, (b) solicitor and client, client paying, and (c) solicitor and client, third party paying. In litigation where an interlocutor awards expenses without qualification this implies taxation on a party/party basis.[4]

2.3 Party and party. Where the award is made on a party/party basis the relative court regulations governing taxations in the sheriff court state: "In order that the expenses of litigation may be kept within proper and reasonable limits, only such expenses shall be allowed in the taxation of accounts as are reasonable for conducting it in a proper manner. It shall be competent to the auditor to disallow all charges for

[3] See, for example, Rule 9.12 of the Sheriff Court Ordinary Cause Rules 1993 requiring the sheriff at Options Hearing to "*...seek to secure the expeditious progress of the cause*...".
[4] See *McGregor's Trustees v. Kimbell* 1912 SC 261 and *Walker v. McNeil* 1981 SLT (Notes) 21.

papers, parts of papers or particular procedure or agency which he shall judge irregular or unnecessary".[5]

2.4 In the Court of Session the relevant court rule provides: "Only such expenses as are reasonable for conducting the cause in a proper manner shall be allowed".[6]

2.5 Solicitor/client – client paying. Where a taxation is carried out on the basis of solicitor and client it has been said that "the rule is that the client is liable for all expenses reasonably incurred by the agent for the protection of his client's interests in the suit, even although such expenses cannot be recovered from the opposite party. The client is, of course, also liable for any expenses which he has specially authorised; and it is proper and prudent that agents should have their client's authority before incurring expenses of an extraordinary character".[7]

2.6 In exceptional circumstances it is within the discretion of the court to order taxation of expenses against a party on the basis of solicitor/client – client paying, as a mark of disapproval of a party's unreasonable conduct.[8]

2.7 Solicitor/client – third party paying. It has been said that where the account of expenses is to be taxed on the basis of solicitor/client – third party paying, the mode of taxation while it is "not so generous" as in a taxation between solicitor and client – client paying, it "is yet not quite so rigorous as the taxation as between party and party".[9] In a taxation to be assessed on the solicitor/client – third party paying basis the auditor may disallow numerous items which would otherwise be admissible in a taxation as between solicitor/client – client paying. It has been held that solicitor/client – third party paying is the appropriate basis of taxation in an action of multiplepoinding (an action in which the court is asked to adjudicate on competing claims made to property or money (called the fund *in medio*)). In that situation parties are entitled to expenses out of the fund *in medio* assessed on a solicitor/client basis.[10]

2.8 Fees agreed between solicitor and client. In terms of Section 61(a)[11] of the Solicitors (Scotland) Act 1980 where a solicitor and his client have reached agreement in writing as to the solicitor's fees it is not competent for the court, in any litigation arising out of a dispute as to the amount due under the agreement, to remit the solicitor's account for taxation.

2.9 The current tables of fees regulating the taxation of accounts between party and party and solicitor and client with relevant general regulations are published and widely available.

2.10 Sheriff court tables. The sheriff court tables apply to sheriff courts across the whole of Scotland. The block fees and hourly rates contained in the relative chapters of the tables apply regardless of the location of the sheriff court in which the litigation takes place. Thus, the same table rate will apply in a case in Lochmaddy Sheriff Court

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[5] Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993 (S.I. 1993/3080).
[6] Rules of the Court of Session, Rule 42.10.
[7] See Mackay - Practice ii, 585; Maclaren - Expenses, p509.
[8] See *Walker v. McNeil* 1981 SLT (Notes) 21. See also *Milligan v. Tinne's Trustees* 1971 SLT (Notes) 64.
[9] See Maclaren – Expenses, p509.
[10] See *Park –v- Colville's Ltd.* 1960 SC 143 at 153.
[11] Section 61(a) was inserted in the Solicitors (Scotland) Act 1980 by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and took effect on 4th July, 1992.

in the Western Isles as would apply in Glasgow Sheriff Court. It will be observed that party/party accounts of expenses can be prepared either on a "block" basis or on a time and line basis. The block basis allows charges for particular segments of work but this basis will also include time charges to cover such matters as appearing in court. For example, by reference to paragraph 1B of chapter 2 of the sheriff court table a charge of £560.80 is allowed in respect of work done before the commencement of a Commercial Action. By reference to paragraph 17(a) of the same table an hourly charge out rate of £37.65 x 4 = £150.60 is allowed for the conduct of the proof. An example of a time and line charge can be found in chapter 3 of the same table. By reference to paragraph 12(b) of that table a letter per page of 125 words can be charged at £17.10. In assessing party/party charges it is not competent to charge partly on the basis of block/time and partly on the basis of time and line. The account must be prepared either under one chapter or the other.

2.11 Increased fees in appropriate cases. In appropriate cases of complexity, high value etc. solicitors can seek an increase in the scale fees from the court. The factors which the court must take into account are as follows:

(i) The complexity of the cause and the number, difficulty and novelty of the questions raised;

(ii) The skill, time and labour and specialised knowledge required of the solicitor;

(iii) The number and importance of any documents prepared or perused;

(iv) The place and circumstances of the cause or in which the work of the solicitor in preparation for, and conduct or, the cause has been carried out;

(v) The importance of the cause or the subject matter of it to the client;

(vi) The amount or value of money or property involved in the cause;

(vii) The steps taken with a view to settling the cause, limiting the matters in dispute or limiting the scope of any hearing.

2.12 Annual reviews. The levels of fees for litigation in the sheriff court and Court of Session are reviewed annually taking due account of earnings/cost inflation and following the submission of proposals by the Lord President to the Scottish Parliament.

2.13 Conditional fee agreements. Solicitors in Scotland who conduct litigation for a client are entitled to enter into a speculative fee charging agreement[12] with the client in terms of which it is agreed that the solicitor shall be entitled to a fee for the work only if the client is successful in the litigation. In that situation the solicitor's fee is based on an account prepared as between party and party. In the event of success the agreement provides that the fees element in the account shall be increased by a figure not exceeding 100%. It is emphasised that this is an agreement between the solicitor and his client and there is no question of the unsuccessful party having to bear the cost of the increase. The increased or additional fee would in effect be deducted from the compensation. Conditional fee agreements are not part of the expenses regime in Scotland. The cost of before-the-event (BTE) or after-the-event (ATE) insurance is not a recoverable charge in a party/party account in Scotland. Referral fees are not permitted in Scotland. Neither counsel nor solicitors in Scotland are permitted to enter into *a pactum de quota lites*, i.e. an agreement for a contingency fee in the sense that the lawyer agrees to accept a share of what may be

[12] Act of Sederunt (Fees of Solicitors in Speculative Actions) 1992.

recovered in a lawsuit in place of a fee. Such an agreement is illegal and void in Scotland.

2.14 Fees payable when cases are settled. For many years the Law Society of Scotland issued a recommended general table of fees for Scottish solicitors. This table covered the general work of solicitors ranging from the drafting of documents, correspondence, writs relating to heritable property and the sale, purchase or lease of property. Chapter 10 provided a scale of fees for negotiating and completing settlement of claims for compensation or reparation on any ground whatever. The table provided a sliding scale of fees to apply in respect of reparation claims. It became very common practice for this table to be used where claims were settled without the need for litigation. Insurers were in favour of the chapter 10 scale because it provided certainty and was conducive to the settlement of claims without resort to litigation. This of course was consistent with the philosophy that litigation ought to be a last resort rather than first resort. The application of chapter 10 became extremely common in personal injury claims which were settled without the need for litigation. The Law Society general table of fees was withdrawn in the summer of 2005. It had been suggested that the recommended table may have infringed the Treaty of Rome and restricted competition in such a way as to amount to a contravention of the Competition Act 1998. Although the general table was withdrawn insurers and claimants continued to abide by the chapter 10 scale fees.

2.15 Pre-action protocol for personal injury claims. On 1 January, 2006 following negotiations between the Law Society of Scotland and the Forum of Scottish Claims Managers (an insurer organisation) a voluntary pre-action protocol took effect. This applied to personal injury claims intimated after 1st January, 2006 in respect of claims valued at less than £10,000. Where parties agree to deal with the claim on the basis of the voluntary pre-action protocol and settlement is agreed the compensator is bound to pay the fees detailed in the protocol. These fees are essentially based on the old chapter 10 scale.

2.16. Legal aid. Civil legal aid is still available for litigation work. If an assisted person fails in his/her action, the courts have the power (which is generally exercised) to modify the assisted person's liability to an opponent for expenses to nil. This is discussed further in paragraph 3.4 below.

3. INTERPRETATION BY THE COURTS

3.1 Court's discretion. The starting point is to re-emphasise that the court has an inherent discretionary common law power to decide (a) whether to award expenses, (b) the party in whose favour any award should be made, and (c) the amount of such expenses.[13] Factors such as the conduct of the parties in pursuing/defending the litigation may influence the court. Awards of expenses are rarely altered on appeal.[14]

3.2 Costs generally follow the event. Subject to the foregoing, the general rule is that "expenses follow success". In one of the leading cases it was put thus: "if any party is put to expense in vindicating his rights he is entitled to recover it from the person by whom it was created, unless there is something in his own conduct that gives him the character of an improper litigant in insisting on things which his title does not warrant".[15]

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[13] Maclaren – Expenses, p3.
[14] See e.g. *McLean v Zonal Retail Data Systems Ltd* [2009] CSOH 12 at [2].
[15] *Howie v. Alexander & Sons* 1948 SC 154 at 157, per Lord President Cooper.

3.3 Exceptions. In determining the issue of expenses the court has to look at the prevailing circumstances of each case. Some examples of a successful party being refused expenses are as follows:

(i) In resorting to litigation a pursuer requires to demonstrate that the action is necessary. In an action for payment of money it is normal for the initial writ or summons to contain averments along the lines of "Despite repeated requests for payment the defender has refused, or at least delayed, to make payment and this action is necessary". Where no repeated request for payment has been made it has been held that the action was unnecessary and the court refused to award expenses to the pursuer.[16]

(ii) If the court decides that both parties contribute to the length and expense of the Proof (trial) then no award may be made.[17]

(iii) Circumstances could arise in which a party may be successful on the merits of the case but may be found liable to his opponent in expenses. For example, in a case in which the successful party obstructed the precognition (proof of evidence) of witnesses the court found that party liable in expenses to his opponent.[18]

(iv) The court may also modify expenses where, for example, the award of damages was trivial.[19]

These examples simply serve to highlight that to rebut the presumption of "expenses follow success" it is for the court, in seeking to do justice to the parties, to consider the prevailing circumstances of the case in question.

3.4 Assisted person's liability for costs. A person with legal aid may apply to the court to have his liability for expenses to an opponent modified.[20] In determining the extent of modification the general principle to be applied is as set out by the First Division of the Inner House of the Court of Session as follows:

> "The figure should not be so high as to render it for practical purposes impossible for the party, with the resources available to him, to meet the liability. It equally seems clear that it was not intended that the liability should as a matter of course be fixed at a nominal sum or even at nil".[21]

In practice, frequently the court assesses applications for modification under the 1986 Act at nil.

3.5 Increased fees. As already explained, it is open to a party to apply to the court for an additional fee taking account of complexity, skill, time and labour, number and importance of documents, place and circumstances of the cause on which the work of the solicitor has been carried out, the importance of the cause or the subject matter, the amount or value of money or property involved, the steps taken with a view to settling the cause, limiting the matters in dispute or limiting the scope of any hearing.

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[16] *Maclennan v. Luth* 1951 SLT (Sheriff Court) 103.
[17] *Elf Caledonia Ltd. v. London Bridge Engineering Ltd. (No. 2)* 1998 GWD 2-86.
[18] *Barry v. Caledonian Railway* 1902 5 F 30.
[19] *McIntosh v. British Railways Board* (No. 1) 1990 SLT 637.
[20] Legal Aid (Scotland) Act 1986 section 18(2).
[21] *Armstrong v. Armstrong* 1970 SC 161 at 166.

Only one factor need be recognised by the court as sufficient to justify the allowance of an additional fee.[22]

In the Court of Session the judge may determine the application or remit it to the Auditor of Court to determine and fix the fee. In the sheriff court the application is determined by the sheriff.

3.6 Extra judicial settlement. It is of course common for court actions to settle. In Scotland such settlements can be extra judicial or judicial. An extra judicial settlement is essentially where parties in the litigation reach agreement, both in relation to the subject matter of the litigation and expenses. It is normal not to disclose the terms of settlement to the court. A simple joint minute is prepared and all that is required is for the court to interpone its authority to the minute.

3.7 Judicial settlement. A judicial settlement occurs following the lodging by the defender of a minute of tender which is a clear and unambiguous offer to settle the action without admission of liability and without prejudice to the defender's whole rights and pleas, invariably by payment of a sum of money. To be valid a tender must contain an offer to pay the opponent's expenses to the date of lodging and intimation of the minute. The tender is lodged in court in a sealed envelope which must not be disclosed to the court until after the case has been determined, either by an acceptance of the tender or by the decision of the court. The pursuer is entitled to a reasonable period to consider the tender. If the pursuer does not accept the tender and he is ultimately found entitled to the sum tendered or less, then the expenses incurred from the date of the tender are awarded against him. In the event that the pursuer is ultimately awarded a sum larger than the sum tendered, he is said to "beat the tender" and he will in the normal course of events be entitled to his full judicial expenses. A tender can be withdrawn at any time before it is accepted by the lodging of a minute of acceptance. The essence of the tender procedure is similar to the Part 36 procedure in England and Wales.

3.8 Agent disburser. The court may allow decree for expenses to be extracted in the name of the solicitor as agent disburser. This is based on the principle of an implied assignation by the client to the solicitor of his right to these expenses. A party against whom the decree is granted is not entitled to plead compensation (set off) in respect of sums due to him by the pursuer.[23]

4. PRACTICAL CONSEQUENCES

(i) Perception of the present rules and their application

4.1 General satisfaction. I am told that many lawyers and court users regard the Scottish system as striking a fair balance between the conflicting interests which are in play. The application of a transparent table of fees and court outlays governing litigation in all sheriff courts in the country and similar tables governing litigation in the Court of Session provides consistency and predictability.

4.2 Determination of sheriff court expenses. In the sheriff courts solicitors routinely adjust party/party judicial accounts of expenses by reference to the prescribed table. This exercise can be done in a relatively short time and is often

[22] *Hill v. Lovett* (No. 2) 1992 GWD 7-380.
[23] See *Lochgelly Iron & Coal Co. Ltd. v. Sinclair* 1907 SC 442.

conducted by telephone. Most accounts are based on the block/time chapter in the table.

4.3 For complex cases which proceed to proof in the sheriff court over a number of days it is common for accounts to be remitted to the Auditor of Court for taxation by reference to the tables and principles to which reference has been made. In such cases specialist law accountants are frequently instructed by agents to conduct the taxation, or indeed to negotiate a suitable figure.

4.4 Determination of Court of Session expenses. As with the sheriff court, most cases in the Court of Session settle extra judicially and it is common for party/party judicial accounts of expenses to be adjusted between solicitors along the lines of that described in the sheriff court. In complex cases, and in cases which have proceeded to proof, it is common for law accountants to be instructed to negotiate, or if necessary conduct the taxation before the Auditor of Court.

4.5 Concern re commercial actions. There is a view that in relation to commercial actions the fees specified in the prescribed sheriff court and Court of Session tables are too low. Those who hold this view consider that a successful commercial litigant may not recover much more than half of the total fees for which he is liable to his lawyers.

4.6 Avoidance of satellite litigation. The system of expenses in Scotland does not involve disproportionate judicial time being spent on the assessment of expenses.

4.7 The practice of agreeing fees on the "old chapter 10" basis has greatly encouraged the settlement of a large proportion of reparation claims without the need for litigation.

(ii) Lord Gill's Review

4.8 During the last two years or so the Civil Courts Review under the chairmanship of Lord Gill has been carrying out a root and branch review of all aspects of the structure of the Scottish civil courts including the cost of litigation. The full terms of the remit are as follows:

> "To review the provision of civil justice by the courts in Scotland, including their structure, jurisdiction, procedures and working methods, having particular regard to
>
> - the cost of litigation to parties and to the public purse;
> - the role of mediation and other methods of dispute resolution in relation to court process;
> - the development of modern methods of communication and case management; and
> - the issue of specialisation of courts or procedures, including the relationship between the civil and criminal courts;
>
> and to report within 2 years, making recommendations for changes with a view to improving access to civil justice in Scotland, promoting early resolution of disputes, making the best use of resources, and ensuring that cases are dealt with in ways which are proportionate to the value, importance and complexity of the issues raised."

4.9 Lord Gill and his team are due to report to the Scottish Government's Cabinet Secretary for Justice in April 2009. That report is not available at the time of drafting this chapter. It may or may not be in the public domain by the date when this report is published.

CHAPTER 55. GERMANY

1. INTRODUCTION

1.1 The German rules of civil procedure contemplate cost shifting, albeit according to well-defined scales for recovery. The effect may be that a successful litigant is entitled to recover a smaller proportion of its actual fees than would be recoverable in England and Wales.

1.2 The German system permits the use of contingency fees only in limited circumstances, namely where a claimant does not have the means to retain lawyers for his case. Legal aid is available in certain civil cases.

1.3 In Germany, civil litigation is managed by the court so that it controls the proceedings and the evidence that is brought before it. One method by which the court does this is to appoint experts to assist the court on relevant factual issues, rather than leaving it to the parties to adduce their own expert evidence.[24]

2. RELEVANT RULES AND LEGISLATION

(i) Cost rules

2.1 The relevant provisions of the German Code of Civil Procedure[25] are as follows:

> "The losing party has to bear all costs of the litigation, in particular all costs accrued by the opponent, as far as these costs were necessary to defend or to enforce a right..."[26]
>
> "The statutory fees and expenses of the lawyer of the winning party are to be refunded in any type of proceeding..."[27]
>
> "If each party partly loses and partly wins costs are to be balanced out or to be shared proportionally".[28]

2.2 The German cost rules, unlike CPR Part 44, do not confer any general discretion upon the court in respect of costs. The court will determine the extent to which each party has succeeded in proving its case, and make its order accordingly. By way of example, if the claimant claims €1,000,000, and recovers €700,000, the court will order the defendant to pay 70% of the costs, and the claimant to pay 30% of the costs.[29] Such costs comprise court fees, lawyers' fees and expenses as discussed below.

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[24] However, the German system is not inquisitorial, i.e. the court does not conduct an inquiry. It is for the parties themselves to plead their respective cases and provide evidence to the court. The court simply exercises control over the evidence that is to be adduced, based on the court's decision as to what evidence it needs. This approach is referred to as the "principle of procuring" (Beibringungsgrundsatz).

[25] German Civil Procedure Code (Zivilprozessordnung in der Fassung der Bekanntmachung vom 5. Dezember 2005, zuletzt geändert durch Artikel 1 des Gesetzes vom 30. Oktober 2008 ("ZPO")).

[26] German Civil Procedure Code, section 91(1).

[27] German Civil Procedure Code, section 91(2).

[28] German Civil Procedure Code, section 91(3).

[29] In respect of claims for non-monetary relief, the court will make a similar assessment by

(ii) Recoverable costs and court fees and expenses

2.3 The quantum of legal costs that a successful party is entitled to recover from an unsuccessful party, and the fees and expenses of the court which are payable, are prescribed by statute.[30] These rules do not seek to provide a successful party with a complete indemnity for his or her legal fees. Instead, they provide for the payment of legal fees and court costs in scales which increase in a degressive, non-linear fashion and with the use of multipliers that vary according to the value of the dispute, the stage at which the case is resolved, and other aspects of the case.[31] Illustrations are given below of how these rules apply to disputes of varying sizes, in respect of the amount payable by the unsuccessful party (leaving aside that party's own legal fees, which it must bear).[32]

- Amount in dispute = €10,000

Court fees payable	€588.00
Lawyer's fees payable (for one lawyer)	€1,869.37
Total payable by unsuccessful party	€2,457.37

- Amount in dispute = €100,000

Court fees payable	€2,568.00
Lawyer's fees payable (for one lawyer)	€5,123.07
Total payable by unsuccessful party	€7,961.07

- Amount in dispute = €1,000,000

Court fees payable	€13,368.00
Lawyer's fees payable (for one lawyer)	€16,900.85
Total payable by unsuccessful party	€30,268.85

reference to the issues on which each party has succeeded.

[30] Court fees are prescribed by the German Court Fees Act (the "GKG", being the Gerichtkostengesetz vom 5 Mai 2004, zuletzt geändert am 30 Oktober 2008) and legal fees are scaled under the German Lawyers' Fees Act (the "RVG", being the Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte vom 5 Mai 2004, zuletzt geändert am 30 Oktober 2008). The RVG is the only applicable statute in respect of legal fees. There are other statutory provisions concerning the payment of court fees in certain cases (e.g. guardianship and probate cases), but the GKG is the main statute in relation to civil litigation.

[31] According to German Civil Procedure Code section 3(1), the value of the dispute is to be determined by the court in its "absolute discretion". I am advised, however, by senior German judges that in practice no discretion is involved when the litigation concerns quantified or readily quantifiable claims.

[32] The costs, fees and expenses payable under Court Fees Act and the Lawyers' Fees Act vary depending upon a number of factors, e.g. the number of lay and expert witnesses and whether the witnesses were examined in court. The examples given in this chapter assume among other things, and for the sake of simplicity in calculation, that neither the court nor the successful party's lawyer incurred any expenses, and no witness or expert was examined in court. The calculation of recoverable lawyers' fees and payment of court fees is different where a party seeks non-monetary relief, e.g. in the nature of a declaration or injunction.

- Amount in dispute = €30,000,000[33]

Court fees payable	€96,408.70
Lawyer's fees payable (for one lawyer)	€274,368.00
Total payable by unsuccessful party	€343,020.35

2.4 The court fees payable are significantly less (i.e. around 1/3rd less) where court proceedings are discontinued e.g. because of settlement, to reflect the fact that the court has less work to do in such cases. However, the recoverable lawyers' fees (assuming the parties do not settle the issue of legal fees) are higher than if the case proceeds to judgment. One of the reasons for this is to provide the parties' lawyers with an incentive to settle.[34] To illustrate, in the case of a €1,000,000 claim which settles before trial, the fees would be as follows (again, assuming that the parties do not agree to settle the question of payable legal fees):

Court fees payable	€4,456.00
Lawyer's fees payable (for one lawyer)	€22,251.09
Total payable by unsuccessful party	€26,707.09

2.5 A key notion that underpins the German cost rules, and the amounts recoverable under the applicable rules for lawyers' fees, is that a lawyer is "*an independent agent in the administration of justice*"[35] who is bound only to law and justice and to the concerns of his client. Lawyers practise in a "*liberal profession*"[36] which is "*not a trade*".[37] The cost rules try to ensure that lawyers maintain their independence by, among other things, prohibiting (subject to limited exceptions) agreements between lawyers and their clients that contemplate lawyers being remunerated for court work at rates below those prescribed by the cost rules.[38] By doing this the German cost rules endeavour to ensure that a lawyer is able to focus his or her energies on pursuing the legal rights of his or her client, without being distracted or compromised by having to focus on his or her own interests in being remunerated at a reasonable rate. In broad terms, the German cost scales seek to provide lawyers with something akin to a living wage, whilst at the same time

[33] In respect of claims for more than €30m, the lawyers' fees (but not the court fees) are capped at the level fixed for €30m claims. The constitutional validity of this cap was recently challenged, but affirmed by the German Constitutional Court: see section 3, below.

[34] The fact that a lawyer may receive a bonus of sorts for a case settling (an "Einigungsgebühr") can, at least theoretically, give rise to a conflict between the lawyer's interests and those of his or her client. There is, however, no evidence of this potential conflict affecting lawyers' behaviour in practice, and moreover the fact that a case has settled could be regarded as a benefit which outweighs the potential for conflicts of interest. Another reason why this apparent conflict of interest may not be regarded as problematic is that it is common for parties to settle proceedings on the basis that each party is to bear its own costs, and that court fees are to be shared proportionally. Under the German system there is no equivalent to Part 36 of the CPR, or other costs principles which give parties with an incentive to settle by making settlement offers.

[35] German Federal Lawyers' Act (the "BRAO" or Bundesrechtsanwaltordnung vom 01.08.1959, zuletzt geändert am 12 Juni 2008) section 1.

[36] German Federal Lawyers' Act section 1(1).

[37] German Federal Lawyers' Act section 2(2).

[38] German Federal Lawyers' Act section 49b(1) and (2). It has, however, been reported these statutory provisions are regularly breached, as many clients are often are not willing or able to pay the full statutory fees: Dr Michael Kleine-Cosack, Commentary on the Federal Lawyers' Act (2008).

ensuring that the scale of recoverable fees and expenses is proportionate to the amount in dispute.

2.6 "Cross-subsidisation".[39] A notion which underpins the cost scales used in Germany is that of "cross-subsidisation" which, in summary, posits that a lawyer may earn a reasonable living out of his or her profession by accepting a number of smaller cases where remuneration under the scale of fees is not very great (and there may be only a small profit margin) and in addition accepting a number of medium or large cases where the scale fees are higher. If a lawyer's practice consists of a mix of small, medium and high value cases, the theory is that the fees from the medium and large value cases will "cross-subsidise" those derived from smaller ones, enabling the lawyer overall to earn a reasonable living.

2.7 Adjustments to cost scales. The scales of costs applied in the German legal system remain fixed until amended by legislation. There is no in-built mechanism for increasing or reducing the scale of fees according, for example, to the prevailing rate of inflation (or deflation).[40] The most recent change to the scale of fees occurred in 2004,[41] and the previous change before that was in 1994.

2.8 It should be noted, however, that the cost scales prescribed by the rules only limit (i) the amount of costs recoverable as between parties to litigation; and (ii) the minimum which a client is required to pay to his or her lawyer. It is open to a party to retain a lawyer on a rate which exceeds the scale rates.

(iii) Funding arrangements

2.9 Contingency fees and CFAs.[42] Until recently, agreements for contingency agreements and CFAs were thought to be illegal under German law, and were expressly prohibited unless they were agreed *after* judgment in a case or settlement of the case. One objection to them was that they contemplate a lawyer being paid at less than the applicable scale fee where the lawyer's client is unsuccessful, which may be inconsistent with the underlying notion of "cross-subsidisation" (which allows lawyers to earn something equivalent to a "living wage").[43] However, a recent ruling of the German Constitutional Court[44] decided that the strict prohibition of contingency fees and CFAs as traditionally provided for in German statutory law was not in line with the German constitution (the Basic Law, or "Grundgesetz"). German law was therefore amended on 1 July 2008 to permit contingency fee agreements and

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[39] The German expression is "Quersubventionierung".

[40] This may be contrasted with e.g. the Italian Civil Procedure Code, where it is contemplated that the applicable scales of costs be reviewed every 2 years. A similar position applies in Slovakia, where cost scales are linked to a general price indexed, and the scales are adjusted approximately every 2 years. However, the adjustment of cost scales according to prevailing rates of inflation (or deflation) has an effect on legal aid funds, as lawyers who perform legal aid work are remunerated according to the applicable costs scale. Legal aid is discussed further, below.

[41] The change was partly driven by the "*need to adjust fees to the present economic situation*": draft law (Gesetzesentwurf) by the German Federal Government (Bundesregierung), BT-Drs.15/2403, page 1.

[42] German law does not make a distinction between contingency fee agreements and CFAs. The German expression for such agreements is "Erfolgshonorar".

[43] German Federal Lawyers' Act section 49b(1) and (2). It was, however, permissible for lawyers to enter into an agreements which provided for an uplift in fees (as occurs under CFAs), provided that such an agreement did not in any circumstance contemplate the lawyer being paid at less than the statutory scale.

[44] Bundesverfassungsgericht, judgment dated 12th December 2006 (1 BvR 2576/04).

CFAs to be used, but only in limited circumstances such as where a client does not qualify for legal aid and is unable to afford a lawyer.[45] The question of whether a person, who is ineligible for legal aid, is unable to afford a lawyer (and may therefore engage a lawyer on a contingency fee or CFA basis) is not entirely clear. A key consideration is whether a person in the client's position would not instruct a lawyer, on the basis of the expense of doing so, unless it were on the basis of a contingency fee or CFA basis.[46]

2.10 Legal expenses insurance. Before-the-event legal expenses insurance is used commonly (and has been for a long time) as a means of paying for a party's legal fees (whether claimant or defendant).[47] This is discussed further in section 4, below.

2.11 Third party funding. Third party funding is permissible under German law, but it is not widely used. This, too, is discussed further in section 4, below.

2.12 Legal aid. Legal aid is available in certain civil, administrative, social, employment and tax cases. Prospective claimants who wish to apply for legal aid are means tested, and their case must be likely to succeed before funding will be available. The decision as to whether an applicant will be granted legal aid is made by the court which is to decide the case. Legal aid is granted on the basis that the appointed lawyer will be remunerated according to the applicable costs scale.

2.13 Cost assessments. Costs are assessed shortly after judgment has been given. Costs are assessed by a "Rechtspfleger", a court official broadly similar to a costs officer in England and Wales. The assessment of court fees and scale fees is a mechanistic task, for which IT is readily available. In addition, the Rechtspfleger will allow reasonable "court expenses". These comprise the costs of attendance by factual witnesses and experts whom the court has called. In rare and exceptional cases, the Rechtspfleger may allow the costs of independent experts who have assisted the parties during the course of proceedings (for example, in complex clinical negligence or construction cases).

2.14 Small claims. Small claims procedures are implemented across most of Germany, as enacted by the various State (Länder) legislatures. The small claims procedures usually involve claims of less than €600, and endeavour to resolve such claims primarily by way of extra-judicial mediation. In practice the small claims procedure is not widely used, and does not operate so as to prevent a claimant from taking its case straight to court.[48] Germany has also recently implemented the European Small Claims Procedure[49] in respect of cross-border claims of €2,000.00 or less.

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[45] This is now reflected in the Lawyers' Fees Act (the "RVG") sections 4 and 4a. The German Federal Lawyers' Act section 49b(2) was also amended to include an explicit prohibition on comprehensive funding agreements by lawyers. The prohibition, however, only extends to the lawyer's own fees, not the fees of the opponent in court proceedings or to court costs.

[46] The prevailing view is that the question must be answered objectively, that is from the perspective of a reasonable person in the financial circumstances of the particular client: Mayer/Kroiß, *Rechtsanwaltsvergütungsgesetz* (2008).

[47] Prof Adrian Zuckerman, "*Lord Woolf's Access to Justice: Plus ça change…*" (1996) 59 Modern Law Review 773 at 791-795; Dr Matthias Kilian, "*Alternatives to Public Provision: the Role of Legal Expenses Insurance in Broadening Access to Justice: The German Experience*" (2003) 30 Journal of Law and Society 31.

[48] If a claim for less than €600 is brought by way of court proceedings, the court has a broad discretion as to the conduct of the case: German Civil Procedure Code, section 495. Such cases are conducted in an informal manner if the parties are unrepresented.

[49] EC Regulation No. 861/2007, which took effect on 1st January 2009. The procedure has been implemented in German Civil Procedure Code, section 1097ff.

2.15 Specialist courts. There are specialist courts in Germany, such as the "Kammer für Handelssachen" (Chamber of Commerce),[50] but no special cost rules apply to those courts.

3. INTERPRETATION BY THE COURTS AND COMMENTATORS

3.1 In large measure, the German cost rules, which have been in place since the mid-19th century,[51] are codified, self-explanatory and are generally regarded as working satisfactorily. The cost rules described above are regularly applied by the German courts, so as to effect a shifting of costs from successful to unsuccessful litigants, albeit in amounts prescribed by the applicable scales.

3.2 The concept of judicial precedent is not applicable in Germany as it is in England and Wales, and the decisions of the German courts usually deal with costs by a straightforward application of the applicable scales, rather than going into any exegesis on the law itself. Having said this, decisions of appellate courts such as the Higher Regional Courts (the "Oberlandesgericht") and the Federal Court (the "Bundesgerichtshof") are usually treated as persuasive by lower courts, even if not strictly binding upon them. The German courts also develop and apply judge-made law ("Richterrecht") in cases where the statutory law is fragmentary or incomplete.[52] Commentary by legal scholars and jurists is influential on the application and development of the law.[53]

3.3 The use of cost scales is regarded by the courts as beneficial, as their application gives effect to a central value enshrined in the German constitution, being the "rule of law".[54] The rule of law requires not only that there should be free access to the courts, but that litigation costs should be both predictable and reasonable.[55] It also requires the German legislature to ensure that access to the courts does not depend on the economic situation of an individual. One of the ways in which the legislature ensures access is by offering legal aid to people who meet the relevant criteria for such funding.[56]

3.4 Despite their longevity, the German laws concerning costs have been subject to recent legal challenges, including the following cases:

- Contingency fees / CFAs. The German Constitutional Court considered a challenge to the prohibition under German law of contingency fee agreements and CFAs.[57] The court decided that the strict prohibition on such agreements was

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[50] There are other specialist courts that deal with specific types of claims such as claims arising out of construction contracts, and competition law claims.

[51] In the late 1870's, Bismarck's government introduced the civil procedure and cost rules which laid the foundation for the rules which apply today in Germany. The costs system has been subject to occasional review and amendment, and the current rules concerning the recovery of lawyers' fees are based on the "Bundrechtsanwaltsgebührenordnung" (or "BRAGO") that came into force on 1 October 1957.

[52] See Werner Ebke and Matthew Finkin, Introduction to German Law (1996) pp16-21.

[53] Professor Stefan Vogenauer, "*An Empire of Light? Learning and lawmaking in the history of German law*" [2005] Cambridge Law Journal 481 and "*An empire of light? Learning and lawmaking in Germany today*" (2006) 26 Oxford Journal of Legal Studies 627.

[54] The German is "Rechtsstaatprinzip".

[55] A cognate notion is reflected in the "principle of equality" in Article 3 of the German Constitution. The "principle of equality" means that every person is equal before the law.

[56] This is reflected in a decision of the German Constitutional Court, being Bundesverfassungsgericht judgment dated 26th April 1988, 1 BvL 84/86.

[57] Bundesverfassungsgericht judgment dated 12th December 2006 (1 BvR 2576/04).

not in line with the German constitution. According to the court, the general prohibition of contingency fees / CFAs is intended among other things (i) to secure the independence of lawyers; and (ii) to safeguard clients from disadvantageous fee agreements. Although upholding the general prohibition, the court held that there should be certain exceptions, such as where an individual would not be able to pursue his or her rights without entering into on a contingency fee agreement or a CFA. Interestingly, the court also held that it would not be unconstitutional for the general prohibition on contingency fees and CFAs to be lifted, but whether this should happen is a matter for the legislature.

- The €30m cap. A challenge was made to the cap that applies on recoverable legal costs for claims worth more than €30m. The German Constitutional Court held[58] that the cap was not unconstitutional. In doing so the court acknowledged the legislature's desire to avoid disproportionate lawyers' fees being incurred, and pointed out that lawyers and their clients are free to agree on higher fees individually.
- Statutory fee scales. The ECJ's decision in *Cipolla*[59] confirmed that the use of statutory fee scales is in line with fundamental EU freedoms (particularly the freedom of establishment and services as set forth in Article 48 of the EC Treaty). The court considered the Italian cost rules. The court stressed that the national courts, when interpreting statutory cost rules, are obliged to consider if the cost rules aim to protect consumers. The court considered whether the cost rules facilitated the administration of justice, or alternatively whether they were unnecessary or disproportionate in their effect. German scholars[60] reason that *Cipolla* affirms that cost fee scales such as those applicable in Germany are in line with European law.

4. PRACTICAL CONSEQUENCES

4.1 There are number of important consequences of the application of the German cost rules.

4.2 Proportionate cost shifting. The costs recoverable by a successful party in litigation are linked to the amount in dispute. Save in exceptional cases,[61] recoverable fees cannot approach or exceed the amount in dispute, as they can under the law of England and Wales.

4.3 Scale used for charging clients. It is common for lawyers in litigious matters to be remunerated at a rate equal to that recoverable under the applicable costs scale. It is a relatively new phenomenon in Germany for lawyers' fees to be charged on the basis of hourly rates, leading to costs being payable in an amount exceeding the scale amount. Broadly speaking, it is medium to large size law firms who will usually charge clients on such a basis for commercial disputes. German lawyers in smaller disputes and those involving individuals will often charge their client according to the applicable scale. A study by the Soldan Institute[62] in 2006 revealed approximately 30% of lawyers' turnover was derived from fee agreements not using the statutory

[58] Bundesverfassungsgericht judgment dated 13th February 2007 (1 BvR 910/05 and 1 BvR 1389/05).
[59] Judgment of 5 Dec. 2006 – RS. C-94/04, Slg. 2006, I-11421.
[60] E.g., Wölfle, *Der EUGH stärkt dem RVG den Rücken, in: Anwaltsblatt* 2007, p130.
[61] Legal fees may approach or exceed the amount in dispute where the disputed amount is very small, e.g. €20.00. See paragraph 2.14, above, regarding small claims in Germany.
[62] The Soldan Institute is an independent and respected foundation which has conducted empirical research on the German legal system.

scales, and the remaining approximate 70% was under the statutory scales.[63] In smaller German law firms (where there are less then 5 lawyers), whose clients are often individuals, merely 22% of retainers were based on contractually-agreed fees.[64] The result of scales being used is that costs are predictable, and in practice estimates of costs given by lawyers to their clients may be made with a good degree of accuracy.

4.4 Hourly rates. The Soldan (2006) study reveals that where hourly rates are charged the average hourly rate for German lawyers is €182.00, but figures display a wide range of hourly fees depending on the size of the law firm, the size of the firm's place of business, the age and experience of the lawyer dealing with the case and his or her degree of specialisation. In larger law firms operating an international business, fees are much higher. In Eastern Germany (i.e. the former German Democratic Republic) the average fees are still considerably lower (i.e. 17% - 33% less).[65] The following table from the Soldan study illustrates the range of fees that are generally applied:[66]

Table 55.1: Average hourly rates in Germany

Practice Type	Average fixed hourly fee	Average minimum fee	Average maximum fee
Sole practitioners	€157	€119	€203
Firms with up to 5 lawyers	€177	€142	€228
Firms with up to 20 lawyers	€222	€179	€261
Firms with more then 20 lawyers	€289	€247	€335

4.5 There are other features of civil litigation in Germany which may have the effect of keeping the cost of litigation down:

- No disclosure. The German legal system does not use any procedure akin to standard disclosure under Part 31 of the CPR. Parties will plead the facts on which they rely. It is only if those facts are controverted that parties will lodge relevant documents on which they rely. Thereafter the court may order disclosure of other specific documents which are pertinent.
- Establishing the facts. Civil litigation in Germany is conducted using a technique called "Relationsmethode", which is a method of identifying what the relevant facts are, and which facts are in dispute. In broad terms, the process involves a claimant listing all of the relevant facts it relies on, and the defendant pleading which facts it disputes and why. In intermediate court hearings the judge handling a case will examine which facts (i) are disputed; and (ii) are relevant to the dispute. After the relevant and disputed facts have been identified, the judge may call for further evidence on those disputed matters. Once the further evidence is filed with the court, the judge will usually express (in a short hearing) a preliminary view on the facts. There may subsequently be further evidence adduced by the parties, after which the judge will give a final ruling. The effect of

[63] Christoph Hommerich and Kilian, *Vergütungsvereinbarungen deutscher Rechtsanwälte* (2006) (the "Soldan (2006) study").
[64] Soldan (2006) study, page 31 figure 7.
[65] Soldan (2006) study, page 70, table 17.
[66] Soldan (2006) study, page 66, table 14.

this "Relationsmethode" procedure is to require the parties to focus on the key facts in disputes, resulting in short hearing times.

- Witness evidence. Witness statements are not used. The parties will inform the court of the matters which identified witnesses can prove. Witnesses are usually only required to give evidence if the presiding judge believes it is necessary. If witnesses are cross-examined, the cross-examination is usually brief and the presiding judge can limit cross-examination.
- Court-appointed experts. Where expert witnesses are required for a case they are normally appointed by the court. The parties themselves do not usually appoint or retain their own experts, or if they do they bear the costs of their expert. An exception is only made in complex cases when independent expert witnesses are regarded as essential.
- Small legal teams. It is common for civil litigation to be conducted by a single lawyer, and even in large cases there may usually be only 2 or 3 lawyers working on any particular case.
- Short hearings. Another feature of German civil litigation is that hearings, even in large cases, are usually very short – maybe 1 or 2 hours.[67] It is uncommon for a case to be heard for more than 1 day. The reason hearings are short is because of the "Relationsmethode" (mentioned above) which the court applies in establishing the facts.[68]
- Length of cases. The great majority of civil cases are concluded within a year of commencement, and often within a matter of months. A study[69] conducted between 2002-2004 indicated that the average length of cases in the Local Courts ("Amtsgericht") was 4.4 months,[70] and in the Regional Courts ("Landgericht") the average duration was 7.2 months.[71]

4.6 Funding arrangements. A further study conducted by the Soldan Institute in 2007[72] compares the forms of funding used for litigation in Germany with those in England and Wales. A summary of the study's findings appears on the next page.

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[67] Although the German Civil Procedure Code (section 272(1)) indicates that cases should be resolved in a single hearing, it is not uncommon for there to be, for example, 2 or 3 short hearings before judgment is given.

[68] The average time scales for disposal of cases in the Local Courts ("Amtsgericht"), Regional Courts ("Landgericht"), Higher Regional Courts ("Oberlandesgericht") and Federal Courts ("Bundesgerichtshof") are all set out in an annual publication of Judicial Statistics.

[69] Hommerich et al, *Rechtstatsächliche Untersuchung zu den Auswirkungen der Reform des Zivilprozessrechts auf die gerichtliche Praxis – Evaluation ZPO Reform* (2006).

[70] That is, from the time the claim was filed to the time the case resolved (whether by judgment or settlement). In cases where a judgment was given on the merits the average was 7.8 months, and where the parties settled the average was 5.3-5.5 months.

[71] In cases where judgment was given on the merits, the average length was 11.2 – 11.7 months. In cases which settled, the average duration was 8.4 months.

[72] Hommerich and Kilian, *Mandanten und ihre Anwälte: Ergebnisse einer Bevölkerungsumfrage zur Inanspruchnahme und Bewertung von Rechtsdienstleistungen*, Bonn (2007) (the "Soldan (2007) study") page 139 figure 47.

Table 55.2: Comparison of funding forms in Germany and England & Wales

	Germany	England & Wales
Client paying with its own money	47%	60%
Legal expenses insurance / commercial third party funding	35%	4%
Legal aid	8%	13%
Fees paid by a private third party	6%	7%
Pro bono	2%	2%
Other	2%	9%

4.7 Importance of legal expenses insurance. What is evident from the Soldan study is the significant role that legal expenses insurance plays in Germany when compared with England and Wales. It is common for individuals in Germany to take out legal expenses insurance to cover their legal fees in the event that they are involved in litigation, whether as a claimant or a defendant.[73] Legal expenses insurance covers individuals for costs according to the statutory scale. The advantage to insurers is that the scale of costs makes the extent of the insurer's exposure predictable. The widespread use of legal expenses insurance is seen as the driver of the widespread use of cost agreements according to the cost scales. It is difficult for lawyers whose clients are covered by legal expenses insurance to negotiate an individual fee agreement for remuneration at a rate above the applicable scale.[74]

4.8 Third party funding. Third party funding, in contrast, is only used in approximately 0.4% of cases according to the Soldan 2007 study. Its limited use appears to be a consequence of (a) it being relatively expensive (funders commonly ask for 25%-30% of any amount awarded, depending on the size of the claim), and is only economical for monetary claims above a certain value (usually around €50,000, but it does vary considerably between funders); (b) funders usually only agreeing to accept cases that have a strong chance of success; and (c) the widespread use of legal expenses insurance, which to a large extent takes away the need for private funding of litigation.

4.9 Contingency fees and CFAs. The role and effect of contingency fee and CFA agreements has not yet been assessed, which is unsurprising given that they have only recently been permitted under German law. Nevertheless, according to the Soldan Institute study (2006), before the rules on contingency fees and CFAs were amended, 8% of the German lawyers occasionally agreed upon contingency fees or CFAs.[75] Another 59% of the German lawyers stated that they occasionally adjusted their invoices depending of the results of a case.[76]

4.10 "Cross-subsidisation". The principle of "cross-subsidisation" (see above) contemplates a lawyer earning a reasonable living through taking a mixture of small,

[73] According to Breyer, *Kostenorientierte Steuerung des Zivilprozesses* (2006) (Mohr Siebeck), legal expenses insurance is widely used in private labour law, traffic and landlord / tenant cases. It is, however, uncommon for legal expenses to be used in commercial cases, because such insurance is seldom available.
[74] The Soldan (2006) study p155.
[75] The Soldan (2006) study page 103, paragraph 5.4.2 and figure 34.
[76] The Soldan (2006) study page 105, paragraph 5.4.3 and page 106 figure 36.

medium and high value claims, with the remuneration from the medium and high value claims compensating for the relatively low scale fees for small value claims. The operation of this principle is quite important, as nearly 70% of claims made in the German courts involve relatively small amounts, i.e. €2,000 or less.[77] In practice it seems that "cross-subsidisation" does not always occur for many firms, particular smaller firms that take a number of small cases and few high-value cases. The Soldan (2006) study revealed that 38% of participants believed that "cross-subsidisation" was "not workable".[78]

4.11 Cost-effectiveness of litigation. German legal fees (especially where the statutory scales are used as a basis for charging) are relatively low when compared to lawyers' fees in other parts of Europe. The World Bank's "*Doing Business Report*" (2009) ranks Germany at 9th position in the world for the ease of enforcing contracts, with legal costs on average representing 14.4% of the claim value. The World Economic Forum's "*Global Competitiveness Report 2008-2009*" puts Germany 4th (out of 134 countries) for the efficiency of its legal framework.[79]

[77] The figures are derived from the 2006 report of the Federal Office for Statistics (Bundesamt für Statistik) entitled "*Justizbericht in Zivilsachen*" ("*Report on the Judiciary in the Area of Civil Law*").

[78] Soldan (2006) study page 22 figure 1. Cross-subsidisation has been applied in Germany for approximately 130 years. It was developed at a time when most German law firms were small, and handled a variety of cases. In the modern German legal world, where some firms will handle mainly larger cases and not small ones, and vice versa, it is difficult for lawyers who handle smaller claims to cross-subsidise.

[79] Denmark, Singapore and Switzerland ranked ahead of Germany in 1st, 2nd and 3rd places respectively. The United Kingdom's legal framework was ranked 18th in terms of its efficiency.

CHAPTER 56: FRANCE

1. INTRODUCTION

1.1 Under the French legal system, there is only limited provision for cost shifting. The court will order an unsuccessful party to pay the court fees and related charges. The court also has a discretion to order that an unsuccessful party should pay part of the successful party's legal fees, but in practice any such sums awarded are extremely modest.

1.2 Litigants in France are usually funded by their own money, by legal expenses insurance or by legal aid (which is means but not merits tested). There is not a developed market for alternative forms of funding.

2. RELEVANT RULES AND LEGISLATION

(i) Cost rules

2.1 Limited cost shifting. The relevant cost rules are contained in the Code of Civil Procedure ("CPC"). French law adopts the "loser pays" approach in relation to the payable fees of the court (the "*depens*").[80] Each party is required to bear its own legal costs, subject to any award made in respect of the "*frais*", as explained below. The applicable principles are as follows:

- The parties to court proceedings are liable to pay the "*depens*", being "the fees, taxes, government royalties or emoluments levied by the clerk's offices of courts or by the tax administration with the exception of fees, taxes and penalties which may be due on documents and titles produced in support of the claims of the parties, the costs of translation of the documents when such translation is requested by law or by an international commitment; the indemnities of the witnesses, the fees of the experts, the fees of the bailiffs, the emoluments of the law officials and public officers, the fees of the lawyers for the part of them which are regulated (legal aid or postulation[81] before the Tribunal de Grande Instance), the costs of notification of the documents in a foreign country".[82]

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[80] Although there are some elements of the *depens* that are not purely court fees. For example, certain disbursements come under the umbrella of the *depens*.

[81] A "postulation" is a charge that arises from the jurisdictional limitations placed on lawyers in France. Generally speaking, a lawyer is only entitled to represent a client within the jurisdiction covered by the Bar Association with which he or she is registered. As a simple illustration of how a postulation charge may work, suppose that a lawyer who is a member of the Parisian Bar Association wishes to represent a client in the courts of Nice. If the lawyer was not also a member of the Nice Bar Association, he or she would be required to instruct a correspondent lawyer to file court documents and appear at procedural hearings. The Parisian lawyer would, however, be entitled to appear at the trial of the case. The Nice lawyer would be entitled to charge a "postulation" for his or her services. There are scales for determining the appropriate postulation.

[82] Article 695 of the CPC. The effect of this provision is to require most court costs to be paid for by the parties. However, the principle remains that justice in France is free, even if this principle is restricted to the fact that the judge and other court officials are paid by the State and not by the parties, as reflected in Act No. 77-1468 of 30 December 1977. The principle of free justice has existed since the time of the French Revolution.

- However, the *depens* "shall be borne by the losing party", although the courts may make alternative orders where appropriate.[83]
- The courts also possess a discretionary power to order the losing party to pay some of the legal fees of the successful party (the "*frais*") which are not included in the *depens*. A judge, in deciding whether a *frais* should be awarded, will take into account the equity of the case, the conduct of the parties in the litigation and the economic circumstances of the unsuccessful party.[84] It is usual for a *frais* to be awarded. However, even where it is awarded, the *frais* may only represent a small part of the successful party's legal costs.[85]

2.2 Cost assessments. The judge who determines the case also decides by whom the *depens* and, if relevant the *frais*, is to be paid.[86] The judge will determine amount of the *depens*, by applying the statutory scale, which yields a fixed, ascertainable amount. The decision to order that a *frais* be paid, and if so the amount of the *frais*, is within the discretion of the judge. However, a *frais* will usually represent a fraction of the successful party's legal costs. It is not intended to act as a complete indemnity.

(ii) Funding arrangements

2.3 Contingency fees and CFAs. Although it is generally open to lawyers and their clients to agree freely the terms upon which the lawyer is to be paid, contingency fees are not permitted under French law.[87] Article 10 of the Act No. 71-1130 of 31 December 1971 relevantly provides:

> "Any determination of fee that would solely depend on the result of the case is forbidden. It is lawful for the agreement to provide for payment in respect of work done for a complementary fee depending on the result obtained for the service rendered."

Thus it can be seen that, although "no win no fee" agreements are prohibited (because remuneration would depend solely on the result of the case), success fees are permissible in France. Such success fees (unlike success fees under English CFAs) may be a percentage of any sums recovered by the client.

2.4 Legal expenses insurance. Before the event legal expenses insurance is widely used in France. It was originally found commonly as an ancillary part of other forms of insurance (e.g. motor vehicle insurance), but it is now usual for legal expenses policies to be taken out in their own right. Such policies usually apply in respect of a wide range of civil litigation. Where LEI cover is taken out, it is the insured's right to choose his or her own lawyer, and the insurance company may only nominate a lawyer if the insured requests that this be done.[88] It is, however, usual for LEI policies to place a financial cap on the cover provided. If the legal fees exceed the cap, the client must bear the additional cost. However, if the insured is successful in his or her claim, any amount recovered for legal costs (as a *frais*) is first to be paid to the insured in respect of this excess of cost, with any leftover money paid to the LEI insurer.[89]

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[83] Article 696 of the CPC.
[84] Article 700 of the CPC.
[85] It is not uncommon for the *frais* to be an amount between €2,000 and €5,000.
[86] In accordance with Article 696 of the CPC. There is not a distinct group of court officers who fulfil the role of cost assessors or judges.
[87] Article 10 of the Act No. 71-1130 of 31 December 1971.
[88] Statute of 31 December 1989, modified by Act 2007-210 of 19th February 2007.
[89] Article L. 127-8 of the Insurance Code.

2.5 After the event insurance. After the event insurance is not used in France. This may be a consequence of the fact that any cost incurred in taking out such insurance would not usually be recoverable in court proceedings.

2.6 Third party funding. Whether third party funding would theoretically be allowed under French law is unclear to me on the basis of present research. However, in practice third party funding is not used. This may possibly be due to (a) major third party funders not having established significant businesses in France; and (b) the widespread availability of legal aid.

2.7 Legal aid. Legal aid is available for litigants in civil cases. Eligibility is means tested,[90] but not merits tested. A person who is granted legal aid is entitled to choose his or her lawyer, or if no choice is made a lawyer will be provided. Where a litigant is entitled to "full" legal aid, his or her lawyer is only entitled to be paid the amount granted in legal aid. If legal aid funding is "partial", it is open to the lawyer to negotiate a further fee, on top of the amount he or she will receive through legal aid.

(iii) Small claims and specialist tribunals

2.8 Small claims. There are specialist courts and tribunals in France that deal with smaller claims. The Tribunal de Proximite is the lower court, which handles civil claims of under €4,000. Cases in this court are heard by a single judge, who is usually not a full-time judge, but has legal knowledge and experience.[91] Legal representation is not mandatory, and the proceedings before this court are usually conducted orally. The decisions of the Juge de Proximite cannot be appealed on questions of fact.[92]

2.9 Another small-claims court is the Tribunal d'instance, which deals with civil claims of under €10,000. Cases in this court are heard by a professional judge and proceedings are conducted orally. It is not mandatory to be represented by a lawyer in the Tribunal d'instance, but I am told by practitioners that parties often are represented in this court. The decisions of the Tribunal d'instance are issued fairly quickly (usually within about 4 or 5 months of the commencement of proceedings),[93] and it is generally regarded as an efficient court.

2.10 In both the Tribunal de Proximite and the Tribunal d'instance, the unsuccessful party is usually required to pay the *depens* and sometimes the *frais*.[94] However, no *depens* is usually payable in respect of the appointment of a lawyer, given that it is not mandatory for a party to be represented by a lawyer.

2.11 Finally, it should be noted that the European Small Claims Procedure,[95] concerning cross-border claims of up to €2,000 in value, took effect in France on 1 January 2009.[96]

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[90] Under the current criteria, a person is ineligible for legal aid if his or her income exceeds €911 per month for "full" legal aid, and €1,367 for "partial" legal aid. The monetary thresholds for legal aid are increased according to the number of dependents that the applicant has.

[91] Such a person may, for example, be a semi-retired judge or lawyer.

[92] Cases from the Tribunal de Proximite can, however, be taken to the Supreme Court (Cour de Cassation), but only on points of law.

[93] See section 4, below, for the average length of proceedings in French courts.

[94] I am told that orders to pay the *frais* are made less often against individuals than against companies.

[95] Being EC Regulation no 861/2007.

[96] Unlike the UK, in France EC Regulations take automatic effect, without needing to be

2.12 Specialist courts. There are specialist courts in France, such as the Conseil des Prud'hommes which deals with labour-related claims.[97] There are also French Commercial Courts that specialise in commercial law. Cases before the Commercial Courts concern either "business to business" disputes, or disputes brought by a consumer against a business. Unlike in the Commercial Court of England & Wales, judges in the French Commercial Courts are not professional judges. They are usually professionals in a particular trade, who are elected by their peers, and conduct hearings according to commercial custom and usage - without written evidence. The efficacy of these courts has on occasion been brought into question. The specialist courts in France do not have specific cost rules,[98] and generally apply the "loser pays" rule, so that an unsuccessful party will be required to pay the *depens* and possibly also a *frais*.

3. INTERPRETATION BY THE COURTS

3.1 General approach to cost rules. The French courts generally apply the "loser pays" rule, and order the unsuccessful party to pay the *depens*, and usually also a *frais*. French judges, in the civil law tradition, do not create law. Thus there is no proper case law in France. However, the lower courts do rely upon the decisions of the higher court (Cour de Cassation) in interpreting legislation, and such decisions are regarded as being of great importance and may establish long-lasting doctrine known as "*jurisprudence constante*". While there is no *stare decisis* rule forcing the lower courts to decide according to the precedent, they tend to do so in practice with respect to *jurisprudence constante*. The judges must substantiate their decisions, explain the grounds of fact and law on which they base their decisions, and are subject to the oversight of the Cour de Cassation.

3.2 *Depens.* If a claimant is partially successful in its claim, the defendant may still be ordered to pay the *depens*, or the court may order that it be paid by the parties in proportions.[99] The rules concerning the *depens* are self-explanatory, and the list of costs provided by the Code of Civil Procedure are prescriptive.[100] There is limited room for a court to depart from the tariffs prescribed by the Code.

3.3 *Frais.* The courts have a discretion to order that the unsuccessful party in litigation is required to pay the successful party an amount (a *frais*) in respect of its legal fees. A court may order that a *frais* be paid where, among other things, the successful party is of limited financial means, or where the justice of the case requires that he or she be compensated for some of his or her actual legal expenses. A *frais* is, however, only intended to provide a partial indemnity to the successful party for its legal costs. The amount of a *frais* may be in the order of €2,000 to €5,000 for medium to large cases in civil litigation (although there would not appear to be any empirical data available concerning such amounts). One commercial avocat told me[101] that the largest *frais* ever awarded in his experience was €15,000 and that was in a very substantial commercial action.

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enacted individually in the domestic law.

[97] Including small claims. There is no financial threshold for claims brought in the Conseil des Prud'hommes.

[98] Most of the provisions of the CPC are applicable in these courts.

[99] The court may order proportionate payment e.g. if there are 2 unrelated issues in a case, where the claimant succeeds on one but loses on the other.

[100] Article 695 of the CPC. The rigid application of the Code to determine the *depens* was affirmed by the Cour de Cassation, 2e civ., 6th May 1987.

[101] At a meeting in Paris on 17th April 2009.

3.4 Information on legal fees. The disclosure of fees (and recommendations by local bar associations as to fees that should be charged) is affected by French competition law. In 2001, the Conseil de la Concurrence (the Competition Court) decided a case concerning a document entitled "recommendations as to the lawyers fees", published by the Nice Bar Association for its members in the early to mid 1990s.[102] This was held to breach French competition laws. The publication infringed a law proscribing behaviour that has "any direct or indirect influence on the structure of competition in the profession". The Conseil decided that the indicative list regarding lawyers' fees issued by the Bar Association exercised such an influence, and therefore operated in the nature of a cartel. The Bar Association was ordered to stop the publication of the indicative recommendations and to pay a fine.

3.5 There is virtually no publicly available information in France on fees charged by lawyers. This is, to a large extent, the result of (i) legal fees not being regulated (i.e. "free market" conditions apply);[103] and (ii) the matter of legal fees being regarded as a private matter between a lawyer and his or her client.

4. PRACTICAL CONSEQUENCES

4.1 Effects of limited cost shifting. The fact that claimants in French civil cases rarely recover anything like their actual costs incurred in litigation appears to have two conflicting consequences. First, a would-be claimant may be discouraged from commencing proceedings, or if proceedings are commenced a claimant may seek an early settlement, to avoid incurring irrecoverable costs. (The same monetary disincentives do not, of course, apply to persons who are funded by legal aid.) Secondly, however, I am told that a number of unmeritorious cases are pursued, because neither claimants nor defendants are at risk of any substantial adverse costs order.

4.2 Basis of charging. Generally speaking, lawyers in France charge hourly rates for work performed in relation to civil cases. It is difficult for lawyers to anticipate all of the steps in "heavy" or substantial proceedings (and the amount of work required for each step), which is why lawyers rarely charge on a fixed fee or similar basis for such cases. However, fixed fees are not uncommon in respect of smaller and medium cases. As previously mentioned, there is no publicly available information on the hourly rates usually charged by lawyers. However, I am told by practitioners[104] that hourly rates (when charged) usually range between about €200 and €400, depending upon the nature of the firm and the size of the case.

4.3 VAT. A related issue is the level of VAT which is payable on legal services. In France it is 19.6%.[105] Although a business litigant will be able to claim back the VAT it pays for legal representation, a person who is not in business is unable to do so. Given the limited cost shifting that applies under the French system, VAT can and does add considerably to the cost of accessing justice.

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[102] Decision of Conseil de la Concurrence, 00-D-52 of January 15, 2001.

[103] However, French lawyers are only entitled to enter into fee agreements on terms which accord with the financial means of their clients: Article 10 of the Law of 31st December 1990.

[104] At a meeting with five practitioners in Paris on 17th April 2009.

[105] For necessities such as food, VAT is 5.5%.

(i) Funding of litigation

4.4 In the main, civil litigants are usually funded by (a) their own money; (b) legal expenses insurance; or (c) legal aid. Other forms of funding do not feature in civil litigation in France.

4.5 LEI and legal aid. LEI and legal aid are to a large extent alternatives. A person who has taken out an LEI policy will not usually be eligible for legal aid, and a person who is eligible for legal aid may not be able to afford LEI cover. This has caused some difficulties in France, where attempts have been made to reduce or control the legal aid budget. One suggested method by which this could be done is encouraging the greater use of LEI. However, as has been observed, the difficulty with that approach is that those people who are eligible for legal aid will often not be able to afford LEI.[106]

Legal aid in France is means tested but not merits tested. One of the consequences of this is that vexatious litigants, or litigants with hopeless cases, have access to public funds as a matter of right to pursue their claims. Around 1/5th of claimants in civil cases are funded by legal aid.[107]

(ii) The nature of civil litigation in France

4.6 There are aspects of court procedure in France that have an impact on the cost of accessing justice.

4.7 Court procedure - generally. Civil litigation in France is managed by a judge, who leads and controls the proceedings.[108] The judge will direct the steps to be taken by the parties in the proceedings, and call upon the parties to produce to the court evidence that the judge regards as relevant.

4.8 Legal representation. Although it is permissible for a litigant to be self-represented in many French courts (especially the ones with limited monetary jurisdictions),[109] in the higher echelons of the French court system[110] it is compulsory to be legally represented. In small cases, especially before the lower courts, the procedure is very simple and a non-lawyer can easily follow it.

4.9 Disclosure. There is no disclosure or similar procedure under French law. Having said this, during the course of court proceedings a judge may order the disclosure of a particular document, on demand of the other party, if the demand is legitimate and necessary.[111] I a told that in France standard disclosure, such as under the Civil Procedure Rules of England and Wales, is regarded by many French legal practitioners as expensive, time consuming, and creating a risk of exposure of

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[106] R. Martin, *Deontologie de l'avocat*, Litec, p. 26.

[107] The figure was 20.7% in the year 2006: Les chiffres-cles de la Justice, October 2007, Secretariat General Direction de l'Administration Generale et de l'Equipement, Sous-Direction de la Statistiaue, des Etudes et de la Documentation.

[108] It would not be accurate to describe civil litigation in France as "inquisitorial" in nature. The court will exercise control over proceedings, but it does not conduct an inquiry.

[109] E.g. the Tribunal d'Instance and the Conseil des Prud'homme, discussed above in section 2 in relation to specialist courts and tribunals.

[110] I.e. before the Tribunal de Grande Instance, the Courts of Appeal and the Cour de Cassation (Supreme Court).

[111] Article 140 of the Code of Civil Procedure. If the relevant document is not produced, the judge will draw appropriate adverse inferences. The judge also has power to send a court official or expert to a party's premises, to make a specific search.

confidential information and trade secrets. On 17th April 2009 I discussed this issue with a number of practitioners in Paris (one of whom had spent six months in the litigation department of a London firm of solicitors). They were all firmly of the view that the French approach to disclosure was satisfactory and enabled the court to do justice. They regarded the English approach as needlessly extravagant.

4.10 Witness evidence. Witness statements are often used in French civil litigation.[112] They are generally regarded as beneficial, in that they may remove the need to require a witness to come to court to give evidence.[113] In practice, witnesses are seldom required to attend court. If a witness does give oral evidence, he or she will be questioned by the judge. No cross-examination of witnesses is permitted by parties or their representatives. This is regretted by some practitioners.

4.11 Experts. The French courts will appoint an expert where it is considered appropriate, i.e. where such evidence is needed to assist the court. The cost of court-appointed experts[114] forms part of the *depens*, and will be ultimately payable by the unsuccessful party.[115] It is open to parties to appoint their own experts, if they wish. However, successful parties will recover at best a very modest *frais* in respect of their own legal costs and expert fees.

4.12 Length of hearing. In most cases, the average court hearing for a civil proceeding will not last for more than a few hours, or possibly a day in exceptional cases. Although court hearings are not usually very long, it is common for cases to be listed without a specific hearing time, meaning that much time can be spent by lawyers waiting in court for their case to be heard.[116]

4.13 Length of proceedings. Statistics are available as to the average length of court proceedings, that is from the commencement of proceedings (or an appeal) to the time that judgment is given. A 2006 survey reveals that the average length of proceedings in the French courts were as follows:[117]

- Court of Appeal: 13.3 months.
- Tribunaux de Grande Instance: 6.6 months.
- Tribunaux d'instance et Juges de Proximite: 4.7 months.
- Commercial Courts: 6 months.
- Conseils de Prud'homme (labour): 9.9 months.

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[112] Although there are some courts, e.g. the French Commercial Courts, in which evidence is only given orally.

[113] Witness costs, such as costs for travelling time, time spent in court, travel and accommodation expenses are all payable to a witness by the court, in accordance with a particular scale. Witness costs form part of the *depens*.

[114] Experts are paid according to a scale or "barême": Articles 248, 262, 269, 724 and 725 of the Code of Civil Procedure. The scale fees for experts are low, which means that high-quality experts are not necessarily attracted to acting as court-appointed experts.

[115] In the first instance the party seeking the court appointed expert will put the court in funds to meet the expert's fees. In the event of success, that party will recover the sum paid out in respect of expert fees, as part of the *depens*.

[116] Which time will usually be charged to the client.

[117] Les chiffres-cles de la Justice, October 2007, Secretariat General Direction de l'Administration Generale et de l'Equipement, Sous-Direction de la Statistiaue, des Etudes et de la Documentation.

Practitioners have expressed some scepticism about the figure for Tribunaux de Grande Instance (suggesting that 12-18 months is more realistic) and the figure for the Commercial Courts (suggesting that 12-18 months is more realistic).

4.14 Some court proceedings in France can take a long time to reach a conclusion. In one egregious case decided in 2008,[118] the Cour de Cassation ordered the French government to pay damages to an individual because of the length of the procedure. The claimant, who was seeking compensation after suffering an industrial accident, had to wait 14 years before a final decision concerning his indemnity was issued. The Cour de Cassation ruled that this delay revealed a malfunctioning of the justice system.[119]

4.15 Cost-effectiveness of litigation. The World Bank's "*Doing Business Report*" (2009) ranks France at 10th position in the world for the ease of enforcing contracts, with legal costs on average representing 17.4% of the claim value. The World Economic Forum's "Global Competitiveness Report 2008-2009" puts France 16th (out of 134 countries) for the efficiency of its legal framework.

[118] Cass. 1re Civ. 20th February 2008, nr 06-20.384.
[119] A similar case was *Malve v France* (no. 46051/99 [2001] ECHR).

CHAPTER 57. THE NETHERLANDS

1. INTRODUCTION

1.1 In civil litigation in the Netherlands there is cost shifting (applying the "loser pays" principle) according to cost scales.

1.2 The court system in the Netherlands is divided into some 19 Districts, each with its own courts.[120] Within each of these Districts are Subdistricts that also have their own courts that deal with smaller claims[121] – in which parties are often not legally represented. Legal representation is required in the District Courts and appellate courts above them.

2. RELEVANT RULES AND LEGISLATION

(i) Cost rules

2.1 Cost shifting. Article 237 of the Dutch Code on Civil Procedure[122] enshrines the general principle of cost shifting in the following terms: "the party who has been proven wrong, shall be ordered to pay the costs". It is, however, open to the court to order that there be partial cost shifting where a party has only met with partial success. A successful party may be disallowed costs where it was responsible for unnecessary or wasted costs in the litigation. The courts are only required to give minimal reasons for their decisions on costs, and usually do so in terms which paraphrase article 237 of the Dutch Code on Civil Procedure, with little elaboration on the specific reasons for making an order. It is, furthermore, permissible for parties to contract out of Article 237, so as to agree that one or other party is to pay the cost of court proceedings in any event.

2.2 Rights of appeal. A significant aspect of the Dutch legal system is that a party who is dissatisfied with the decision of a lower court may in effect be able to re-argue its case by appealing to the Court of Appeal. Parties may, within certain limits, amend and extend their claims, introduce new facts and new evidence and alter the grounds of their claims and defences. It is, furthermore, possible to appeal as of right from the Court of Appeal to the Supreme Court of the Netherlands.[123] The fact that there are almost unrestricted rights of appeal, combined with the ability of a party to re-argue its case (or even run a different case) on appeal to the Court of Appeal, means that decisions on costs can and are made afresh on appeal, without it having to be demonstrated that the lower court fell into error.

2.3 Recoverable costs and court fees and expenses payable. The judge who hears a case will also make an award on costs, determining the amounts payable in respect of (a) the successful party's recoverable costs and expenses; and (b) court fees.[124]

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[120] The District Court is the "Rechtbank".

[121] A Subdistrict court is a "Kantongerecht". The Subdistrict courts have a jurisdictional limit in civil disputes of €5,000, although the Dutch government has recently announced that it intends to increase the limit to €25,000.

[122] The "*Wetboek van Burgerlijke Rechtsvordering*", which is usually abbreviated to "Rv". The Rv applies to proceedings conducted in the various courts in civil cases.

[123] Although in the Supreme Court (the "Hoge Raad") it is generally not permissible for a party to seek to introduce new evidence. The Supreme Court will usually not revisit findings of fact made in the lower courts.

[124] The amount of court fees ("Griffierechten") payable in a case depends on a number of

Although the court has a total discretion in relation to the amount of costs awarded, in practice all courts adhere to an unofficial but published tariff list, called the "*Liquidatietarieven*".[125] The scale provided by the *Liquidatietarieven* operates to ensure that recoverable costs are kept in proportion to the amount in dispute.

2.4 The calculation under the *Liquidatietarieven* of recoverable lawyers' fees depends on the value of the claim, and the steps that were taken in the proceedings. Each procedural step is worth a point (minor acts are worth 0.5 point). There are 8 levels. The determination of the applicable level depends on the monetary value of the claim at the date of the first hearing. At level 1, one point attracts a tariff of just under €400 (with a maximum of 5 points). At level 8, one point is worth approximately €3,300 (there are no limits on the amount of points that may be accrued at level 8). When calculating the costs payable by a party, the court simply identifies the number of procedural steps in the case, tallies the points, and multiplies by the applicable tariff in respect of each point. The courts usually show their calculations in their reasons for judgment.

2.5 Worked example. The following is an illustration of how these cost rules apply to determine the amount payable in Dutch civil litigation. Suppose a claimant brings an action for €12,000, and the defendant counterclaims for €5,000. The matter proceeds by way of a writ of summons, defence and a counterclaim, a defence to the counterclaim, followed by a 1 day court hearing where a witness gives evidence and is cross-examined (on both the claim and counterclaim, which overlap). The claimant is wholly successful in obtaining judgment for the €12,000 claimed, with the defendant's counterclaim failing entirely. In such a case the value of the claim would be classed as level II (the level II banding being €10,000 - €20,000). Each relevant step taken in the proceedings concerning the claim attracts a point with a value of €452 (being the level II amount). There were four relevant steps for the purpose of calculating costs, being (a) the filing of the summons; (b) the defence to the summons; (c) the hearing itself; and (d) the fact that a witness was called and cross-examined at the hearing. The amount of costs payable by the unsuccessful party would therefore be 4 x €452, i.e. €1,806.

2.6 Additionally, the unsuccessful defendant would be required to pay the claimant's costs of defending the counterclaim. The €5,000 claimed by the defendant would be classified as level I (which applies to claims of less than €10,000). The tariff value in level I is €384 per point. For the purposes of calculating the costs of the counterclaim there were 3 relevant steps, being (a) the filing of the counterclaim; (b) the defence to counterclaim; and (c) the hearing. The examination (and cross-examination) of the witness at the hearing would not count for the purpose of calculating costs, because under the cost rules it is treated as already having been covered by the calculation of costs payable to the claimant in respect of its claim. The amount of costs payable by the unsuccessful defendant in respect of its counterclaim would therefore be 3 x €384, i.e. €1,052.

2.7 An unsuccessful party is required, in addition to paying the successful party's costs calculated in accordance with the *Liquidatietarieven*, to reimburse the successful party for all of the court fees it has paid in the litigation.

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factors, including the value of the claim, the court in which the claim is brought (or appealed), and whether the claimant is a natural person or a corporation. Court fees are fixed under statute law (the "*Wet en Besluit Tarieven Burgerlijke zaken*" for civil cases, and the "*Wet Tarieven Administratieve zaken*" for administrative cases) and published on the website www.rechtspraak.nl.

[125] The Liquidatietarieven is published on the courts' website: www.rechtspraak.nl.

2.8 Intellectual property cases. The Netherlands has implemented EU Directive 2004/48/EC, which contemplates (in Article 14) a successful party in intellectual property litigation being paid its reasonable and proportionate legal costs and expenses, unless the equity of the case dictates otherwise.[126] The *Liquidatietarieven* does not apply to intellectual property cases. However, the effect of the Directive in relation to costs in intellectual property cases has been emasculated by guidelines issued by the Dutch courts, as noted in section 3 below.

(ii) Funding arrangements

2.9 Contingency fees and CFAs. The Dutch Bar Association prohibits lawyers from acting on a "no win, no fee" basis.[127] However, it is permissible for a lawyer to be retained on a contingency fee agreement or CFA, provided that the agreement entitles the lawyer to be paid his or her disbursements, plus a modest or reasonable salary, in the event of losing. There are no established criteria for determining whether a contingency fee agreement or CFA provides adequate remuneration in the event of the lawyer's client being unsuccessful. In the event of success, the lawyer is entitled to a contingent fee or success fee, provided that the same is not extravagant.[128] The contingent fee or success fee of a lawyer (under a contingency fee agreement or CFA) is not recoverable from an unsuccessful opponent, because the opponent is only required to pay the successful party's costs in accordance with the *Liquidatietarieven*.

2.10 Legal expenses insurance. Before-the-event legal expenses insurance, or "legal aid insurance" as it is referred to in the Netherlands, is permitted under Dutch law and is widely used (see section 4, below). A legal expenses policy is required to state that the insured is entitled to choose its own lawyer, and the insurer is required to pay the insured's lawyer within the financial limits of the particular policy.

2.11 After-the-event insurance. ATE insurance is permissible under Dutch law, although it would not appear to be used in practice.

2.12 Third party funding and mass tort claims. TPF is permissible under the law of the Netherlands and is an increasingly common feature of the litigation landscape, particularly in "mass tort" proceedings. Although there are no material restrictions under Dutch law on TPF, its use in "mass tort" proceedings is a function of the legal limits on the use of contingency fee agreements and CFAs (mentioned above), plus the fact that US-style class actions are not allowed. In "mass tort" proceedings, a not-for-profit foundation or association (which may be set up and managed by the claimants' lawyers) will act for a group of claimants, and will usually ask each claimant initially for a small amount of money (an "entrance fee") to represent them. It is permissible for a representative foundation or association to claim a success fee in the form of a percentage of any money awarded by the court, or a pre-agreed amount. But a success fee can only be agreed on a not-for-profit basis, so as to provide the lawyers acting for the claimants with a reasonable remuneration for their work – not to give them a windfall profit from any damages award.

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126 This has been implemented in Article 1019h of the Dutch Code on Civil Procedure.

127 Article 25 lid 2 Gedragsregels (Professional Code of Conduct).

128 Where a court considers a contingency fee agreement or CFA to provide the lawyer with an "extravagant" remuneration, the court will strike down the agreement, and permit the lawyer to recover a reasonable remuneration: President of the Court of the Hague dated 16th February 2007, in the case of M. von Saher-Langenbein, te Greenwich (V.S.) v Mr R.O.N. van Holthe tot Echten (lawyer), published in NJF 2007/124 or NJ 2003/34.

2.13 There is no prohibition under Dutch law against the assignment of a cause of action, nor any rules akin to those restricting maintenance and champerty under the law of England and Wales. Third party funders may therefore invest in litigation by taking an assignment of a cause of action, coupled with a power of attorney to invoke the assignor's rights.

2.14 Legal aid. Individuals in the Netherlands (but not companies) with low income and limited assets may be eligible for state-funded legal aid ("toevoeging" or "gesubsidieerde rechtsbijstand"), which is means and merits tested. However, in relation to merits testing an applicant for legal aid will only be refused it if after a prima facie review of the documents submitted with its application it is clear that its claim is frivolous, or it is in an indefensible position.

2.15 Legal aid recipients may be required to make a one-off contribution to their legal costs, depending on their marital status (single, or living with a family) and their net income. Although legal aid covers an individual against his or her own legal costs, it does not cover any award of costs made against the individual, should the individual's case be unsuccessful. A person who is granted legal aid is free to choose his or her lawyer.

(iii) Small claims and specialist courts and tribunals

2.16 Small claims. There are no small claims procedures that are used in the courts of the Netherlands. However, although not styled as "small claims" courts, the various Subdistrict courts of the Netherlands regularly deal with small claims from individuals who are not legally represented (nor need to be legally represented). As noted above, the cost rules which apply in the Subdistrict courts are applicable generally in civil litigation in the Netherlands.

2.17 Specialist courts and tribunals. There are a number of specialist courts and tribunals in the Netherlands, including (a) the Central Appeals Tribunal (based in Utrecht), a court of appeal which is mainly active in legal areas pertaining to social security and the civil service; and (b) the Trade and Industry Appeals Tribunal (based in the Hague), a special administrative court which rules on disputes in the area of social-economic administrative law, and decides appeals on matters of competition and telecommunications laws. In addition, the District Courts and several Courts of Appeal have specialist chambers, dealing with intellectual property law, leases of land, business disputes and the validation of mass claim settlements. The practices of these specialist courts vary in relation to the issue of costs (see section 3, below).

3. INTERPRETATION BY THE COURTS

3.1 The role of court decisions. In the Netherlands there is no doctrine of precedent equivalent to that which applies in England and Wales. However, the Dutch courts can and often do refer to earlier decisions of higher courts on the same or related points. A judge is entitled to rely on earlier decisions, but the judge may also depart from them and give an entirely different decision.

3.2 Rights of appeal. Although, as noted above in section 2, there are few restrictions on parties' rights of appeal, and appeals are in effect hearings de novo, the Supreme Court of the Netherlands has held in several cases[129] that it will not

[129] Supreme Court (Hoge Raad) 9th November 1922, Official Journal (NJ) 1923,82 and HR 22 May 1936, NJ 1936,1064.

review the decisions made by lower courts on questions of costs because the allocation of costs as between litigants is regarded purely as a matter of the court's discretion, and not one calling for the application of principles of law. The effect of these decisions is that an appellate court does not have to explain in any detail its decision on the allocation of costs. The appellate court does have to consider the reasoning - if any - of the lower court, but it has a very wide discretion, and may allocate costs as it deems fit.

3.3 Intellectual property cases. As mentioned above in section 2, although the Netherlands has implemented EU Directive 2004/48/EC, which in Article 14 contemplates a successful party in intellectual property cases being paid its reasonable and proportionate legal costs and expenses, on 1 August 2008 the Dutch judiciary released guidelines[130] on the application of this rule in relation to lawyers' fees. Under those guidelines, depending on the kind of procedure, the successful party in an intellectual property case may only be entitled to recover the maximum amount of €6,000 for "simple"[131] cases, or €25,000 for "complex" cases, even if that party's actual legal costs exceed the recoverable amount. The courts do, however, have a discretion to depart from the guidelines, and may well do so where awarding costs in accordance with the guidelines would not enable the successful party to recover its reasonable and proportionate costs.

3.4 Specialist courts. The practices that are applied in the specialist courts of the Netherlands (see section 2, above) vary from court to court. This may be explained in part by the fact that the procedural rules of the specialist courts differ from those courts which deal with general civil litigation. Some of the specialist courts apply the system of the *Liquidatietarieven*, but use a different value per point. Other specialist courts sometimes require the parties to bear their own costs regardless the outcome of the case.

3.5 The *Ondernemingskamer* (a division of the Court of Appeals of Amsterdam) is one of the best known specialist courts. It is the "Enterprise Court" for the whole of the Netherlands. It has exclusive jurisdiction over a variety of company and business disputes. Where proceedings are begun by application rather than writ, the court has a discretion in respect of costs. Where litigation concerns the governance of a company,[132] the parties may be shareholders, directors, supervisory board members, the works council or the company itself. In such litigation, very often the court orders that each side should bear its own costs. This approach has the consequence that access to justice is not adversely affected by considerations concerning costs. I understand from Mr Huub Willems, President of the *Ondernemingskamer*,[133] that, so far as costs are concerned, the court views such litigation as comparable with divorce proceedings. The court is resolving problems within the company and does not seek to apportion blame.

3.6 Contracting out of Article 237 of the Rv. Article 237 of the Dutch Code on Civil Procedure (the "Rv") enshrines the "loser pays" rule. It is, however, open to parties to contract out of this rule, so as to agree that one or other party is to bear the cost of litigation regardless of the result. Provisions of this nature are enforced by the Dutch courts, however in practice the courts use their discretion under Article 242 of the Rv to decide that any costs payable pursuant to such agreements are paid at the rates set out in the *Liquidatietarieven*, even if the actual costs of the party who has the benefit of such an agreement are in excess of such an amount. The court will do

130 See "*Indicatietarieven in IE-Zaken*", 1st August 2008 (www.rechtspraak.nl).
131 It is for the court to decide whether a case is "simple" or "complex".
132 Such litigation is normally begun by application.
133 Discussion on 27th April 2009.

this even if the party liable to pay the costs does not request the court to apply the *Liquidatietarieven* rates.

4. PRACTICAL CONSEQUENCES

(i) Generally

4.1 Basis of charging. It is usual for lawyers to charge for their time on the basis of hourly rates. These rates can vary from between €80 to €1,000 per hour. In some cases, however, where a client provides repeat business of a similar character to a lawyer (e.g. as may be the case where the client is a telecommunications company or utility), the lawyer may agree to work for a small flat fee per case.

4.2 Legal costs. I understand that concerns are often expressed at the cost of lawyers and litigation in the Netherlands. A Dutch institute[134] recently carried out research at the request of the Independent Association of Legal Expenses Insurance ("RIAD"),[135] covering 12 countries (including the Netherlands). The conclusions reached by the study were – in broad terms - that lawyers are expensive, and that the cost of legal services can be brought down by reducing the level of regulation in (or deregulating) legal markets. I understand that the Dutch Bar Association has instructed Groningen University to conduct a similar study focussing solely on the Netherlands.

4.3 Effect of costs on party behaviour. I understand anecdotally that the combination of (a) the expense of engaging a lawyer; and (b) the limits on the recovery of legal costs (under the tariffs), often means that parties will endeavour to settle a case early on, rather than continue with a case to the end, thereby increasing the level of irrecoverable costs. In other cases parties may be deterred from commencing proceedings in light of the fact that the amount of irrecoverable costs they would incur in litigation would be significant in relation to the size of the claim.[136]

(ii) Funding

4.4 CFAs. As noted above in section 2, CFAs are to some extent permitted under Dutch law. They would not, however, appear to be used widely. This may be because of the legal limitations on their terms. Another reason may be the increased use of third party funding.

4.5 Legal expenses insurance. Before-The-Event Legal Expenses Insurance or "legal aid insurance" (as it is referred to in the Netherlands) is very popular, especially amongst individuals (as opposed to companies). It is usually available on a "modular" basis, whereby a person can take out insurance in modules to cover themselves for losses they may suffer or liabilities they may face (e.g. in relation to motor vehicle accidents, general liability, employment claims, consumer purchases

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[134] SEO Economic Research, which is connected with the University of Amsterdam.

[135] See www.riad-online.net. The executive summary of this report (produced in May 2008) is at the time of writing downloadable from this site in English.

[136] A 2008 study prepared by the Dutch Ministry of Justice states that "*Only a small percentage of disputes result in legal proceedings…What factors play a role in the determination to start proceedings? At the procedural level, the cost factor is the first and foremost consideration*": *Dispute Resolution Behaviour – An Overview of Explanations* (Cahier 2008-8, Geschilgedrag: Verklaringen bijeengebracht) (see www.wodc.nl).

etc). Legal aid insurance does not usually cover the cost of criminal proceedings. Most legal aid insurance policies cover legal expenses to maximum amounts ranging between €10,000 and €50,000. It is common for policies to cover up to €25,000 of legal expenses. Legal aid insurance will usually cover a party against having to pay its opponent's legal fees, up to a maximum amount.

4.6 When an insured does wish to utilise his or her legal aid insurance, the insurer will often encourage the insured to use a lawyer (who may be an in-house advocate, employed by the insurer) and supporting resources provided by the insurer itself. An insured cannot be required to accept the insurer's lawyer, and as noted above in section 2 is entitled to choose his or her own lawyer. It is, however, common for insurers' lawyers and staff to handle claims on legal aid insurance. A potential benefit of this approach is that the insurer can take steps to keep its costs down, and by doing so it can offer legal aid insurance to consumers at an affordable price.[137]

4.7 ATE insurance. Although ATE insurance would be permitted under the law of the Netherlands, I understand that it has little or no usage. This may be because of the increasing popularity of third party funding, plus the fact that Before-The-Event LEI is of widespread use.

4.8 Third party funding. TPF is popular in the Netherlands, and is used extensively in "mass tort" litigation. Funders typically take a percentage ranging from 15% to 35% of the amount that is awarded or paid, most of the time after deduction of their costs. They will usually perform a due diligence exercise before deciding whether to accept a case. Although the not-for-profit organisations that represent claimants are not permitted to profit from litigation, funders are perfectly entitled to do so. Representative not-for-profit organisations (and the claimants they represent) often have little alternative but to rely on TPF. I understand that there is a growing tendency for TPF to be used in cases that are partially covered by legal aid, so that an action may be partially-funded by legal aid, with the remainder of the funding coming from a private funder.

(iii) Court proceedings

4.9 Generally. Civil cases in the Netherlands are conducted in stages. The first stage is for the parties to file their respective pleadings (claim form and defence), after which the court usually requires the parties to appear before it. At the hearing the court will usually (i) ask the parties questions about the case; (ii) explore whether there is a possibility of settling the case; and (iii) give directions for the further conduct of the case. At the end of the procedural hearing, the court may give a provisional judgment on the case, based on the material it has before it. A large percentage (perhaps 35% - 40%) of cases settle following this early procedural ruling.

4.10 Disclosure. Dutch law does not allow for discovery or disclosure as such. In a few limited circumstances, a court may order the parties to produce certain documents. Although such a measure is sometimes useful, it is not deployed as a matter of routine.

4.11 Witness evidence. Witnesses often give evidence in the form of witness statements. The undisputed aspects of a witness statement do not need to be proven further. Where they are disputed then a witness may be called to give oral testimony. The procedure for the examination of a witness involves the judge asking questions of

[137] I understand that legal aid insurance policies typically cost in the region of €350 - €1,500 per year.

a witness, after which the parties or their representatives may ask questions (but this is not in the nature of cross-examination, as it is habitually conducted in England and Wales). Following this the judge will dictate a summary of the witness's evidence, and if the witness is happy with the summary he will sign it. The process of examination is fairly time efficient, however it can take place at more than one hearing, meaning that the witness's oral evidence is staggered over a period of time.

4.12 Experts. It is usual for parties to provide their own experts to give evidence on their behalf. If, however, there is a conflict between the evidence of the experts, the court may appoint its own expert.

4.13 Length of proceedings. According to the annual report of the Dutch Judiciary, in 2007 the average length of a commercial case brought before the District Court was 5 weeks if no defence was filed, and 60 weeks if there was a defence.[138] In the Subdistrict Courts, the average length of a commercial case was 1 week (if no defence was filed), or 16 weeks if there was a defence. The average length of proceedings in an appellate court is 70 weeks.[139]

4.14 Cost-effectiveness of litigation. The World Bank's "*Doing Business Report*" (2009) ranks the Netherlands at 34th position in the world for the ease of enforcing contracts, with legal costs on average representing 24.4% of the claim value. The World Economic Forum's "*Global Competitiveness Report 2008-2009*" puts the Netherlands 9th (out of 134 countries) for the efficiency of its legal framework.

[138] De rechtspraak, jaarverslag 2007 page 35, published at www.rechtspraak.nl.
[139] I understand that cases in the appellate courts have consistently taken such an amount of time for a number of years.

CHAPTER 58: AUSTRALIA

1. INTRODUCTION

1.1 The Australian courts[140] and some of its tribunals apply cost shifting rules, so that the "loser pays". The Australian cost rules are similar to those in England and Wales, i.e. although the courts exercise a discretion as to costs, the general rule is that costs follow the event.[141] The legal funding options available in the Australian legal market are also similar to those available in England and Wales.

1.2 The cost regimes applicable across Australia are broadly similar in their operation. For the sake of brevity the main focus of this chapter will be on the regimes of New South Wales ("NSW") and Victoria, the two most populous States with the largest economies. Some costs aspects of other jurisdictions are also considered.

2. RELEVANT RULES AND LEGISLATION

(i) Cost rules

2.1 Cost shifting. Although the awarding of cost is a matter within the discretion of the court,[142] the discretion is usually exercised on a "loser pays" or "costs follow the event" basis, unless there are other factors in the case which justify making a different order, or the court or tribunal has specific limits on its costs powers.[143] Costs are usually awarded either on an "ordinary" basis (i.e. a standard or party / party basis) or an indemnity basis.[144] Broadly speaking, the principles of cost shifting applied by the Australian courts are similar to those applicable in England and Wales under the CPR.

2.2 Costs in NSW. In NSW, where a successful party is entitled to be paid its costs on an "ordinary" (or standard) basis, that party will be entitled to be paid its reasonable costs.[145] Where costs are payable on an indemnity basis, all costs incurred by a party are recoverable, save to the extent that they were incurred unreasonably,

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[140] The Australian legal system is federal in nature, like the United States. There is a Commonwealth government (being a federal government) which possesses defined powers under the Australian Constitution. There are also six States (New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania) and ten Territories, of which the Northern Territory and the Australian Capital Territory are the most populous. The laws made by each State or Territory are only applicable within their territorial limits. In contrast, the Commonwealth government may exercise its federal powers to pass laws affecting the whole of Australia.

[141] However, alternative cost orders can be made if the justice of the case requires that this occur.

[142] Civil Procedure Act 2005 (NSW) s98(1); Supreme Court Act 1986 (Vic) s24(1).

[143] Uniform Civil Procedure Rules 2005 (NSW) r.42.1. In Victoria there is no express provision that "costs follow the event", but in the exercise of the court's discretion this is usually the case: see *Boman Irani Pty Ltd v St George Bank Limited (No 2)* [2009] VSCA 1 at [4], per Hargrave AJA; Victorian Law Reform Commission "*Civil Justice Review – Report 14*" (2008) p633 (downloadable at www.lawreform.vic.gov.au). See also *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [66]-[70], per McHugh J.

[144] Civil Procedure Act 2005 (NSW) s98(1)(c); Supreme Court (General Civil Procedure) Rules 2005 (Vic) r 63.28. In Victoria, costs may be ordered on other bases, e.g. on a "solicitor / client" basis, or on a basis that the court deems fit.

[145] Legal Profession Act 2004 (NSW) s364.

or are unreasonable in their amount.[146] The recovery of costs in NSW is not constrained by scales. Costs in the NSW courts are assessed by costs assessors, who are generally practising solicitors or counsel, appointed to sit part time as costs assessors.[147]

2.3 Costs in Victoria. In the State of Victoria there is the Supreme Court (which also has appellate jurisdiction), the County Court and the Magistrates' Court. All courts have scales of costs which reflect the level and importance of the matter before the court. Thus cases proceeding in the Supreme Court are remunerated at a higher level than those in the Magistrates' Court. The scales of costs set out the amount which is recoverable between the parties in respect of any given item. They are based on events not times. Solicitors may agree different fee arrangements with their clients which are not restricted by the scales. The client may challenge the solicitor's bill and all such disputes are dealt with by the State Courts. Although the rates are increased every year (usually in line with inflation) there is a perception that there is a growing gap between the amount payable by the client to the solicitor and the amount recoverable under the scales. The County Court scales are presently under review. The Supreme Court scale is also being reviewed with a view to providing items in respect of electronic steps in the action. Under the Supreme Court (General Civil Procedure) Rules 2005 section 63.34 Appendix A sets out the charges which may be allowed to a solicitor and Appendix B sets out the allowances for witnesses and interpreters. The Court may, on special grounds arising out of the nature and importance or the difficulty or urgency of the case, allow an increase not exceeding 30 per cent of the solicitor's charges allowed on the taxation of costs with respect (a) to the proceeding generally; or (b) to any application, step or other matter in the proceeding. If the rules of any court are found not to cover a particular situation the Rules of the Supreme Court apply.

2.4 Victoria has recently passed an Act which will bring a new Costs Court into existence later this year. The purpose of this reform is to provide consistency of approach throughout the State. Taxations are currently carried out by the Associate Judge and by assistant registrars (who are experienced but not legally qualified). The Costs Court will deal with the taxation of costs from all courts and will also deal with family cases from the Federal Court. All costs hearings take place in Melbourne.

2.5 As between solicitor and client, the solicitor must give proper costs disclosure to the client which must contain an estimate. The estimate must be updated if it becomes inaccurate. If the solicitors sue for their costs the matter will go to the Costs Court.

2.6 Other states. The other four states (Queensland, Tasmania, Western Australia,[148] South Australia) and the two mainland territories (the Northern

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[146] Uniform Civil Procedure Rules 2005 (NSW) r.42.5(b).

[147] On 31st March 2009, I attended a meeting of NSW costs assessors and practitioners in Sydney. They informed me that on an assessment in NSW the receiving party recovered more than would be recovered under the scales effective in other states. In NSW the receiving party would probably recover between 65% and 85% of actual costs. The general view of the costs assessors and practitioners was that the NSW system was preferable to that elsewhere in Australia. However, one dissenter preferred the "scales" approach of other states and of the Federal Court, because (a) the process of taxation was quicker and less expensive and (b) the outcome was more predictable. A second partial dissenter preferred the "scales" system, but only in the Australian Capital Territory, where scales are set at a more generous level.

[148] On 27th March 2009, I attended a meeting with the Costs Committee of the Western Australia Supreme Court, at which there was a lively debate about the merits of scales. The majority view was that scales were beneficial, because they worked well, were straightforward to apply and provided certainty. The minority view was that scales were too rigid and

Territory and the Australian Capital Territory) have scales for the assessment of costs. These scales are similar in principle to the Victorian scales. The scales prevailing in the Australian Capital Territory are regarded as being the most generous.

(ii) Funding arrangements

2.7 Contingency fees and CFAs. In both NSW and Victoria, CFAs are permissible in civil litigation,[149] but contingency fee agreements are not.[150] The uplift in fees for a CFA is not allowed to exceed 25%. The uplift in fees is not recoverable from the opposing party under an order for costs. The uplift is a matter between the solicitor and his client. It is the solicitor's reward for acting on a "no win, no fee" basis. In this respect, the costs rules of the other four Australian states and the Territories are similar.

2.8 Third party funding. Third party funding is permissible under Australian law, and its use is seemingly on the increase outside of its traditional "base" in the area of insolvency. Funders will typically seek between 20% - 40% of any "resolution sum".

2.9 Legal aid. Legal aid is available in NSW[151] and Victoria[152] for certain civil cases. The granting of legal aid is means tests and in certain cases also merits tested.[153] Only persons of very limited means now qualify for legal aid.

2.10 CLAF. Contingency Legal Aid Funds have been set up in several Australian jurisdictions. Under the South Australian Legal Assistance Fund,[154] applicants for funding are means and merits tested. The fund receives 15% of any money awarded to the grantee by the court or as part of a settlement of the case.[155] For further details, see chapter 18 above.

(iii) Small claims and specialist courts and tribunals

2.11 Small claims. Small claims procedures are used in the Australian courts, and some of the specialist courts and tribunals (see below) fulfil the purpose of providing an informal and low-cost forum for dispute resolution. In New South Wales, there is a Small Claims Division of the Local Court, which has a jurisdictional limit of AUS$10,000. Proceedings in the Small Claims Division are to be conducted with as little formality and technicality as the proper consideration of the matter permits.[156]

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inhibited the successful party from obtaining an indemnity in respect of his costs. The members of the Costs Committee are all practitioners in and around Perth.

[149] Legal Profession Act 2004 (NSW) ss323 and 324; Legal Profession Act 2004 (Vic) s3.4.27 and 3.4.28.

[150] Legal Profession Act 2004 (NSW) s325; Legal Profession Act 2004 (Vic) s 3.4.29. However, under the Victorian Act the prohibition does not apply to the extent that a costs agreement adopts an applicable scale of costs.

[151] Under the Legal Aid Commission Act 1979 (NSW). See also www.legalaid.nsw.gov.au.

[152] Under the Legal Aid Act 1978 (Vic). See also www.legalaid.vic.gov.au.

[153] Other Australian jurisdictions have legal aid schemes, which operate along similar lines to those in NSW and Victoria.

[154] Being the Litigation Assistance Fund, a charitable trust established by the Law Society of South Australia – see generally http://www.lawsocietysa.asn.au/community/laf.htm. The Law Society also offers a Disbursements Only Fund, which as the name suggests only applies in respect of legal disbursements (e.g. court fees, experts' fees etc).

[155] The scheme run by the Law Institute of Victoria through its "Law Aid" scheme is similar (see www.liv.asn.au).

[156] Local Courts Act 2007 (NSW) s35(2).

The Local Court, when proceeding in the Small Claims Division, has no general power to award costs, although cost orders may be made in limited circumstances.[157] A similar procedure is used in Victorian Magistrates Court for claims of under AUS$10,000, although such claims will be referred to arbitration,[158] and the Court may award costs in claims for more than AUS$500.[159]

In South Australia, cost scales are applied in the Magistrates Court, which has a jurisdiction for general claims of up to AUS$40,000.[160] The scales provide for the recovery of modest amounts, e.g. AUS$1,200 is recoverable for the cost of counsel attending the first day of a trial in a case worth up to AUS$20,000.[161] It has been suggested that the use of cost scales in the Magistrates Court has helped to maintain "a cost saving culture in the court".[162]

2.12 Specialist courts and tribunals. There are a number of specialist courts and tribunals established by statute throughout Australia. It is not, however, possible in this preliminary report to give an overview of these courts and tribunals, and two examples only will be considered.

2.13 In NSW, the Consumer, Trader and Tenancy Tribunal (the "CTTT")[163] hears and determines a variety of claims concerning among other things consumer, residential tenancy, motor vehicles, home building and retirement village disputes. Most of these disputes tend to involve claims of up to around AUS$30,000.[164] Procedure in the CTTT is deliberately less formal than in court proceedings.[165] The usual position is that each party is to bear its own costs of the proceedings before the Tribunal, although there are certain circumstances in which costs may be awarded.[166]

2.14 In Victoria, the Victorian Civil and Administrative Tribunal ("VCAT")[167] hears a variety of consumer, commercial and civil cases concerning such matters as consumer credit, guardianship, real property, domestic building contract and other disputes. VCAT is obliged to proceed in an informal and non-technical way, and may inform itself of the facts or issues as it sees fit.[168] The general position is that each party is to bear its own costs of proceedings before VCAT, although the Tribunal may make cost orders in certain circumstances.[169]

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[157] Local Courts Act 2007 (NSW) s37. As to the exceptions, see Local Court (Civil Procedure) Rules 2005 (NSW) reg 14.
[158] Magistrates' Court Act 1989 (Vic) s102.
[159] Magistrates' Court Act 1989 (Vic) s105.
[160] Magistrates Court Act 1991 (SA) s8. A jurisdictional limit of AUS$80,000 applies in cases concerning motor vehicle cases and cases concerning the ownership of real or personal property.
[161] This includes the fee on brief and refreshers. The rate is AUS$1,500 for a case worth between AUS$20,000 – AUS$80,000.
[162] Dr Andrew Cannon (currently the deputy-chief magistrate), "*Proportionality – Cost-Effective Justice?*" (a paper delivered at the 22nd AIJA conference, 17-19 September 2004) page 14 (www.aija.org.au).
[163] The CTTT was established by the Consumer, Trader and Tenancy Tribunal Act 2001 (NSW).
[164] See generally www.cttt.nsw.gov.au.
[165] Consumer, Trader and Tenancy Tribunal Act 2001 (NSW) s28(3).
[166] Consumer, Trader and Tenancy Tribunal Act 2001 (NSW) s53; Consumer, Trader and Tenancy Tribunal Regulation 2002 (NSW) reg 20.
[167] Established by the Victorian Civil and Administrative Tribunal Act 1998 (Vic).
[168] Victorian Civil and Administrative Tribunal Act 1998 (Vic) s98(1).
[169] Victorian Civil and Administrative Tribunal Act 1998 (Vic) s109.

(iv) The Federal Court

2.15 History. The Federal Court of Australia was established in 1977. By then the High Court of Australia's original jurisdiction had expanded and was proving increasingly burdensome. The Federal Court was established in order to deal with Federal matters at first instance and also to hear certain appeals.[170] There are now 45 Federal Court judges, the majority of whom are based in Sydney or Melbourne. However, the Federal Court sits in all six states (New South Wales, Victoria, Queensland, South Australia, Tasmania and Western Australia) as well as the two mainland territories (the Australian Capital Territory and the Northern Territory).

2.16 Jurisdiction. The Federal Court has no inherent jurisdiction, and the cases before it usually relate to Federal (i.e. Commonwealth) statutes and Federal matters. The court's principal areas of first instance work are administrative law, admiralty, bankruptcy, competition law, trade practices, corporations, human rights, workplace relations, intellectual property, immigration and tax. In some areas, e.g. commercial litigation, the Federal Court has parallel jurisdiction with the state Supreme Courts. This leads to a degree of healthy competition, which tends to drive up the standards of service by all courts.[171]

2.17 Docket system and limited discovery.[172] The Federal Court, like a number of State courts, operates a docket system. I understand from practitioners that the docket system is much appreciated by court users, who value continuity of judge. Many of the Federal Court judges do not order full discovery in commercial cases, but rather order focussed discovery of specified classes of documents. These are identified as being relevant to genuine issues during the course of case management conferences. Inevitably, views about the merits of full disclosure versus limited disclosure differ. Nevertheless, from talking to numerous practitioners across Australia, I gained the clear message that the majority of practitioners and court users support the restricted approach to discovery adopted by certain Federal Court judges.[173] This avoids the huge drain on costs and resources, which is imposed by conventional discovery.

2.18 Costs in the Federal Court. The Federal Court of Australia applies cost scales.[174] In the Federal Court bills of costs are taxed by "Registrars" who are qualified lawyers. The Registrar receives the bill and papers, including the paying party's objections, and forms a preliminary view on the papers. An interim certificate is prepared showing the amount allowed. Either party may request a hearing, but, if at that hearing that party does not achieve a difference of 15-20% of the figure allowed, a costs penalty follows. If the parties accept the interim certificate, it

[170] For a clear and readable history of the Federal Court, see the essay by the Hon Michael Black AC, Chief Justice of the Federal Court published in the Melbourne University Law Review: "*The Federal Court of Australia: the First 30 Years – a Survey on the Occasion of Two Anniversaries*" (2007) 31 MULR 1.

[171] Because of the proximity of Melbourne and Sydney, there appears to be a degree of competition for commercial and similar cases between the Federal Court in Melbourne, the Federal Court in Sydney, the Supreme Court in Melbourne and the Supreme Court in Sydney. For example, one practitioner who generally issues proceedings in the Federal Court told me that she uses the Supreme Court in Sydney for insolvency matters, because that court has a very well managed insolvency list.

[172] Australia uses the pre-CPR term "discovery" for what we now call "disclosure".

[173] A similar approach to discovery is adopted in some state courts. For example, Chief Justice Wayne Martin of the Western Australia Supreme Court (a leading commercial silk, who was appointed straight to the office of Chief Justice) generally limits discovery to limited categories of documents.

[174] Order 62 Federal Court Rules.

becomes the final certificate. This procedure eliminates the full taxation process in most cases.[175]

2.19 There is no automatic entitlement to quantify/tax interlocutory costs orders until the substantive proceedings are finished. A positive order is needed to tax them earlier.[176]

3. INTERPRETATION BY THE COURTS

3.1 General approach. The approach taken by the Australian courts to the question of costs is similar to that taken in England and Wales, i.e. the courts will apply the "loser pays" approach so as to give effect to the cost shifting principle. The courts will also tailor their cost orders to meet the justice of the case, e.g. by ordering that a party who is only partially successful is not entitled to all of its costs, and rewarding (with a more favourable costs order) a party who makes an "unbeaten" offer to settle. In many respects, there is little difference between the laws, and their interpretation by the courts, in Australia and in England and Wales.

3.2 Third party Funding. In *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*,[177] the High Court of Australia[178] considered a challenge to the legitimacy of third party funding. The case involved representative proceedings brought on behalf of tobacco retailers, who sought to recover tobacco licence fees from the NSW government. The litigation was funded by a third party funder (Firmstones). Firmstones stood to make a considerable profit should the representative proceedings have been successful. They also exercised substantial control over the manner in which the claim was conducted. The funding arrangement was challenged on the basis that, among other things, it constituted an abuse of process, and was contrary to public policy. The High Court of Australia rejected that challenge, and upheld the funding arrangement. In doing so, the court made the following observations:

> "[88] Shorn of the terms of disapprobation, the appellants' submissions can be seen to fasten upon Firmstones' seeking out those who may have claims, and offering terms which not only gave Firmstones control of the litigation but also would yield, so Firmstones hoped and expected, a significant profit to Firmstones. But none of these elements, alone or in combination, warrant condemnation as being contrary to public policy or leading to any abuse of process.
>
> [89] As Mason P rightly pointed out in the Court of Appeal, many people seek profit from assisting the processes of litigation. That a person who hazards funds in litigation wishes to control the litigation is hardly surprising. That someone seeks out those who may have a claim and excites litigation where otherwise there would be none could be condemned as contrary to public policy only if a general rule against the maintenance of actions were to be adopted. But that approach has

[175] Order 62 rule 46 Federal Court Rules.
[176] Order 62 rule 3(3) Federal Court Rules. This is the same as the provision of the RSC in England prior to 1986.
[177] [2006] HCA 41.
[178] The High Court is Australia's highest appellate court, and broadly speaking its decision have a similar value in Australia as precedent or as a persuasive statement of the law as decisions of the House of Lords have in the UK.

long since been abandoned and the qualification of that rule (by reference to criteria of common interest) proved unsuccessful. And if the conduct is neither criminal nor tortious, what would be the ultimate foundation for a conclusion not only that maintaining an action (or maintaining an action in return for a share of the proceeds) should be considered as contrary to public policy, but also that the claim that is maintained should not be determined by the court whose jurisdiction otherwise is regularly invoked?". [179]

3.3 On the question of the ability of a third party funder's ability to control the conduct of litigation, and whether that might lead to the court's process being abused (so as to justify the court stopping such an abuse), Callinan and Heydon JJ held:

> "[266] The justifications for the court's intervention against this kind of abuse of process as exemplified by some forms of litigation funding are diverse. Court process is expensive for the State to supply and for litigants to participate in. It is coercive and otherwise injurious both to litigants and to third parties and should not be employed beyond legitimate necessity. To the extent that people with urgent claims are held out from having them heard by actions in abuse of process, the latter actions should be stayed so that the former may be heard. Normal litigation is fought between parties represented by solicitors and counsel. Solicitors and counsel owe duties of care and to some extent fiduciary duties to their clients, and they owe ethical duties to the courts. They can readily be controlled, not only by professional associations but by the court...."

4. PRACTICAL CONSEQUENCES

(i) General

4.1 Recoverable costs. Although the scales vary from court to court,[180] my impression from talking to practitioners is that on a taxation by reference to scales the receiving party generally recovers about 50% of its actual costs. The reason for the gap between recoverable costs and actual costs is that it is common for lawyers to be retained on the basis of hourly rates, rather than scales. On an assessment in the Supreme Court of New South Wales (where scales do not apply) the receiving party is likely to recover about 65%-85% of actual costs. In all States, where costs are awarded on an indemnity basis the receiving party does substantially better.

4.2 Conditional fee agreements. As previously mentioned, in all Australian States the uplift (capped at 25% of the solicitors' costs) is deducted from the damages, rather than recovered from the defendant. On 30th March 2009, accompanied by two of my assessors,[181] I attended a meeting with a large group of practitioners[182] in Melbourne, at which they explained to me the workings of CFAs. In practice, personal injury claimants generally receive 80-85% of their damages, after deduction of the solicitor's uplift. Since the solicitor has been acting on a "no win, no fee" basis, the deduction of this uplift is not seen as unfair and is not a cause of complaint. The

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[179] Per Gummow, Hayne and Crennan JJ.
[180] The scales in ACT (the Australian Capital Territory) are said to be more generous than scales elsewhere.
[181] Senior Costs Judge Peter Hurst and Michael Napier QC.
[182] Principally, but not exclusively, claimant practitioners.

Victorian practitioners expressed amazement at the generosity of the English system towards claimants.[183]

4.3 Costs specialists in Victoria. Some 40 solicitors in Victoria specialise in costs work (out of a total of 14,500). In addition there are 20 to 30 unqualified persons who carry out costs drafting work and maybe half a dozen counsel who specialise in costs. Advocacy on taxation is mainly left to the solicitors, since the non-qualified people cannot recover any costs for their own appearance.

(ii) Funding

4.4 Legal expenses insurance. There is not a developed market in Australia for legal expenses insurance as a product in its own right.

4.5 ATE Insurance. ATE insurance is rarely available in Australia and there is not a developed market for it. ATE insurance is not routinely taken out for particular types of cases. Where it is used, it tends to be specifically negotiated, with the insurance premium representing 10% - 40% of the claimant's lawyer's assessment of the worst case scenario from a costs perspective.[184]

4.6 Third party funding. Third party funding is a feature of civil litigation in Australia, although it tends to be used principally in (a) large commercial cases and (b) group litigation. Third party funders favour larger cases where there is a good chance of success.[185] On 1st April 2009 I attended a meeting with IMF, who are major litigation funders based in Melbourne. IMF state that they have so far funded about 200 cases, of which the great majority were successful. Most of those successful cases were settled, but a few went to trial. IMF ended up with adverse costs orders in approximately 5 out of the 200 cases, and they duly complied with those adverse costs orders. IMF carefully vet all cases which are proposed for funding. They use their own internal team of legal staff, accountants and experts for this purpose.

(iii) Other aspects of court procedure.

4.7 Overriding purpose. The Civil Procedure Act 2005 (NSW), like the CPR in England and Wales, provides that the overriding purpose of the Act and the rules of court, in relation to civil proceedings, is "to facilitate the just, quick and cheap resolution of the real issues in the proceedings".[186] Parties to proceedings and their legal representatives are under a duty to the court to assist it in achieving this objective.[187] The court may rely on these provisions as a basis for making adverse

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[183] One claimant practitioner commented with reference to the English CFA regime: "we would have thought that Christmas here!".

[184] Dr Andrew Cannon, "Proportionality – Cost-Effective Justice?" (a paper delivered at the 22nd AIJA conference, 17-19 September 2004) pages 24-25 (www.aija.org.au).

[185] Funders *"seek to minimise their total risks by 'picking winners'"*: Laurie Glanfield AM (Director-General, Attorney-General's Department for NSW), "Litigation Funding – Issues of Regulation" (AILA National Conference, 1 November 2006) page 13 (www.aila.org).

[186] *Civil Procedure Act* 2005 (NSW) s56(1). There is no equivalent "overriding purpose" in the Victorian legislation or court rules, although the Victorian Supreme Court is required to ensure that questions in proceedings are determined "economically": *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) r. 1.14.(1)(a).

[187] *Civil Procedure Act* 2005 (NSW) ss56(3) and (4). Put another way, parties are now required to be "model litigants": *Priest v State of New South Wales* [2007] NSWSC 41 at [34], per Johnson J.

costs orders (where some relevant misconduct is identified).[188] Furthermore, the practice and procedure of the court is required to be implemented "with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute".[189] What is unclear, however, is whether these provisions have had the general effect of ensuring that litigation is "cheap", or that costs are proportionate.

4.8 Reasonable grounds for commencing proceedings. In New South Wales, where a party is represented by a legal practitioner, the legal practitioner must not provide legal services in relation to a claim or defence for damages unless her or she reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.[190] The evident intent of this provision is to impose a duty on legal practitioners to ensure that unmeritorious claims or defences (that waste the time and money of the parties and the court) do not finish up before the court.

4.9 Extra-judicial comments. Senior Australian judges have commented extra-judicially on the cost of litigation in Australia. For example, the Hon Mr Justice McClellan, the Chief Judge at Common Law in the NSW Supreme Court, observed recently:

> "When parties are left to control their dispute and are allowed whatever court time they require to resolve it the cost, both to the State and the litigating parties, can become disproportionate to the issues at stake. Judges and others often lament the cost of the system and urge that 'something be done about it'."[191]
>
> "Many judges, practitioners and users of the court system have acknowledged the burdens imposed on parties by the cost of litigation. It is thought, probably correctly, that many disputes settle before judgment because of a fear that the costs of judicial resolution will be excessive. It is equally common to learn of cases where the parties have been unable to compromise and the ultimate cost of the proceedings exceeds the amount at stake. The dispute evolves into a dispute about the costs in which the sum originally at stake is of lesser significance. In practical terms once litigation has commenced both parties must agree before the proceedings can be brought to an end. The litigation process becomes for many an unmanageable, and ultimately unsatisfactory experience." [192]

Furthermore, the Chief Justice of NSW has recently made the following observations:

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[188] See, for example, *Lemery Holdings Pty Limited v Reliance Financial Services Pty Ltd* [2008] NSWSC 1114.

[189] Civil Procedure Act 2005 (NSW) s60. In a speech in 2007, the Chief Justice of NSW said of the words in section 60 *"I accept that this is a statement of ambition, rather than a description of what occurs"*: the Hon JJ Spigelman AC, "*Access to Justice and Access to Lawyers*" (address at the 35th Australian Legal Convention, 24 March 2007) (www.lawlink.nsw.gov.au) (also (2007) 29 Australian Bar Review 136).

[190] Legal Profession Act 2004 (NSW) s345(1).

[191] Hon Justice Peter McClellan, "*The Australian Justice System in 2020*" (a paper delivered on 25 October 2008, downloadable at www.lawlink.nsw.gov.au) page 5 (referring to earlier papers delivered by the Hon Chief Justice Spigelman AC (Chief Justice of NSW) and the Hon. Justice GL Davies).

[192] Hon Justice Peter McClellan, "*Dispute Resolution in the 21st Century – Mediate or Litigate?*" (a paper delivered at the National Australian Insurance Law Association Conference, 17-19 September 2008) (www.lawlink.nsw.gov.au).

> "Over the last decade or two substantial progress has been made in reducing delays in the courts and some progress has been made in controlling costs. However, we must continually re-engineer the process of dispute resolution because the pressures on the process are in a continual state of flux...
>
> Judges are able to contribute to the process of controlling legal costs, especially in terms of delay and length of trial. However, there are limits to the supervision and intervention which are consistent with the continuation of an adversary system. Although that system has been modified in many respects, it remains the case that the principal role in controlling costs lies with the profession".[193]

4.10 Law reform. There have been three major studies conducted and reports produced in Australia in the last 15 years concerning the civil litigation process, suggesting ways in which it could be improved. The principal reports are mentioned below, with particular reference to recommendations regarding costs.

4.11 Commonwealth. In 1995, the Australian Law Reform Commission (ALRC) published its report (no.75) "*Costs Shifting – Who Pays for Litigation*".[194] The Commission recommended the retention of the cost shifting rule in civil litigation,[195] although in doing so it did acknowledge that the rule tends to have the effect of increasing the cost of litigation compared to when there is no cost shifting.[196] However, the Commission envisaged the use of case management powers as being one method for controlling costs in a cost shifting environment.[197]

4.12 Western Australia. In 1999, the Law Reform Commission of Western Australia issued its report (no.92) "*Review of the Criminal and Civil Justice System in Western Australia*".[198] The report agreed with the recommendations made in the ALRC report of 1995 that the cost shifting rule be retained,[199] and that the Supreme Court be given cost capping powers.[200]

4.13 Victoria. In 2008 the Victorian Law Reform Commission produced a lengthy "*Civil Justice Review – Report 14*", recommending numerous changes to the civil justice system in Victoria.[201] Chapter 11 of the report is entitled and concerned with "*Reducing the Cost of Litigation*", and the recommendations made in that chapter include the following:

- Prohibiting law firms from profiting from disbursements, including photocopying, except in the case of clients of reasonably substantial means who agree to pay for disbursements which include an element of profit.[202]

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193 The Hon JJ Spigelman AC, "*Opening of Law Term Dinner, 2009*" (2nd February 2009) (www.lawlink.nsw.gov.au).
194 The report is downloadable at www.austlii.edu.au.
195 Recommendation 8 of the Report. The Commission did, however, identify some circumstances in which the cost shifting rule should not apply, e.g. if there had been misconduct in court proceedings.
196 Paragraph 4.19 of the Report.
197 Paragraph 4.20 of the Report.
198 See www.lrc.justice.wa.gov.au.
199 Recommendations 126 and 127 of the WALRC report.
200 Recommendations 128 and 129 of the WALRC report.
201 See www.lawreform.vic.gov.au.
202 Recommendation 152.

- Reconsidering the absolute legislative prohibition of percentage contingent fees, provided that any proposed (regulated) percentage fee arrangements are subject to adequate safeguards to protect consumers and to protect abuse.[203]

(iv) Recent procedural innovations

4.14 Fast track. The Federal Court operates a "fast track", which is available for commercial cases with a trial length of 8 days or less. These cases are brought to trial and judgment within 6 months, by means of accelerated procedures[204] (summaries instead of pleadings, very limited disclosure, etc).[205] The fast track is sometimes described as the "rocket docket", a term derived from the USA. I understand that the fast track is currently only operated by the Federal Court in Melbourne, essentially as a pilot exercise, but there is support for its wider implementation.

4.15 Practitioners' experience of the fast track. The speed with which cases are progressed on the Federal Court's fast track is much appreciated by court users. One practitioner (who was less than enthusiastic about certain of the case management techniques adopted)[206] told me that his clients liked the fast track. Because a case would be completed within six months, the same solicitors and clerks would generally be dealing with that case from beginning to end; also time related costs were cut back. He considered that the speed achieved on fast track cases resulted in a 50% saving in costs. Another practitioner (at a different meeting), whose firm had recently litigated on the fast track, told me that the experience was shattering. At the first case management conference the judge (not the same judge as in the previous example) had got to grips with the issues and had closely questioned counsel about the documents required. Having dealt with discovery in a robust manner he fixed a trial date for 6 weeks later. The trial duly took place and the judgment was not appealed. The practitioner told me that, although the lawyers found the whole process stressful, her clients were "stoked" (an Australian term meaning very pleased). She confirmed that the fast track achieved huge cost savings and was a "fantastic forum" for appropriate cases. Another practitioner at the same meeting opined that it was a "fantastic forum" for all commercial cases. At a separate meeting (in a more distant part of Australia) a practitioner spoke in glowing terms about the speedy and effective service offered by the Federal Court in Melbourne for commercial litigation. Finally, shortly before leaving Australia, I spoke to litigation funders who currently have three cases proceeding in the Melbourne Federal Court fast track. The funders informed me that they regarded the service provided by the Federal Court on the fast track as excellent. That assessment would be unaffected by the outcome of the three current cases.

4.16 Case management in the Victoria Court of Appeal. The Victorian Court of Appeal forms part of the Supreme Court in Melbourne. In recent years its workload has been steadily growing. In the year 2007-2008, there were 222 appeals filed and 490 applications for leave to appeal filed. (Leave to appeal is required in respect of interlocutory judgments, but not in respect of final judgments.) The President of the Court of Appeal, Justice Chris Maxwell, has appointed an Associate Justice, namely

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[203] Recommendation 154.

[204] The fast track procedures are described in Justice Michelle Gordon's lecture to the Queensland Bar Association on 14th March 2009 entitled "*Fast Track*".

[205] "*The general presumption is not just that discovery will be limited, but that there will be no discovery unless a party can identify with specificity particular documents or materials (not simply categories) that they require, the reasons that they require those documents, and why no alternative cheaper means of obtaining the information is available*" (per Justice Gordon's lecture of 14/3/2009)

[206] He described the techniques in graphic terms, including "new age pleadings".

Associate Justice Robyn Lansdowne, to undertake early case management of appeals. Ms Lansdowne is a qualified solicitor with many years experience in adjudicative roles. She convenes a directions hearing in every new appeal. She controls rigorously what goes into the appeal book (bundles are called "books" in Australia) and requires counsel to justify the relevance of the documents which they propose to include. Skeleton arguments are limited to 6 pages. Any counsel wishing to file a longer skeleton must persuade Associate Judge Lansdowne to allow additional pages. Ms Lansdowne estimates that she allows additional pages (the numbers of which are specified) in approximately 25% of appeals. She also fixes the length of hearings, having heard the parties' observations on that aspect. The President tells me that these reforms are working well. They are saving both time and cost. [207]

4.17 Hot tub. The practice has been developed in Australia of hearing evidence concurrently from the experts in any particular discipline. This practice is known colloquially as "hot tub". The practice began in the Competition Tribunal and was subsequently adopted in the Supreme Court of New South Wales. The experts meet pre-trial in order to identify where they agree and where they disagree. At trial, experts in the same discipline are sworn in at the same time and the judge chairs a discussion between the experts. The pre-trial document recording the matters upon which the experts disagree serves as the agenda. Counsel join in the discussion. They can put questions to the experts, as and when permitted by the judge. In addition the experts can put questions to each other. This procedure has spread from Sydney to other courts and is, apparently, quite widely used across a range of courts and states in Australia. The New South Wales judges[208] tell me that the procedure is effective. It saves both time and costs. It gives back to experts their proper role of helping the court to resolve disputes. Also it does away with the "one on one" gladiatorial combat between cross-examining counsel and each expert. Two practitioners[209] in New South Wales have confirmed to me that the procedure is effective, saving both time and costs. One practitioner commented that the procedure works well in areas where there are no issues of credit and the experts know and respect each other. The other practitioner said that time is saved, because instead of counsel turning round to take whispered instructions during cross-examination, he puts his questions to the experts in the "hot tub". Both/all experts can then deal with the particular point. The procedure does not enable experts to "get away with" flawed evidence.

4.18 There is an excellent DVD available, which illustrates the operation of the procedure by re-enacting recent litigation in which four expert witnesses gave evidence concurrently.[210] Justice Peter McLellan, who has extensive experience of the procedure,[211] provides a commentary. Having watched the DVD and talked to both judges and practitioners, I have formed the provisional view that this is a cost saving procedure, which at least merits consideration and may possibly merit a pilot study in England and Wales.

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[207] I had meetings with Justice Maxwell and Associate Justice Lansdowne to discuss the costs of appeals and case management of appeals on 31st March 2009.

[208] At a joint meeting of Federal judges and State Supreme Court judges in Sydney on 1st April 2009.

[209] At a breakfast meeting in Sydney of the Anglo-Australian Lawyers Association on 2nd April 2009.

[210] The script for the DVD is taken from the court transcript.

[211] Justice McLellan used the concurrent evidence procedure for every case in the NSW Land and Environment Court and now uses the same procedure regularly in the NSW Supreme Court.

(v) Cost-effectiveness of litigation in Australia

4.19 The World Bank's "*Doing Business Report*" (2009) ranks Australia at 20th position in the world for the ease of enforcing contracts, with legal costs on average representing 20.7% of the claim value. The World Economic Forum's "*Global Competitiveness Report 2008-2009*"[212] puts Australia 10th (out of 134 countries) for the efficiency of its legal framework.

[212] See www.weforum.org.

CHAPTER 59. NEW ZEALAND

1. INTRODUCTION

1.1 The civil courts in New Zealand. The civil courts in New Zealand comprise the District Court and the High Court. The District Court has jurisdiction for civil claims up to NZ$200,000, although the upper limit is NZ$500,000 if land is claimed. Civil claims above the District Court limits go to the High Court. The original procedural rules for the High Court were contained in schedule 2 to the Judicature Act 1908 (NZ). From time to time later statutes have substituted revised versions of schedule 2 to the 1908 Act. The current High Court Rules are contained in schedule 2 to the 1908 Act, as substituted by s. 8(1) of the Judicature (High Court Rules) Amendment Act 2008. These rules came into force on 1st February 2009. The procedural rules which govern the conduct of civil litigation in the District Court are District Court Rules, made under the District Courts Act 1947. The New Zealand Rules Committee makes the rules for both the High Court and the District Court.

1.2 Cost shifting rules. The New Zealand courts apply cost shifting according to scales that form part of the rules of court. The scales are different to those found in other jurisdictions, in that the scale which applies depends upon the complexity of the case. Furthermore, the amount which is recoverable in respect of any individual step in court proceedings depends on the amount of time it ought reasonably to have taken to perform that particular step.

1.3 A similar system of scales applies both in the High Court and in the District Court. I shall explain the High Court scales in a little detail. For the sake of brevity, I shall not repeat the exercise with reference to the District Court, since the principles are the same, although the actual figures are lower.

1.4 The legal profession in New Zealand. Lawyers qualify as "barristers and solicitors". I shall refer to those who practise in solicitors firms as "solicitors", even though they have full rights of audience. I shall refer to those who practise at the independent Bar as "counsel". It should be noted, however, that they all have the same professional qualifications. Furthermore, both solicitors and counsel may be awarded the status of Queen's Counsel or Senior Counsel (the title has recently changed and, I understand, may change again).

1.5 New Zealand judiciary. The judiciary of New Zealand comprises 5 Supreme Court judges, 9 Court of Appeal judges, 30 High Court judges and a larger number of District Court judges. The population of New Zealand is about 4 million people.

1.6 No personal injuries litigation. There is no personal injuries litigation in the New Zealand courts.[213] This is because the only remedy for personal injuries is to claim compensation from the Accident Compensation Commission. Such compensation is awarded on a "no fault" basis and is substantially less generous than common law damages.

[213] Save for (a) occasional challenges to decisions of the Accident Compensation Commission; and (b) claims in exceptional personal injury cases for exemplary damages.

2. RELEVANT RULES AND LEGISLATION

(i) Cost rules

2.1 Cost shifting. Although costs are in the discretion of the court,[214] the discretion of the court is usually exercised so that costs follow the event, unless there are features of the case which warrant departing from such an approach.[215]

2.2 Recoverable costs. The rules of the High Court of New Zealand provide for the recovery of costs according to a scale.[216] However, the application of the scale depends on the nature and conduct of the proceedings. The applicable cost principles as stated in the High Court Rules are as follows:

> "14.2 Principles applying to determination of costs
>
> The following general principles apply to the determination of costs:
>
> (a) the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds:
>
> (b) an award of costs should reflect the complexity and significance of the proceeding:
>
> (c) costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application:
>
> (d) an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application:
>
> (e) what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the actual solicitor or counsel involved or on the time actually spent by the actual solicitor or counsel involved or on the costs actually incurred by the party claiming costs:
>
> (f) an award of costs should not exceed the costs incurred by the party claiming costs:
>
> (g) so far as possible the determination of costs should be predictable and expeditious".

It should be noted that the reference to "two thirds" in rule 14.2 (d) states the policy underlying the costs rules. The sub-paragraph does not mean that during the calculation process required by the rules any of the figures should be reduced by one third.

2.3 Appropriate daily rate. The "appropriate daily recovery rate" varies according to the category of the proceedings. In the High Court the category of the proceedings

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[214] *High Court Rules* (NZ) r.14.1.

[215] *High Court Rules* (NZ) r.14.2(a). See also *Shirley v Wairarapa District Health Board* [2006] NZSC 63.

[216] The current system took effect on 1st January 2000. An overview of the costs system in New Zealand may be found in a paper of the Hon Justice Venning, "*Alternatives to Activity Based Costing – the New Zealand Approach*" (delivered at the AIJA Annual Conference, 15-17 September 2006) (www.aija.org.au).

will usually be fixed by an associate judge[217] at an early directions conference. Once the category of the proceedings has been designated, that category will apply to the assessment of all subsequent cost determinations unless there are reasons for departing from the early categorisation.[218] The following table sets out the current applicable categories and corresponding rates.[219]

Table 59.1: Current appropriate daily recovery rates

Category	Description	Appropriate Daily Recovery Rate
1	Proceedings of a straight-forward nature able to be conducted by counsel considered junior in the High Court	NZ$1,070 / day
2	Proceedings of average complexity requiring counsel of skill and experience considered average in the High Court	NZ$1,600 / day
3	Proceedings that because of their complexity or significance require counsel to have special skill and experience in the High Court	NZ$2,370 / day

2.4 Reasonable time. The High Court Rules also prescribe what a "reasonable time" is for the steps in court proceedings, depending on the nature of the particular step.[220] For this purpose, all steps in proceedings must be allocated to one of three possible bands, as described in the table below:[221]

Table 59.2: "Reasonable time" bands

Band	Description
A	Where a comparatively small amount of time for the particular step is considered reasonable.
B	Where a normal amount of time for the particular step is considered reasonable.
C	Where a comparatively large amount of time is considered reasonable.

In order to ascertain the reasonable time for a step in the proceedings, one first looks up the particular activity in schedule 3 to the High Court Cost Rules (i.e. in schedule 3 to schedule 2 to the 1908 Act) and one then looks at the column headed A, B or C, as appropriate. By way of example, it can be seen from schedule 3 that drafting a notice to admit facts, if allocated to category B (i.e. requiring a normal amount of time) attracts a time allowance of 0.8 days. That same step, if allocated to category C (i.e. requiring a comparatively large amount of time) attracts a time allowance of 2.4 days. In order to calculate the recoverable costs for any step in the proceedings, one multiplies the appropriate daily rate (derived as set out in the previous paragraph) by

[217] Associate judges were formerly known as masters.
[218] High Court Rules (NZ) r.14.3; the Hon Justice Venning's paper, "*Alternatives to Activity Based Costing – the New Zealand Approach*" (*ibid*) page 5.
[219] High Court Rules (NZ) rules 14.3, 14.4 and Schedule 2.
[220] The relevant multipliers for the various steps in proceedings are set out in Schedule 3 of the High Court Rules.
[221] High Court Rules (NZ) r. 14.5.

the multiplier derived from schedule 3 to the rules. The resultant figure is the total sum payable for the work done both by solicitors and counsel in respect of that step.

2.5 Worked examples. By way of illustration of how these rules may work in practice, if a plaintiff in High Court proceedings, of average complexity requiring counsel of skill and experience considered average in the High Court (i.e. Category 2), were awarded its costs, the plaintiff would normally be entitled to recover the applicable daily rate (NZ $1,600 per day) for every step in the proceedings, multiplied by the appropriate multiplier for each particular step. If it was considered that a "normal amount of time" was required for the commencement of proceedings[222] (i.e. that step was in band B), the applicable multiplier under the Rules would be 3, meaning that the plaintiff would be entitled to recover NZ$1,600 x 3, i.e. NZ$4,800. If, however, the commencement of proceedings were considered as reasonably requiring a comparatively large amount of time (i.e. the step was in band C), the applicable multiplier would be 10, meaning that the plaintiff would be entitled to recover NZ $1,600 x 10, i.e. NZ$16,000. Similar calculations would be conducted in relation to each of the other steps in the proceedings.

2.6 Increased, decreased and indemnity costs. Although in ordinary cases costs will be recoverable by a party according to the prescribed scales, rule 14.6 permits the court in appropriate circumstances to award (a) "increased costs" (i.e. costs above those prescribed by the scales)[223] or (b) "indemnity costs". The circumstances for awarding increased costs are set out in rule 14.6 (3). These include (a) where the time required for a step would substantially exceed the time allocated under band C or (b) where the other party has conducted the proceedings, or conducted itself in relation to a step in the proceedings, by wasting time or by acting in a vexatious or improper manner. The circumstances for awarding indemnity costs are set out in rule 14.6 (4). These include where the opposing party has acted vexatiously or improperly. There are also circumstances where a court may order that an otherwise successful party should be refused its costs, or paid at less than the scale, based on its conduct in the proceedings or other specific matters warranting reduction.[224]

2.7 Cost assessments. In the High Court costs are usually settled or agreed by the parties by application of the cost scales. Where, however, departure from the cost scales is permitted under the High Court Rules, the trial judge will determine the basis on which costs are to be calculated, although the judge's discretion is constrained under rules 14.6 and 14.7. In contrast, the approval of disbursements is usually conducted by a Registrar, where there is no other issue as to costs. For this purpose, "disbursements" do not include counsel's fees, as these are included within the scale fees.

(ii) Funding arrangements

2.8 Contingency fees and CFAs. Whether contingency fee agreements are permissible appears to be a grey area, upon which different views were expressed by various judges and practitioners during my visit to New Zealand.[225] However, CFAs

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[222] "Commencement of proceedings" includes receiving instructions, researching facts and law, and preparing, filing, and serving statement of claim and notice of proceeding or equivalent or originating application.

[223] Under an order for increased costs, the court will only add a percentage to the scale fees; the court will not allow a party to recover a percentage of its actual fees: *Holdfast NZ Limited v Selleys Pty Ltd* [2005] NZCA 302 at [40]-[41].

[224] High Court Rules (NZ) r.14.7.

[225] On 3rd April 2009.

are permissible in relation to most civil cases.[226] Success fees paid under CFAs are not recoverable from opposing parties under cost orders.[227] Furthermore, the rules of professional conduct require that the total fees charged to the client (including any success fee) must be reasonable.[228]

2.9 ATE insurance. ATE insurance would appear to be permissible under New Zealand law. However, it is not used widely, if at all.

2.10 Legal expenses insurance. Before the event legal expenses insurance is permissible, but it is not generally used in New Zealand.

2.11 Third party funding. Third party funding is permissible under the law of New Zealand, but its use is not extensive outside of the area of insolvency. However, I understand that the New Zealand Rules Committee is currently considering litigation funding as part of its review of whether class action rules should be introduced.

2.12 Legal aid. Legal aid is available in New Zealand for certain civil proceedings.[229] The granting of legal aid is means and merits tested.[230] The financial limits for legal aid are low, so that few persons qualify. However, anyone who qualifies for legal aid is generally protected against an adverse costs order.[231] The possibility of implementing a Contingency Legal Aid Fund ("CLAF") was floated by the New Zealand Law Commission, but no such fund has yet been established.[232]

(iii) Small claims and specialist courts and tribunals

2.13 Small claims. There is a Disputes Tribunal[233] in New Zealand which hears and determines certain civil claims up to a monetary limit of NZ$7,500,[234] although this jurisdictional limit will soon be increased to NZ$15,000.[235] Proceedings before the Disputes Tribunal are private,[236] informal, and are held before a referee. Legal representation is not allowed before the Disputes Tribunal. The referee may or may not have legal training. The referee will first try to encourage the parties to settle their dispute (by attempting to mediate the dispute), and only if no agreement is reached will the referee make a decision which binds the parties.[237] The rights of appeal against the referee are very limited, essentially on grounds of procedural

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[226] Lawyers and Conveyancers Act 2006 (NZ) s334. There are exceptional civil cases where CFAs are not permitted, e.g. family law cases: section 335.

[227] The New Zealand judges and lawyers to whom I spoke viewed the English recoverability rules with surprise.

[228] See paragraph 9.9 (b) of the Lawyers and Conveyancers Act (Lawyers: Conduct and client Care) Rules 2008.

[229] Pursuant to the scheme established by the Legal Services Act 2000 (NZ).

[230] See Legal Services Act 2000 (NZ) Part 2.

[231] As in England and Wales.

[232] New Zealand Law Commission in its report *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (Report No. 85) (2004) pages 48-49.

[233] The Disputes Tribunal is established under the Disputes Tribunals Act 1988 (NZ).

[234] The Tribunal's jurisdictional limit may be increased by agreement of the parties up to the amount of NZ$12,000: Disputes Tribunals Act 1988 (NZ) s13. This potential upper limit will soon be increased to NZ $20,000: see the NZ Minister of Justice's press announcement dated 4th February 2009.

[235] See the NZ Justice Minister's press announcement dated 4th February 2009. The Minister stated that this increase is intended to assist small businesses by reducing litigation costs.

[236] Disputes Tribunals Act 1988 (NZ) s39.

[237] Disputes Tribunals Act 1988 (NZ) s45. See generally www.justice.govt.nz. Both the mediation and (if there is no settlement) the making of a decision by the referee take place in the same hearing.

fairness. The general position is that the parties bear their own costs of proceedings before the Disputes Tribunal.[238]

2.14 Specialist courts and tribunals. There are other New Zealand tribunals, in addition to the Disputes Tribunal, which determine civil disputes. These include the Employment Relations Authority,[239] the Weathertight Homes Tribunal and the Tenancy Tribunal. Broadly speaking, these tribunals contemplate proceedings being conducted in a less formal manner than court proceedings. The applicable cost rules depend on the terms of the enabling legislation. In the Tenancy Tribunal the general position is that there is no cost shifting.[240] In the Weathertight Homes Tribunal there is no cost shifting, subject to an unreasonable conduct exception.

(iv) Costs in the Court of Appeal

2.15 Scale fees. A simplified system of scale fees prevails in the Court of Appeal. There are two bands, namely:

- Band A: "standard appeals, which are appeals of average complexity requiring counsel of skill and experience considered average in the Court of Appeal;"
- Band B: "complex appeals, which are appeals that because of their complexity or significance require senior counsel".[241]

2.16 There are two categories for work in connection with appeals to the Court of Appeal. These are category 2 and category 3, as defined for the purpose of High Court proceedings.[242]

2.17 The scale fee for each step in Court of Appeal proceedings is derived following the same procedure as applies to High Court proceedings. The relevant time allocations for the various steps in appellate proceedings are set out in schedule 2 to the Court of Appeal (Civil) Rules 2005, as inserted by rule 10 of the Court of Appeal (Civil) Amendment Rules (No. 2) 2008.

3. INTERPRETATION BY THE COURTS

3.1 Reluctance to allow increased costs. The courts of New Zealand, including the appellate courts, have firmly upheld the regime of cost scales applicable in civil litigation. Although the rules do permit the courts to depart from the scales,[243] the mere fact that a party's actual legal costs have exceeded (perhaps by a large amount) its recoverable legal costs does not of itself permit a departure from the scales.

3.2 This was illustrated vividly in *Glaister v Amalgamated Dairies Ltd*,[244] where a trial lasting 8.5 days was conducted in the High Court. The plaintiff was successful, and obtained judgment for NZ$2.5m plus interest of NZ$626,177. The plaintiff's actual legal fees were NZ$258,000, yet under the cost scales the plaintiff was only awarded NZ$87,210 for its costs (i.e. around 1/3 of its actual costs). It challenged the

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238 Disputes Tribunals Act 1988 (NZ) s43.
239 Until recently the Employment Relations Authority was known as the Employment Tribunal.
240 Residential Tenancies Act 1986 (NZ) s102.
241 See rule 53B of the Court of Appeal (Civil) Rules 2005.
242 See rule 53C of the Court of Appeal (Civil) Rules 2005.
243 See rules 14.6 and 14.7, discussed above.
244 [2004] 2 NZLR 606.

court's decision on costs, and contended that it should be paid around 2/3rds of its actual and reasonable costs, as this is what the costs regime established by the High Court Rules contemplates. The plaintiff's argument was rejected by the Court of Appeal, which held relevantly as follows:

> "[14] The new (and statutory) High Court scheme has at its heart the proposition that a successful party should receive a reasonable contribution towards his or her costs, being two-thirds of the costs deemed (under the new scheme) to be reasonable in a proceeding (or for that matter on an interlocutory application), having regard to the complexity and significance of the matters which were at issue and the time which was reasonably required to be taken. Rules 47(c) and (d) expressly use the term "considered reasonable", and that reference is to the statutory scheme.[245] And, r. 47(e) expressly provides that what is an appropriate daily recovery rate, and a reasonable amount of time, does not depend on the skill or the experience of the actual solicitor or counsel involved or on the costs actually incurred by the party claiming costs. The only reference which it is necessary to make towards actual costs is to be found in r. 47(f), namely that "an award of costs should not exceed the costs incurred by the party claiming costs". This of course reinforces the thesis underlying the new scheme: that the test is entirely an objective, and not a subjective, one.
>
> [15] The point was plainly enough put by this Court in Mansfield Drycleaner's.[246] There the High Court had considered affidavit evidence about the costs actually incurred by a successful party, and awarded approximately two-thirds of the actual costs. This Court stated, "we can see no departure [in this case] from any of the cost principles in the Rules other than the subjective rather than the objective starting point" (at 668 emphasis added).
>
> [16] These "deemed" costs have nothing to do with actual costs, however reasonable the latter may be. The deemed costs are established by the Rules Committee, on a national basis, after appropriate consultation.
>
> [17] In the result, given the mischief the revision of the costs scheme was addressing; the terms of the High Court Rules themselves; and the absence of any sound basis to depart from the view of the new High Court Rules this Court has previously taken, there is no basis for the first proposition advanced [by the appellant]".

3.3 The Court of Appeal then went on to consider the appellant's second argument, namely that the trial judge should have exercised the discretion given under the High Court Rules to depart from the scale. This argument was also rejected by the Court of Appeal, which held as follows:

> "[21] The new costs regime, as between competing parties, is of a regulatory character. It is important that the integrity of that scheme be maintained, and that if monetary adjustments to the scale are to be made that they be made on a national basis by the Rules Committee. In fact certain monetary adjustments were made to have effect from 1

[245] The High Court Rules were renumbered pursuant to amendments that took effect in 2009. The provisions in the old rule 47 are now reflected in rule 14.2.

[246] *Mansfield Drycleaners Ltd v Quinny's Drycleaning (Dentice Drycleaning Upper Hutt) Ltd* (2002) 16 PRNZ 662 (NZCA).

January 2004, and there is no present reason to think that the former problem of rate obsolescence will arise.

[22] When a departure is to be made from the High Court Rules' allowances, it is necessary that it be done in a particularised, and principled way. As was observed by this Court during the course of argument, the problem is a familiar one in our jurisprudence – a scheme of general application is laid down, but provision then has to be made for something that is not contemplated within the scheme or which is unfairly recognised by it.

[23] The allowances in the High Court Rules may be inappropriate in a given case. In commercial litigation, the difficulties will usually arise in one of two areas – where there is an unusual volume of discovery; or where, for some reason, the quite generous allowance of two days preparation for trial for every day of trial is inadequate.

[24] To put this another way, there is a relatively obvious logic to the monetary allowances in the new Rules and the discretion exists to enable the unexpected and the unforeseen to be fairly accommodated. It is not a case of r. 46 having an exclusionary primacy over r. 47 (or any other rules): the rules are complementary, and designed to produce an effective whole".[247]

3.4 The court then went on to emphasise that the question of whether a court should exercise its discretion to depart from the cost scales was "not simply a matter of putting the global sum under the High Court Rules up against costs actually incurred".[248] In the result, the Court of Appeal held that no error was shown in the trial judge's approach, therefore his decision (to the effect that the plaintiff would only recover 1/3rd of its actual costs) would stand.

3.5 Example of indemnity costs. As stated in section 2 above, rule 14.6 (4) permits the court to award indemnity costs in specified circumstances. The recent decision of Harrison J in *Bradbury v Westpac Banking Corporation* [2008] PRNZ 859 affords a good example of the extreme circumstances in which the court will award indemnity costs. In *Bradbury* the judge found that the plaintiffs had pursued five hopeless causes of action against *Westpac* to trial, in the hope of forcing a financial settlement. Such conduct merited an award of indemnity costs.[249]

4. PRACTICAL CONSEQUENCES

4.1 Predictability and flexibility. Two observations may be made about the cost rules discussed above.

4.2 The first is that they provide litigants with a degree of predictability as to the extent of the costs risk they face, or right of recovery they may have, based on the fact that the court rules countenance recovery according to a scale. The fact that costs are predictable is seen as facilitating the settlement of proceedings, as parties involved in settlement discussions will have a clear understanding of their position regarding costs.[250]

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[247] See also *Prebble v Shirley* [2005] NZSC 18 at [11], per Elias CJ.
[248] *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 at [28].
[249] See paragraphs 162, 163 and 196.
[250] The Hon Justice Venning's paper, "*Alternatives to Activity Based Costing – the New Zealand Approach*" (*ibid*) page 10.

4.3 The second point is that the costs scales import a degree of flexibility, in that the scale to be applied will vary depending upon (a) the nature of the proceedings; and (b) the amount of time it ought reasonably to have taken to perform a particular step in the proceedings. The rules do not take a "one size fits all" approach to costs. They also permit the court to depart from the costs scale if unforeseen events occur. However, as the *Glaister* case (mentioned above) makes clear, there are constraints on the ability of trial judges to depart from the scales. However, I understand it is not uncommon for litigants to apply for some departure from the scales. I am informed by practitioners that such applications are made in about 10% of cases. Despite the element of flexibility, the ABC/123 system provides a sufficient degree of certainty, such that there is generally no need for detailed assessment hearings.

4.4 Updating cost scales. As with all scales of costs, there is the potential for them to become out of date. This has been recognised in New Zealand. Both commentators and textbooks state that the cost scales applied under the rules of court are regularly reviewed and updated.[251] However, the Rules Committee has many other calls upon its time. In practice the scales have only been updated twice[252] in the nine years and four months since they were introduced.

4.5 The gap between actual and recoverable costs. As stated in rule 14.2 (d) above, the scale fees were originally intended to approximate to two thirds of actual costs. It is clear, however, from talking to practitioners that in practice scale fees generally fall far short of that. The width of that "gap" depends upon the type of litigation and the location of the lawyers. The scales constitute uniform rates across the whole of New Zealand, even though the overheads and charging rates of lawyers in, say, Auckland will be very different from those of lawyers in more remote areas. Some practitioners told me that recovery in their cases was in the region of 30-40%. Others quoted higher or lower percentages than that. One commercial litigator informed me that recovery in his cases was about 10% of actual costs. There are particular concerns about the low level of recovery for certain interlocutory steps (such as injunction applications) and in respect of appeals. However, these concerns relate to the figures included in the scales, rather than to the principle of the scales. It would be perfectly possible to re-calibrate the scales, possibly introducing one further band, so that sums recovered equate to approximately two thirds of actual costs.

4.6 The gap between arbitration and litigation costs. The percentage of costs recovered by successful parties now appears to be significantly higher in arbitration than in litigation.[253] I understand from practitioners that this factor may be encouraging some commercial litigants to prefer arbitration over litigation.

4.7 Do the New Zealand cost rules tend to reduce costs or promote access to justice? It is unclear whether the New Zealand cost rules have the effect of reducing legal costs or promoting access to justice. There is a dearth of empirical evidence on

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[251] According to Venning, page 11, every year the Rules Committee of the High Court should consult with the New Zealand Law Society and the Bar Association for their input on the appropriate daily recovery rates. Paragraph HR 14.4.01 of the standard loose leaf commentary on the NZ High Court Rules (release dated 1st January 2009) is to the same effect.

[252] On 1st January 2004 and 1st June 2006.

[253] See "*Arbitration v Litigation – a Cost Benefit Analysis. Comparative Costs Recovery Issues*", a paper presented by Stephen Mills QC to the First New Zealand Arbitration Day Seminar on 9th June 2006.

the point.[254] On one view, the prospect of only making partial recovery in the event of victory may deter litigants from maintaining meritorious claims or defences. On the alternative view, the reduced potential liability for adverse costs may encourage litigants to go ahead with claims or defences.

4.8 Comment. It is perhaps significant that the majority of litigants with leaking houses (a particular problem in New Zealand) prefer to proceed in the Weathertight Homes Tribunal rather than in the District Court. It appears that such litigants take this course, because they wish to avoid cost shifting altogether. Such litigants see cost shifting as perilous and therefore as inhibiting, rather than promoting, access to justice. On the other hand commercial litigants in high value disputes appear to prefer full cost shifting: see paragraph 4.6 above. It may therefore be simplistic either to say that full cost shifting inhibits access to justice or to say that full cost shifting promotes access to justice. The New Zealand experience suggests that the answer to this question depends upon the type of litigation and the circumstances of the litigant.

4.9 The New Zealand "ABC/123" system may be seen as a compromise between full cost shifting and no cost shifting. For many this compromise is a satisfactory one. The New Zealand costs rules also have the huge benefit of predictability and certainty.

4.10 Legal funding. As noted above, it is doubtful whether contingency fee agreements are permissible in New Zealand. CFAs are permissible, but they are only used occasionally.[255] There is no significant use of ATE insurance. There is some third party funding of litigation, provided more often by funders in Australia than by funders in New Zealand.[256] Before the event legal expenses insurance appears to be seldom used. However, the difficulty in making these statements is that there is little or no available statistical information about these matters.

4.11 Law reform. The justice system of New Zealand has been subject to detailed review in recent years, including by the New Zealand Law Commission in its report Delivering Justice for All: A Vision for New Zealand Courts and Tribunals (Report No. 85) (2004).[257] The report provided impetus for the modernisation of the rules of the High Court, which were recently the subject of a limited review aimed at improving their accessibility by such matters as re-numbering and using plainer language. There remain concerns about the costs and delays[258] associated with civil litigation and the New Zealand Rules Committee is considering these matters.

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[254] New Zealand Law Commission in its report *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (Report No. 85) (2004) page 36, paragraph 110.

[255] Of the practitioners to whom I spoke on 3rd April 2009, two said that they currently had CFA cases running (one case each).

[256] In a paper presented to the Hobart Conference in January 2009, Justice Raynor Asher stated that third party funding could promote access to justice. New Zealand did not have a *Fostif* decision (as to which see chapter 58). Justice Asher argued that the ancient torts of maintenance and champerty should not be allowed to inhibit access to justice. He suggested that a possible solution might be to abolish those torts and instead impose appropriate regulation upon the third party funding of litigation.

[257] See also the Rt Hon Sir Thomas Gault, "*Proportionality – Cost-Effective Justice?*" (a paper delivered at the 22nd AIJA conference, 17-19th September 2004) (see www.aija.org.au).

[258] I understand that one major cause of delay is the amount of criminal business which occupies the time of judges. Furthermore in New Zealand there are only two tiers of first instance judges, namely High Court judges and District Court judges. There is no intermediate tier, corresponding to our circuit judges who undertake the vast bulk of Crown Court work.

However, there are currently no proposals to amend the system that applies for the recovery of costs in civil litigation (i.e. fee scales).

4.12 Cost-effectiveness of litigation. The World Bank's "*Doing Business Report*" (2009) ranks New Zealand at 11th position in the world for the ease of enforcing contracts, with legal costs on average representing 22% of the claim value. The World Economic Forum's "Global Competitiveness Report 2008-2009"[259] puts New Zealand 12th (out of 134 countries) for the efficiency of its legal framework.

[259] See www.weforum.org.

CHAPTER 60. THE USA

1. INTRODUCTION

1.1 The US legal profession is largely self-regulating, and the costs[260] regime is no exception: individual lawyers and law firms determine both how and how much to charge their clients, subject to a standard of "reasonableness". Generally, lawyers bill on an hourly basis or utilise contingency arrangements (i.e. lawyers finance their clients' cases up-front in exchange for a percentage of the damages awarded; also called 'no-win, no-fee'). Flat fee arrangements, "blended" hourly rates (i.e. averaging the per hour rate of different classes of lawyers), retainers, *pro bono* representation, or any *ad hoc* combination of the above are all regularly used by US lawyers.[261]

1.2 US court practice regarding costs operates on the general principle of no fee shifting, i.e. each party to a civil litigation pays its own legal costs regardless of which party prevails (sometimes called the "American Rule"). The numerous federal and state statutory and common law exceptions to this rule demonstrate how the award of costs is used both as a carrot and a stick. Costs are generally awarded to prevailing parties in actions brought under the civil rights acts, environmental statutes, and other legislation that serves a clear public interest. Courts are also authorised to award costs against parties for failing to comply with court rules or, in common law, for pursuing vexatious or frivolous litigation. In this way, the purpose of cost awards under US law is perhaps broader than is suggested by the practice under the law of England and Wales, in that US cost awards serve punitive and compensatory functions while also encouraging parties to litigate claims that serve a wider public interest.

1.3 The policy, ethical and economic implications of the US costs regime has been the subject of much public debate. So-called "tort reform" and concern over private law firms' ever-increasing hourly rates have dominated the agenda, with the issue of legal costs receiving attention from politicians, legal commentators and practitioners alike.

1.4 US federal courts. A brief outline of the US civil courts system may be of assistance to readers. The federal courts deal with (a) litigation arising under federal law (securities, anti-trust, banking etc) and (b) litigation between parties of different states. As a result of the Class Actions Fairness Act 2005 (part of the "tort reform" movement discussed in section 4 below), an increasing number of class actions are being dealt with by the federal courts. The federal courts comprise district courts (which hear trials), courts of appeal (which hear appeals from the district courts) and the Supreme Court. The Supreme Court hears appeals from the federal courts of appeal. The Supreme Court also has some limited first instance jurisdiction, for example in respect of disputes between states. The US is divided into eleven numbered circuits (each embracing several states) and two further circuits located in Washington (DC Circuit and Federal Circuit). Each circuit has its own court of

[260] The term "costs" will be used throughout this chapter to connote both attorney's fees and other assorted court costs. US legal parlance often distinguishes between the two, however, and US lawyers and courts commonly use the terms "attorney's fees" and "costs", with the latter implying litigation costs not including attorney's fees. *See* paragraph 3.15 below, and discussion at footnote 357 regarding the US Supreme Court decision *Marek v. Chesney*, 473 U.S. 1 (1985) that determined when a statutory reference to "costs" should be read to include attorney's fees within the context of an award for attorney's fees under Rule 68 of the Rules of Federal Civil Procedure.

[261] US lawyers generally do not use UK-style "conditional fee arrangements" or CFAs.

appeal, which hears appeals from all district courts within the boundaries of the circuit. Federal court judges hold office for life during good behaviour.[262] The appointments of all federal court judges are confirmed by the Senate after consultation with the American Bar Association. No federal court judges are elected. The federal court judges in the district courts ("district judges") are assisted by "magistrate judges", who are appointed for ten year periods. The magistrate judges have functions similar in some ways to those of Queen's Bench masters and Chancery masters in our jurisdiction.

1.5 State courts. All civil cases outside the jurisdiction of the federal courts are dealt with by state courts.[263] In some states judges are elected, in other states all judges are appointed. The District of Columbia ("DC"), where Washington is situated, is a Federal enclave, rather than a state. The courts for DC are the "Superior Court of the District of Columbia" and the "District of Columbia Court of Appeals". These perform a similar function to state courts, but are in fact federal courts.

1.6 Assignment of each civil case to a single judge. So far as practicable, it is the policy of both federal courts and state courts to assign every civil case to a single judge, who will handle that case from beginning to end.[264] Both the judges and the practitioners to whom I spoke in the US believe that this system is efficient and leads to substantial saving of costs. It is referred to by some as the "docket" system and by others as the "single assignment system". One attorney told me that, in her experience, if a new judge stepped into a case for any reason, it was a hugely expensive process to get the new judge fully informed about the background and history of the case.

1.7 Mediation. Mediation is commonplace in US civil litigation. The Superior Court of the District of Columbia[265] requires almost all civil cases to go to mediation. The mediation is provided at no cost to the parties by officers of the court. The providers of mediation are paid at nominal rates (e.g. US$50 per day) and see themselves as providing a public service. They may be retired persons or they may be practising lawyers acting pro bono. Such mediation service counts towards the pro bono hours which a lawyer is expected to perform.[266]

1.8 Discovery. Discovery (the equivalent of our "disclosure") is a major driver of costs in US litigation, both in the Federal Courts and in the state courts. Witnesses from each party are "deposed" (i.e. cross-examined about the available documentation) and their answers are transcribed for future reference by the court. In class actions and other substantial litigation, the deposition process can generate massive costs. The advent of electronic communication and e-disclosure[267] has greatly increased the costs of discovery. Rule 26 of the Federal Court Rules[268] governs discovery in the Federal Courts. Rule 26(b)(1) defines the scope of discovery in broad terms,[269] essentially similar to the former *Peruvian Guano* test in English

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[262] Federal Court judges are sometimes referred to as "Article III judges", because they are appointed under article III of the US Constitution.

[263] According to data provided by the Federal Judicial Centre, the state courts handle about 50 million cases per year (both civil and criminal), whereas the federal courts handle about 2 million cases per year.

[264] Obviously this is subject to exceptions, e.g. where a judge retires or is recused, or where a class action proceeding in several states is brought under the control of a single judge.

[265] Which I visited on 6th April 2009.

[266] See section 4 below.

[267] See chapter 40.

[268] The current version of the Federal Court Rules is that promulgated on 1st December 2008.

[269] "*Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense … Relevant information need not be admissible at the trial, if*

law. Rule 26(b)(2) empowers the court to restrict discovery, where full discovery would be disproportionate. I understand from judges that the recent amendments to rule 26, enabling the court to restrict discovery, reflect an increasing concern on the part of federal judges about the escalating costs of discovery and a determination to rein back the extent of discovery. I understand from practitioners that there is some concern that judges do not exercise those powers effectively.

1.9 The district judges (who are dealing with trials) often do not have sufficient time to deal with discovery fully. Therefore they may delegate discovery issues either to magistrate judges[270] or to special masters.[271] I am told by practitioners that, because special masters have both the time and the expertise, they are sometimes very effective in dealing with discovery issues. So also are some of the magistrate judges, who have long experience as practising lawyers.

1.10 Length of trials. Civil trials in the US tend to be shorter than in England and Wales. I am told both by practitioners and judges that this is because of robust, even ruthless, trial management by judges. Even the trial of a big anti-trust case in the district court would probably be completed in 4 to 6 weeks. The same trial 20 years ago may have taken 4 to 6 months. At the pre-trial hearing the judge limits the matters about which he/she will hear evidence, the number of witnesses who will be called and the time to be allotted for each stage of the trial. Subject to limited exceptions, all civil trials are decided by juries. The judge sums up the law, but (unlike in England) he or she does not sum up the evidence.

1.11 Comment. There seems to me to be a contrast, at least in the larger cases, between (a) the immensity of discovery and the deposition process and (b) the relative shortness of the trials. There can be little opportunity to exploit most of the material obtained pre-trial. The question must be asked whether in the US civil justice system the pre-trial process is delivering benefits proportionate to the cost.

2. RELEVANT RULES AND LEGISLATION

(i) Regulation of contingency fees

2.1 Lawyers operating on a contingency fee basis generally charge a percentage of any damages (or settlement) won by a prevailing plaintiff; if the client does not prevail, the lawyer collects no fee. The percentage charged varies depending upon the type of case involved and the rate of the charging attorney or law firm. Contingency fee arrangements are most commonly used by individual plaintiffs in tort litigation (i.e. claims of personal injury allegedly caused by the defendant's wrongful conduct), breach of contract claims and class action suits.

2.2 The Model Rules of Professional Conduct were adopted by the American Bar Association (the "ABA Rules") in 1983 and form the basis for most state rules on legal professional ethics.[272] The ABA Rules are not legally binding, but rather guidelines to

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the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

[270] See paragraph 1.4 above.

[271] Special masters are appointed pursuant to rule 53 of the Federal Rules of Civil Procedure. They are privately paid by the parties, usually in equal shares. Special masters are sometimes retired Federal judges. As the problems associated with e-discovery have multiplied in recent years, so rule 53 has been revised to expand the role of special masters: see Scheindlin and Redgrave, "Special Masters and e-discovery: the intersection of two recent revisions to the Federal Rules of Civil Procedure" (2008) 30 Cardozo Law Review 347.

[272] Available at http://www.abanet.org/cpr/mrpc/model_rules.html.

which lawyers are expected to adhere. Enforcement and any disciplinary proceedings are generally dealt with by state bar associations.[273] The ABA Rules expressly permit contingency fees in all but three circumstances: divorce or alimony proceedings, criminal defence, or where otherwise not permitted by law.[274]

2.3 About half the states in the United States limit contingency fees in some way – from imposing sliding scales, to capping percentages, to requiring court review for reasonableness. Most states that limit contingency fees do so in the context of medical malpractice, personal injury, wrongful death or tortious conduct cases. For example, Texas prohibits contingency fee arrangements in class action lawsuits and requires that fees are paid according to time and cost.[275] California limits contingency fees in medical liability cases on a sliding scale: 40% of the first US$50,000 recovered, 33.3% of the next US$50,000, 25% of the next US$500,000, and 15% of any amount exceeding US$600,000. Iowa state law provides that, in medical liability cases, a court "shall determine" the reasonableness of the contingency fee.[276]

2.4 Some states regulate contingency fees as applicable to all types of cases. For example, New Hampshire requires a court to approve any contingency fee greater than US$200,000[277] and Oklahoma limits contingency fees to 50% of a plaintiff's recovery.[278]

2.5 Federal statutory law regulating contingency fees is relatively sparse, largely because specified restrictions are seen potentially to deter lawyers from taking on clients with the regulated type of claim.[279] There are, however, a few federal statutes that limit contingency fees. For example, 42 U.S.C. § 406(a) limits contingent fees in agency proceedings under Title II of the Social Security Act to the lesser of 25% of any award or US$4,000. Contingent fees in cases before the Department of Veterans Affairs are limited to 20% of any award.[280] And in 2007, then-President George W. Bush issued the Executive Order "Protecting American Taxpayers From Payment of Contingency Fees" which prohibits federal agencies from entering into contingency fee arrangements for legal services.[281]

2.6 For a detailed review of state laws regarding limits and regulation of contingency fees, please see Appendix 29.

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[273] For example, the California State Bar is responsible for regulating the practice of law in California, including attorneys admitted to practice before the courts of California and attorneys not licensed in California but either appearing in specific California proceedings or otherwise rendering California law legal advice. In relation to this responsibility, the Bar takes complaints against attorneys from citizens and other sources, investigates those complaints, and prosecutes attorneys against whom allegations of unethical conduct appear to be justified. Attorney conduct is regulated in California by the California Rules of Professional Conduct and the State Bar Act (Cal. Bus. Prof. Code §§ 6000 et seq.).
[274] Rule 1.5(d).
[275] American Tort Reform Association, "Tort Reform Record", December 31, 2004.
[276] Iowa Code Ann. § 147.138.
[277] N.H. Rev. Stat. Ann. § 508:4-e.
[278] Okla. Stat. Ann. Tit. 5, § 7.
[279] *See* Henry Cohen, CRS Report for Congress: Awards of Attorneys' Fees by Federal Courts and Federal Agencies (June 20, 2008), pp. 58-59 (hereinafter, "CRS Report").
[280] 38 U.S.C. § 5904(d).
[281] Executive Order 13433 (May 16, 2007).

(ii) "Reasonable" Attorney Fees[282]

2.7 ABA Rules. Rule 1.5 of the ABA Rules states that a lawyer shall not charge "an unreasonable fee" and lists eight factors to guide a determination of "reasonableness":

> "The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent."

2.8 Within the wide parameters of "reasonable", lawyers are free to charge clients per hourly billable rates; "blended" rates; contingency fees; fixed fee; retentions; and to represent clients on a pro bono basis and/or via state or federal legal aid schemes.

(iii) The American Rule on Fee Shifting

2.9 The American Rule provides that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."[283] While this general principle still applies under state and federal law, there are a significant number of statutory and common law exceptions that allow for a court (and, occasionally, a federal agency) to order costs against a losing party or, under specific circumstances, as deductions from an award or from a debtor's estate.

(a) Common law exceptions to the American Rule

2.10 The American Rule has two primary common law exceptions: the common benefit doctrine and the bad faith doctrine. Both derive from US courts' historic

[282] Although theoretically the "reasonableness" standard applies to contingency fees as well as to hourly rates, courts' discussion of what constitutes "reasonable" occurs most often when calculating hourly rates in the context of awarding fees under one of the enumerated exceptions to the American Rule. Where regulated, contingency fee arrangements are generally the subject of statutory limitations which by their nature incorporate the reasonableness standard. Accordingly, "reasonable" attorney fees discussed here will focus primarily on hourly rates charged by lawyers and/or awarded by judges.

[283] Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975).

authority to "to do equity in a particular situation"[284], which is often referred to as federal courts' "supervisory" or "inherent" power.[285] The inherent power is invoked infrequently and only in those situations where no statutory or rule-based exception will apply.[286]

2.11 Bad Faith. The bad faith doctrine provides for an award of costs against a party litigating in bad faith. The standard is subjective and requires "some proof of malice entirely apart from inferences arising from the possible frivolous character of a particular claim."[287] Case law regarding what constitutes bad faith sufficient to justify an award of attorney's fees is discussed further in Section 3 below.

2.12 Common Benefit. The common benefit doctrine permits a court to order an award for costs not from the losing party but rather from those who benefited from a successful suit.[288] The plaintiffs' attorney in a successful class action suit, for example, may be awarded costs as a deduction from the total award granted to the plaintiff class, with each individual plaintiff paying his/her pro rata share.[289] Awards under the common benefit doctrine are premised on concerns of fairness, i.e. to prevent the unjust enrichment of the award beneficiaries at the expense of counsel.[290] Although such cost awards occur most often in class action litigation, they may arise in connection with any judgment that creates a "common fund" or a non-monetary "substantial benefit" for an ascertainable class.[291] Case law on the common benefit doctrine is discussed in Section 3 below.

(b) Federal Statutory Exceptions to the American Rule

2.13 Over 200 federal statutes call for the award of attorney fees in certain circumstances.[292] Generally, Congress permits an award for costs in circumstances that implicate public policy concerns or to help equalise contests between a private party and a corporate or governmental entity.[293] Fee shifting is most commonly seen in legislation relating to civil rights, environmental protection and consumer protection, and the most important court decisions regarding cost awards have arisen under these types of statutes.[294] Some of the most frequently invoked exceptions to the American Rule are set out below.

- The Civil Rights Act of 1964 provides for an award of reasonable attorneys' fees to prevailing parties in litigation against a state or federal entity relating to

[284] Sprague v. Ticonic National Bank, 307 U.S. 161, 166 (1939).
[285] CRS Report, p. 2.
[286] *See* David F. Herr, Nicole Narotzky, "*Sanctions in Civil Litigation: A Review of Sanctions by Rule, Statute, and Inherent Power*," ALI-ABA Course of Study, July 2007, p. 1849 (hereinafter, "ABA Sanctions Review").
[287] Copeland v. Martinez, 603 F.2d 981, 991 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980); *see* also *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980).
[288] The doctrine was originally set out in *Trustee v. Greenough*, 105 U.S. 527 (1881).
[289] *See,* e.g., *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980).
[290] *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885).
[291] Alan Hirsch and Diane Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation*, Federal Judicial Center (Second Edition 2005), pp. 59-61 and 83 (hereinafter, "Hirsch & Sheehey").
[292] *See* CRS Report, pp. 64-114, for a complete list of statutory exceptions; *see* also, ABA Sanctions Review.
[293] CRS Report, Introduction.
[294] CRS Report, p. 25.

discrimination or segregation in places of public accommodation[295], public facilities[296] and employment.[297]

- The Civil Rights Attorneys Fees Award Act of 1976 expressly permits federal courts to award attorneys' fees and expert fees under eleven named statutes.[298]
- The Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961 et seq., allows the prevailing party to recover treble damages, costs and "a reasonable attorney's fee".[299]
- The False Claims Act, at 31 U.S.C. §§ 3729-3733, allows recovery of "reasonable attorneys' fees" by prevailing whistleblower qui tam plaintiffs.[300]
- The Freedom of Information Act provides that a court "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case... in which the complainant has substantially prevailed."[301] Courts' discretion has been guided by the four factors set out in Nationwide Building Maintenance.[302]
- The Patent Act, 35 U.S.C. § 285, states: "The court in exceptional cases may award reasonable attorney fees to the prevailing party." The standard is clear and convincing evidence, higher than mere preponderance of the evidence, and generally requires a showing of bad faith, vexatious litigation strategy or wilful infringement to justify an award of costs.[303]

2.14 EAJA. The Equal Access to Justice Act (the "EAJA") authorises generally the payment of attorneys' fees against the United States to the same extent that a private party would be liable pursuant to statute or the common law.[304] A court may also award costs to a prevailing party in any civil proceeding against the United States (with the exception of tax cases and tort claims) unless the government's position was substantially justified or special circumstances make an award unjust.[305] In 1996, the EAJA was amended to limit awards of attorney fees to US$125 per hour and prohibit cost awards in favour of individuals with a net worth over US$2 million or to businesses or organisations with a net worth over US$7 million, or with more than 500 employees.[306]

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[295] 42 U.S.C. § 2000a-3(b).
[296] 42 U.S.C. § 2000b-1.
[297] 42 U.S.C. § 2000e-5(k).
[298] 42 U.S.C. § 1988(b).
[299] 18 U.S.C. § 1964. For a discussion on the standard of reasonableness, *see, infra,* Sections 3.5 and 3.6.
[300] 31 U.S.C. §§ 3730. For a discussion on the standard of reasonableness, *see, infra,* Sections 3.5 and 3.6.
[301] 5 U.S.C. § 552(a)(4)(E).
[302] *Nationwide Building Maintenance v. Sampson*, 559 F.2d 704 (D.C. Cir. 1977). The four factors are: (1) whether the public interest is served by disclosure of the requested information; (2) whether a commercial interest is served by the disclosure; (3) the nature of the plaintiff's interest in the records sought; and (4) the reasonableness of the government's asserted legal basis for withholding the documents.
[303] See *Evident Corp. v. Church & Dwight Co.*, 399 F.3d. 1310, 1315 (Fed. Cir. 2005), *cited in* Raysman, Richard and Brown, Peter, Recovering Attorney's Fees in Patent Litigation, 236 N.Y.L.J. 26 (8th August 2006) (hereinafter, "Raysman & Brown"); see also, Reactive Metals & Alloys Corp. v. ESM, Inc., 769 F.2d 1578, 1582 (Fed. Cir. 1985).
[304] 28 U.S.C. § 2412(b). Prior to enactment of the EAJA in 1980, awards of attorney fees against the United States were prohibited on the grounds of sovereign immunity. See CRS Report, p. 6.
[305] 5 U.S.C. § 504 and 28 U.S.C. § 2412(d); see also CRS Report, page 6.
[306] P.L. 104-121, §§ 231-233. Tax-exempt organisations and agricultural cooperatives may recover fees regardless of their net worth.

2.15 In addition, the EAJA 1996 amendment authorises awards in favour of losing parties if the demand requested by the United States as plaintiff is "substantially in excess" of the judgment finally obtained by the United States and is "unreasonable when compared with such judgment".[307] This provision in favour of losing private parties is unique in US law on costs.

2.16 Section 1927. Under 28 U.S.C. § 1927 (commonly called "Section 1927"), lawyers may be held personally liable for excessive costs as a result of "unreasonable and vexatious" delay or multiplication of proceedings: "An attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorney fees reasonably incurred because of such conduct."[308]

2.17 Chapter 11, Bankruptcy Code. Under Chapter 11 of the Bankruptcy Code, a debtor's attorney's fees (and the cost of other professional services) are paid out of the debtor's estate, subject to court approval.[309] This scheme helps protect the debtor from paying unnecessary or disproportionate legal fees while also encouraging competent attorneys to engage in bankruptcy practice and facilitating debtors' effective reorganisation.[310] The Bankruptcy Code allows the payment of expenses and reasonable compensation only for "actual, necessary" services.[311]

2.18 A more detailed examination of the major federal legislation that provides for fee shifting is set out in Appendix 30.

(c) State law exceptions to the American Rule: Alaska and Florida

2.19 Alaska. Alaska is unique among US jurisdictions insofar as it has had a partial cost-shifting rule since 1884. Alaska Civil Rule 82 provides for the award of attorney fees to the prevailing plaintiff as a percentage of money damages recovered: 20% of the first US$25,000 and 10% of any additional sums recovered at trial.[312] A prevailing defendant receives 30% of his or her actual attorneys' fees for cases tried and 20% of actual fees for cases terminated by other means.[313]

2.20 Florida. In 1980, Florida experimented with a partial cost-shifting rule in medical malpractice lawsuits.[314] The cost-shifting provision was applauded by the medical profession and insurance industry interest groups, who hoped that the statute would reduce malpractice litigation rates in the state and lower the cost of insurance premiums. The fee-shifting law was repealed in 1985 in response to difficulties in collecting attorney fees from insolvent plaintiffs and after several high-value damages awards against doctors.[315]

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[307] 28 U.S.C. § 2412(d).
[308] 28 U.S.C. § 1927.
[309] 11 U.S.C. § 330; see, for example, In re Farley, Inc., 156 B.R. 203, 210 (Bankr. N.D.Ill. 1993); Matter of Hunt's Health Care, Inc., 161 B.R. 971, 975 (Bankr. N.D.Ind. 1993); Matter of Pacheco, 54 B.R. 639, 641 (Bankr. D.N.J. 1985).
[310] Cynthia A. Baker, "*Fixing What's Broken: A Proposal for Reform of the Compensation System in Bankruptcy*", 5 J Bankr L and Prac 435, 438 (July/August 1996).
[311] 11 U.S.C. § 330(a)(1).
[312] Alaska Civil Rule 82.
[313] Marie Gryphon, "*Greater Justice, Lower Cost: How a 'Loser Pays' Rule Would Improve the American Legal System*", Center for Legal Policy: Civil Justice Report no. 11 (December 2008), at p. 14.
[314] Fla. Stat. Ann. § 768.56, repealed by 1985 Fla. Laws ch. 85-175, S 43 (repeal effective 1 October 1985).
[315] Gryphon, *supra* footnote 313, at. 15.

(d) Exceptions in the Federal Rules of Civil Procedure

2.21 The Federal Rules of Civil Procedure ("FRCP") apply in district (trial) courts. The award of attorneys' fees is permitted under several of the Rules to sanction parties' non-compliance therewith.

2.22 Rule 11. Rule 11 governs a party's presentation of written pleadings to court and requires that any claim or defence advanced be "non-frivolous", "warranted by existing law", supported by evidence and otherwise not presented for any "improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."[316] A court may impose a sanction on a party with an award of "reasonable attorney's fees and other expenses incurred as a direct result of" the Rule 11 violation if: (1) a cost award is requested by a motion of the opposing party (rather than on the court's own initiative); (2) a violation of Rule 11 is found; and (3) the court determines in its discretion that such an award is "warranted for effective deterrence."[317]

2.23 Safe harbour. Rule 11 was amended in 1993 to provide a 21-day "safe-harbour" period: if a party wishes to file a Rule 11 motion, it must first provide the opposing party with a 21-day notice period during which that party may withdraw the offending documents or otherwise cease the objectionable conduct.[318] The purpose of the 21-day safe-harbour provision was to allow parties the opportunity to self-regulate, and thus save courts' time and expense in deciding motions to sanction.

2.24 Discovery sanctions. Sanctions in the form of cost awards are also available for violations of the FRCP relating to discovery, including written discovery requests and responses (Rule 26(g)), conduct during oral depositions (Rule 30(d)) and overall compliance with court orders made during the discovery process (Rule 37).

2.25 Failure to beat offer. Finally, Rule 68 of the FRCP provides a partial exception to the American Rule. If a defendant offers a settlement (which includes "statutory costs" then accrued) at least 10 days before the trial date, and the plaintiff fails to accept the offer within 10 days and then wins the lawsuit with a judgment that

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[316] Rule 11(b) states in full: "*By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.*"

[317] It is worth noting that Rule 11 has attracted the ire of both judges and lawyers because of the increase in "satellite" litigation surrounding the imposition of sanctions. *See*, for example, Bench-Bar Proposal to Revise Civil Procedure Rule 11, 137 F.R.D. 159 (1991); "*House Votes to Bring Bite Back to Rule 11*", The National Law Journal, Marcia Coyle, 27 September 2004. Legislation is periodically introduced to amend Rule 11 with a view toward reducing this type of litigation. Most recently, on 16th March 2009, Sen. Chuck Grassley sponsored a bill before the Senate that, if enacted, would remove the court's discretion in awarding sanctions under Rule 11 and make them mandatory upon a court's finding of a Rule 11 violation. *See* Frivolous Lawsuit Prevention Act of 2009, S. 603, 111th Cong. (2009) (at frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s603is.txt.pdf.)

[318] See Alan M. Koral, Sanctions and Litigating Employment Disputes: Recent Developments in Rule 11 Jurisprudence, PLI Order No. 14930 (2008).

is less favourable than the offer, the plaintiff "must pay the costs incurred after the making of the offer."[319] It is important to note that the statutory costs available under Rule 68 generally do not include attorneys' fees (except where otherwise provided, such as the Civil Rights Act, etc.) and thus tend to reflect only a fraction of the true costs and expenses associated with a case.

(e) Awards of "costs" on appeal

2.26 FRCP 54(d) provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs."

2.27 The Federal Rules of Appellate Procedure ("FRAP") apply in circuit (appellate) courts. FRAP Rule 38 states: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." Similarly, 28 U.S.C. § 1912 provides that, "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay and single or double costs." Appeals are generally deemed "frivolous" within the meaning of Rule 30 and § 1912 only if the result is obvious and the arguments are wholly without merit.[320]

2.28 Meaning of costs. Notably "costs", as defined within these rules, expressly do not include attorneys' fees. 28 U.S.C. § 1920 defines "costs" to include: (1) fees of the clerk and marshal, (2) court reporter fees; (3) fees and disbursements for printing and witnesses; (4) fees for copying papers necessary for the case; (5) docket fees; and (6) "compensation of court appointed experts, interpreters and salaries, fees, expenses and costs of special interpretation services under section 1828."[321] This reflects the policy in favour of leaving costs orders to the district courts who are considered best placed to conduct the fact-intensive investigation into the circumstances that would warrant fee-shifting.

(iv) Legal aid and pro bono representation

2.29 Pro bono representation. Historically, the US legal profession has included a significant public service component, even for lawyers employed in the private sector. Rule 6.1 of the ABA Rules set out an aspirational target that every lawyer within private practice devote at least 50 hours per year to pro bono (free) representation. Most state bars incorporate this target into their state ethics guidelines for lawyers licensed in the state.

2.30 Legal aid. The Legal Services Corporation ("LSC") was created by Congress in 1974 to oversee federal funding for civil legal aid. LSC gives grants to independent, local programs. People with income below the federal poverty guidelines are generally eligible for free legal assistance in civil matters through a variety of state and federal programs. People who are elderly, disabled, the victims of domestic violence, enlisted in the military or in other special circumstances may also qualify for free legal assistance, regardless of their income level.[322]

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[319] CRS Report, p. 55.
[320] ABA Sanctions Review, p. 1855, citing *Reliance Ins. Co. v. Sweeney Corp.*, 792 F.2d 1137, 1138 (D.C. Cir. 1986).
[321] CRS Report, pp. 46-47.
[322] *See*, generally, www.lsc.gov.

(v) Third party funding

2.31 Federal and state statutes are largely silent on the question of third party funding of civil litigation. Due to market demands, third party funding has become increasingly more available to US litigants in recent years. Concerns over third party funding have been raised by state bar associations, primarily regarding the potential risk to an attorney's independence and to attorney-client privilege that a third party funding situation may impose.

2.32 Many state bar associations will allow attorneys to refer their clients to litigation funding companies, so long as the referral does not interfere with the lawyer's independent professional judgment, and the lawyer does not disclose client confidences without the client's consent. For example, the Florida State Bar Association takes the view that a lawyer may provide clients with information about litigation finance companies if the lawyer believes this to be in the client's best interest. Additionally, the lawyer may also give factual information about the case to the third party funder with the client's consent, and the lawyer may honour the client's written assignment of a portion of the recovery to the company.[323]

2.33 Another concern in third party litigation financing is the potential risk to attorney-client privilege. Several state bar opinions provide that the lawyer should warn the client about the possible loss of the attorney-client privilege when making disclosures to financing companies.[324]

2.34 Most state bar ethics opinions provide that attorneys may borrow money from third party lending institutions that loan funds to lawyers for litigation expenses, and pass the interest or finance charges on to the client, so long as the attorney obtains the client's consent and the interest rate is reasonable.[325]

(vi) Insurance

2.35 Legal Expenses Insurance. Insurance coverage for attorneys' fees and costs arising from civil litigation (whether as plaintiff or defendant) is commonplace in the US for organisations and some types of professional individuals, most notably doctors. The high cost of insurance for small businesses to cover losses arising from possible civil lawsuits and medical malpractice insurance for doctors have both been targets of the so-called "tort reform" movement, as described below in Section 4.

2.36 No ATE. After-the-event (ATE) insurance, regularly used in England & Wales and other jurisdictions with a loser-pays rule, does not exist in the US.

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[323] Florida State Bar Association, Opinion 00-3 (2000).

[324] *See*, for example, New Jersey Advisory Committee on Professional Ethics Opinion 691 (2001); Missouri Office of Chief Disciplinary Counsel Informal Opinion 2000-0229 (11/00); Committee on Ethics of the Maryland State Bar Association Opinion 92-25 (1992); Committee on Professional Ethics of the Connecticut Bar Association Opinion 99-2 (1999); Committee on Legal Ethics and Professional Responsibility of the Pennsylvania State Bar Opinion 99-8.

[325] *See*, for example, Committee on Rules of Professional Conduct of the State Bar of Arizona Opinion 2001-07 (2001); Maine Board of Bar Overseers Opinion 177 (2001); Missouri Bar Ass'n Informal Opinion No. 970066, (2001); New York State Bar Opinion 754 (2002); Ethics Committee of the Utah State Bar Opinion 02-01 (2001).

3. INTERPRETATION BY THE COURTS AND COMMENTATORS

(i) Regulation of contingency fees

3.1 Contingency fee arrangements have been called a "hallmark" of the US legal system and their use dates back to at least 1786.[326] Today, contingency fee arrangements are most commonly utilised by individual litigants in tort claims or breach of contract claims. A well-regarded (although now somewhat dated) empirical study found that individual litigants use contingency fee arrangements in approximately 87% of all tort claims and 53% of all contractual claims. In contrast, approximately 88% of organisational litigants use hourly or flat fees.[327]

3.2 Courts' review of contingency fee arrangements occur most commonly within the context of attorney disciplinary hearings.[328] Arizona is one of several states that permit the courts to review contingency fee arrangements for reasonableness. In 1984, the Supreme Court of Arizona examined the reasonableness of a contingency fee collected after settlement of a personal injury claim.[329] In Swartz, the court held that a US$50,000 contingency fee in a case with "*no contingency, no difficult problem and little work" was "both clearly excessive and shocking*".[330] The court determined that a contract for a contingent fee "should always be subject to the supervision of the court, as to its reasonableness" based on Arizona state disciplinary rules and the ABA Rules.[331] On this basis, the court found the fee unreasonable in the circumstances and penalised the lawyer involved.

3.3 States may also require compliance with the ethics opinions promulgated by state bar associations. In Blackmon, the Supreme Court of Mississippi found that an attorney's failure to follow the state bar ethics opinion on attorneys' fees in structured settlements constituted misconduct warranting disciplinary action.[332] The court expressly declined to rule on whether a 40% contingency fee, which was approximately the fee at issue in the matter, was excessive or appropriate, but held that the attorney in the matter should have consulted state bar ethics opinions on the calculation of fee percentages.

3.4 Contingency fees have also been examined by some federal courts. In *Gisbrecht*, the Supreme Court examined an award of attorneys' fees to a prevailing party in a claim for Social Security benefits. The Court held that a reviewing authority, when examining contingency fee arrangements, should look first to the terms of the contingency agreement and then test it for reasonableness; the attorney's recovery should be reduced if the character of the representation and results achieved so warrant.[333]

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[326] See Honestus [pseudo. of Benjamin Austin], *Observations on the Pernicious Practice of the Law* (Boston, 1819), reprinted in 13 Am. J. Legal Hist. 241, 256 (1969).
[327] See Winand Emons, *Conditional versus contingent fees*, Oxford Economic Papers 59 (2007), at p. 89-90, citing Kritzer, H. *The Justice Broker: Lawyers and Ordinary Litigation*, Oxford University Press, Oxford (1990).
[328] Many state (and some federal) statutes regulate contingency fees in one manner or another, but determinations of the reasonableness of contingency fees follow state bar codes of conduct and ethics opinions. Because US lawyers are licensed by state rather than on a national level, most case law concerning the reasonableness of contingency fees has arisen in state courts.
[329] In *re Swartz*, 686 P.2d 1236 (Ariz. 1984).
[330] *Id* at 1243.
[331] *Id* at 1242.
[332] *Miss. State Bar v. Blackmon*, 600 So.2d 166 (Miss. 1992).
[333] *Gisbrecht et al v. Barnhart*, 535 U.S. 789 (2002).

(ii) "Reasonable" attorney fees

3.5 As stated in the Introduction, the US legal profession is largely self-regulating and there are no set guidelines for what constitutes a "reasonable" hourly rate for US lawyers, as exists in Germany for example. Courts have provided some guidance, however, when calculating reasonable attorneys' fees in the context of a fee award made under a statutory or common law exception to the American Rule. Three leading Supreme Court decisions guide lower courts' review. First, Perkins v. Standard Oil of California provides that attorneys' fees "should, as a general rule, be fixed in the first instance by the District Court, after hearing evidence as to the extent and nature of the services rendered."[334] District courts thus require parties to submit "fairly definitive information" on the number of hours devoted to general activities, and the time spent on the matter by lawyers of different seniority levels, but not the "exact number of minutes spent nor the precise activity" of each lawyer involved.[335]

3.6 Second, in *Pennsylvania v. Delaware Citizens' Council for Clean Air (Delaware Valley I)* the Supreme Court explained the "lodestar approach", first employed by the Fifth Circuit Court of Appeals, to determine the reasonableness of a fee award:

> "This method, known as the "lodestar" approach, involved two steps. First, the court was to calculate the "lodestar", determined by multiplying the hours spent on a case by a reasonable hourly rate of compensation for each attorney involved. Second, using the lodestar figure as a starting point, the court could then make adjustments to the figure, in light of (1) the contingent nature of the case, reflecting the likelihood that hours were invested and expenses incurred without assurance of compensation; and (2) the quality of the work performed as evidenced by the work observed, the complexity of the issues and the recovery obtained."[336]

3.7 For civil rights cases, the Supreme Court has devised a third component to the costs inquiry. In *Blum v. Stenson* the Supreme Court found that reasonable fees awarded in civil rights cases should be calculated according to "prevailing market rates in the relevant community, regardless of whether the plaintiff is represented by private or nonprofit counsel."[337] Thus the Court rejected the position that a fee award be calculated with reference to the actual cost, which in the case of a civil rights lawyer would likely be lower than the "prevailing market rate" for a private practice attorney.

(iii) Exceptions to the American Rule

(a) Common law exceptions

3.8 Bad Faith. Courts award legal fees under the bad faith exception in limited circumstances, and only when a statutory or other rules-based ground is not available.[338] The Supreme Court has stated that a federal court may award costs

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[334] 399 U.S. 222, 223 (1970).
[335] See CRS Report, p. 49, citing *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3rd Cir. 1973).
[336] 478 U.S. 546, 562-566 (1986) (internal citations omitted).
[337] 465 U.S. 886, 895 (1984); *see* also Save our *Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1520 (D.C. Cir. 1988).
[338] *United States v. One* 1987 VMW 325, 985 F.2d 655, 661 (1st Cir. 1993).

when a party has acted "*in bad faith, vexatiously, wantonly or for oppressive reasons"* and that the purpose of such an award is punitive.[339] Courts have been cautioned to exercise their inherent powers with restraint and discretion because they are *"shielded from democratic controls…*".[340]

3.9 Orders for costs may be levied against a party or the representing attorney. A leading Supreme Court case, *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980), involved a costs award made against an attorney who "*wilfully abused judicial processes*" in the course of a civil litigation.[341]

3.10 Common Benefit. Courts regularly apply the common benefit doctrine to award attorneys' fees and other costs in class action suits or other cases where a "common fund" (i.e. an award that benefits a particular class or group of people) is created. Application of the common benefit doctrine dates back to an 1881 Supreme Court case[342] and has been the subject of voluminous case law and commentary. Awards of legal fees are made by motion to the relevant court, brought either by a plaintiff seeking to apportion its costs among other members of the prevailing class or by the plaintiffs' attorney seeking payment of his/her fees as a deduction from the final judgment amount.[343]

(b) Statutory Exceptions

3.11 Courts apply a dual standard when determining whether to award costs in a civil rights suit.[344] Prevailing plaintiffs in civil rights suits are generally awarded costs "*in all but very unusual circumstances*."[345] Prevailing defendants, however, may recover only upon a finding that a plaintiff's action was "*frivolous, unreasonable or without foundation*".[346] The Supreme Court explained that the dual standard reflects Congressional intent "*to clear the way for suits to be brought under the [Civil Rights] Act*" but also "*to protect defendants from burdensome litigation having no legal or factual basis*."[347]

3.12 The same dual standard has been found to apply in federal environmental statutes[348] and under the Truth in Lending Act[349], but not to apply to the cost provisions of the Copyright Act.[350] In the latter case, the Court based its reasoning on the grounds that "defendants who seek to advance a variety of meritorious copyright

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[339] *Hall v. Cole*, 412 U.S. at 5.
[340] *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).
[341] The Court explained the grounds for its award: "*In narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel… The power of a court over members of its bar is at least as great as its authority over litigants. If a court may tax counsel fees against a party who litigated in bad faith, it certainly may assess those expenses against counsel who wilfully abuse judicial processes… Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record. But in a proper case, such sanctions are within a court's power.*"
[342] *Trustees v. Greenough*, 105 U.S. 527 (1881).
[343] Such motions are made pursuant to Rule 23(h) of the Federal Rules of Civil Procedure.
[344] See CRS Report, pp. 13-14.
[345] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975).
[346] *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 417 (1978).
[347] *Id*. at 420.
[348] *Consolidated Edison Co. v. Realty Investment Associates*, 524 F.Supp. 150 (S.D.N.Y. 1981).
[349] *Postow v. OBA Federal* S&L Ass'n, 627 F.2d 1370, 1387-1388 (D.C. Cir. 1980).
[350] *Fantasy, Inc. v. Fogerty*, 510 U.S. 717, 527 (1994).

defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement."[351]

3.13 Section 1927. Under 28 U.S.C. § 1927, courts impose costs orders directly against lawyers in violation of this section. A lawyer's conduct is "unreasonable and vexatious" if it pursues a claim, defence or position satisfying one of two tests: (i) it is known or should be known by the lawyer to be unwarranted in fact or law, or (ii) it is advanced for the primary purpose of obstructing the orderly progress of the litigation.[352] As only "excess" costs attributable to multiplicative misconduct are recoverable,[353] a § 1927 award will not always shift the entire burden of costs unless the whole action itself was unwarranted and should not have been commenced or pursued, and damages were properly mitigated.[354]

3.14 Chapter 11, Bankruptcy Code. Section 330 of the Bankruptcy Code requires lawyers (and other professionals) to submit detailed fee request applications, setting out the services rendered, time spent and hourly rates charged. Federal bankruptcy courts (a division of the district courts) review the fee applications pursuant to a reasonableness standard, with specific court practice differing among localities. Generally, courts determine reasonableness by reference to the nature, extent and value of services claimed, accounting for all relevant factors, including time spent, the rate charged, necessity or benefit of services, the timeliness of services, and comparison with customary fees in non-bankruptcy proceedings.[355]

(c) Exceptions in the Federal Rules of Civil Procedure

3.15 Failure to beat offer. Rule 68 has been applied regularly by courts to award post-offer costs. The Fifth Circuit Court of Appeals stated in 1987, "[E]very court addressing the issue thus far has held that Rule 68 obligates plaintiffs to pay defendants' post-offer costs after rejecting an offer more favourable than the judgment eventually obtained."[356] As stated by the Supreme Court, "the plain purpose of Rule 68 is to encourage settlement and avoid litigation."[357]

3.16 Safe harbour. Since the 1993 amendments to Rule 11 (the "safe harbour" provision) which allow for lawyers' self-regulation, courts have imposed Rule 11 costs awards only "under unusual circumstances".[358] Courts require a finding of "objective unreasonableness" before imposing a sanction under Rule 11[359] and will generally impose sanctions only if the offending party continues to insist upon a position or

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[351] *Id*. at 534.
[352] *Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163, 1167 (7th Cir. 1968), *cert. denied*, 395 U.S. 908 (1969).
[353] *Pacific Dunlop Holdings, Inc. v. Barosh*, 22 F.3d 113, 120 (7th Cir. 1994).
[354] *Browning v. Kramer*, 931 F.2d 340, 345 (5th Cir. 1991).
[355] 11 U.S.C. § 330(a)(3).
[356] *Crossman v. Marcoccio*, 806 F.2d 329, 332 (5th Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987).
[357] *Marek v. Chesney*, 473 U.S. 1, 5 (1985). In *Marek v. Chesney* the Supreme Court held that, if a lawsuit is brought under a statute that provides for attorney's fees as part of a "costs" award, then Rule 68 should be read to include attorneys' fees. Some courts had queried whether the general reference to "costs" in Rule 68 should be read to always include reasonable attorney's fees, and the Chesney decision provided guidance on this point. *See* CRS Report, pp. 55-56.
[358] David F. Herr and Nicole Narotzky, "*Sanctions in Civil Litigation: A Review of Sanctions by Rule, Statute, and Inherent Power*," ALI-ABA Course of Study (July 11-13, 2007) (hereinafter, "ABA Sanctions Review"), p. 1789.
[359] In *re Pennie & Edmonds LLP*, 323 F.3d 86, 90 (2d Cir. 2003).

argument even after it is "no longer tenable."[360] Further, the purpose of Rule 11 is "to deter rather than compensate"[361] and courts are expressly directed by the Rule to limit sanctions "to what is sufficient to deter repetition of such conduct…". Monetary sanctions, if imposed, are therefore most often paid into court rather than to the opposing party.[362]

3.17 Discovery sanctions. Attorneys' fees are often awarded pursuant to the sanctions available for violations of the FRCP relating to discovery. For example, Rule 37 encourages an award of the attorneys' fees associated with filing a successful motion to compel against a party resisting a discovery request. The Federal Advisory Committee Note to Rule 37 states that "expenses [must] be awarded unless the conduct of the losing party or person is found to have been substantially justified."[363]

(iv) How fee shifting provisions (when applicable) operate

3.18 Most federal fee shifting provisions authorise courts to award fees if the fee claimant was the "prevailing party", the "substantially prevailing party", or "successful".[364] The court does apply a dual standard in respect of prevailing plaintiffs and prevailing defendants, on the basis that awarding fees to prevailing plaintiffs, in the ordinary case, will encourage suits to vindicate the public interest, but awarding fees to defendants in the ordinary case, might have a chilling effect on the institution of such suits. Awarding fees to defendants in frivolous cases, however, may discourage such suits.[365]

3.19 As to what constitutes a "prevailing party" the Supreme Court has held that a party is not a prevailing party under federal fee shifting statutes if it:

> "has failed to secure a judgment on the merits or a court ordered consent decree but has nonetheless achieved the desired result because the law suit brought about a voluntary change in the defendant's conduct."[366]

3.20 Prior to this decision most federal courts of appeals had recognised the "*catalyst theory*" and awarded fees in such circumstances.

3.21 Following the decision of the Supreme Court in the *Buckhannon* case Daniel Steuer[367] discusses the impact of the case, suggesting that the court's interpretation allows many defendants to escape attorney's fees liability and disputes for purely equitable relief by voluntarily ceasing the offending conduct. The author suggests that the narrow construction of "*prevailing party*" sanctioned in *Buckhannon* inhibits the ability of many civil rights litigants to obtain relief in court and discourages individuals from seeking vindication of their rights, making it at odds with the legislative intent behind the civil rights Attorney's Fees Awards Act of 1976. The author proposes a statutory amendment of the Fees Act to include the catalyst theory; a looser interpretation of *Buckhannon*, which would allow more settlements

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[360] Fed.R.Civ.P. 11, 1993 Amendment Advisory Committees Note.
[361] Advisory Committee Note 1993, cited by ABA Sanctions Review, p. 1790.
[362] ABA Sanctions Review, p. 1785.
[363] ABA Sanctions Review, p. 1818.
[364] *Ruckelshaus v Sierra Club* 463 US 680, 684 (1983).
[365] See *Durret v Jenkins Brickyard Inc* 678F. 2d 911 (11 cir.1982).
[366] *Buckhannon Board and Care Home Inc v West Virginia Department of Health and Human Resources* 532 US 598, 600 (2001).
[367] Another brick in the wall: attorney's fees for the civil rights litigant after Buckhannon 11 GEO.J.on poverty L. and POL'Y 53 (2004).

to qualify as the functional equivalent of a consent decree; or a stricter application of the mootness doctrine thereby reducing the number of controversies declared moot.[368] In *Buckhannon* the court had determined that to qualify as a "*prevailing party*" that could collect attorney's fees under statutory fee shifting provisions, a party must have had a judgment on the merits or a court order judicially enforceable consent decree. Justice Rehnquist rejected the so called "catalyst theory" which awarded fees to prevailing parties if their actions were the catalyst for the defendant's subsequent abandonment of the challenged conduct. Since *Buckhannon's* narrow definition of "prevailing party" courts have managed to award fees by interpreting the decision broadly.

4. PRACTICAL CONSEQUENCES

4.1 The practical consequences of the above rules and practice are numerous. Four will be discussed in more detail below: (a) efforts at "tort reform" regarding contingency fees and damages; (b) recent critique of hourly billing practices; (c) evidence as to how changes in the American Rule might impact US civil litigation practice; and (d) details on the rates of pro bono representation by US lawyers.

(i) Regulation of contingency fees and "tort reform"

4.2 Empirical data on contingency fee practice is hard to come by[369]; opinions on the practice, however, are plentiful. The two most prominent commentators on the issue of contingency fees, Professors Herbert Kritzer and Lester Brickman, have written widely on the topic over the past decade or so. The arguments put forth by each reflect the larger political and professional debate ongoing in the US regarding contingency fee practice.

4.3 Kritzer-Brickman debate. Kritzer, a defender of contingency fees, argues that contingency fee lawyers face increased levels of risk when compared to hourly-rate lawyers.[370] The large awards won in high-profile cases skew the public perception of contingency fee practice, which in fact is a vital component of a healthy US legal system where meritorious civil claims from individual plaintiffs should be heard. Brickman states that contingent fee lawyering drives up the insurance costs of small businesses, doctors and hospitals, creating job losses and failed businesses while simultaneously breaching the professional ethical rule that fees be "reasonable."[371]

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[368] Under Article III of the Constitution Federal Courts may only adjudicate live controversies. Generally the actual controversy between the parties "*must exist at [all] stages of appellate or certiorari review, and not simply at the date the action is initiated*". If no such controversy exists the action is moot. The mootness doctrine based on the absence of a case or controversy is outlined in *Fischbach v New Mexico Activities Association* 38F.3d1159 (10th Cir 1994). And see The Mootness Doctrine in The Supreme Court, Harvard Law Review Volume 88 No.2 (December 1974 pages 373 – 395).

[369] See Brickman, "*Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*", 81 Wash. Univ. L.Q. 653 (Fall 2003), at 662, noting the "*dearth of empirical data*" on contingency fees.

[370] Proffessor Kritzer maintains a personal website where his publications are available. *See* http://users.polisci.wisc.edu/kritzer.

[371] See Brickman, *supra* footnote 369. Just a few of his other publications on this subject are: *Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes Are Principally Determined by Lawyers' Rates of Return*, 15 Cardozo L. Rev. 1775 (1994); *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 Cardozo L. Rev. 1819 (1992); ABA Regulation of Contingency Fees: Money Talks, Ethics Walks, 65 Fordham L. Rev. 247 (1996).

Kritzer has argued that the effective hourly rate of contingency fee lawyers is approximately equal to that of other civil litigators because a large number of contingent fee cases lose money. Brickman, however, concludes that contingency fee lawyers earn many times more than their hourly-charging counterparts.

4.4 Studies conducted into contingency fee practice suggest a number of conclusions. A study by Winand Emons concludes that with asymmetric information on the merits of a case, clients with meritorious claims will prefer conditional fee contracts over contingency fee arrangements while clients with weak cases prefer contingency.[372] Another study conducted by Emons and Nuno Garoupa concluded that under contingency fees, lawyers use their information more efficiently than under UK-style conditional fees.[373] Kritzer, as discussed above, argues against federal regulation of contingent free practice but instead allowing market forces to find appropriate controls to prevent lawyers from over-charging clients in the small set of cases (e.g. personal injury and class actions) where over-charging may be problematic.[374]

4.5 A number of public policy organisations, both independent and politically affiliated, exist to conduct research on tort litigation in the US. The independent consulting firm Towers Perrin, for example, issues a well-known annual report on the overall cost of US tort litigation. According to its most recent statistics, U.S. tort costs increased from US$13 billion in 1950 to US$252 billion in 2007 (in 2007 dollars), rising from 0.62 percent to 1.83 percent of U.S. GDP.[375] This percentage of US GDP is triple that of France and the UK and double that of Germany, Japan and Switzerland.[376]

4.6 Given the figures involved, some groups have expressed concern that the U.S. litigation culture is driving away foreign investors; that the cost associated with defending, and insuring, against such claims is prohibitive to many businesses, thus dampening investment in the US.[377]

4.7 Effect on medical care. Of particular importance domestically is the impact of medical malpractice litigation on the availability and quality of medical care. One study indicates that a state's regulation of attorney fees in medical-malpractice lawsuits increases the supply of physicians in that state.[378]

4.8 Proposals for reform. Various legal reforms have been enacted in recent years, largely as a result of tort reform efforts prompted by "abusive" litigation strategies in asbestos, tobacco, personal injury claims and the resulting high-value damages awards. Some of these changes include:

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[372] Winand Emons, *Conditional versus Contingent Fees*, Oxford Economic Papers 59 (1997), p. 90.
[373] Winand Emons and Nuno Garoupa, *The Economics of US-style Contingent Fees and UK-style Conditional Fees* (May 2004).
[374] Herbert Kritzer, *What are Contingent Fees Really Like?* (2002), p. 44.
[375] Towers Perrin, 2008 Update on U.S. Tort Cost Trends, p. 5. "Costs" is defined to include benefits paid to third parties, defense costs and administrative expenses (such as those incurred by insurance companies in the administration of tort claims). *Id.*, at p. 8.
[376] *Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty* (October 2008), U.S. Department of Commerce, (hereinafter "Commerce Report"), p. 1.
[377] *Id.*
[378] Daniel P. Kessler, William M. Sage and David J. Becker, "*Impact of Malpractice Reforms on the Supply of Physicians Services*," Journal of the American Medical Association, Vo. 293, No. 21 (2005), 2618-2625.

- Mississippi's 2004 tort reform law, considered a "model" tort reform statute, includes limits on "forum shopping" (i.e. filing suit in a state with a history of juries awarding high-value damages), limits on joint and several liability, and caps on non-economic damages, such as pain and suffering.[379]
- The federal Class Action Fairness Act signed in 2005 to address the issue of forum shopping in class action suits.[380]
- Five states no longer allow punitive damages awards: Louisiana, Massachusetts, Nebraska, New Hampshire & Washington.[381] Texas limits the amount of punitive damages available and requires a unanimous jury verdict to award punitive damages.[382]
- The US Supreme Court limited punitive damages awards in State Farm v. Campbell, 538 U.S. 408 (2003) to no more than 9 times the compensatory damages awarded (and normally a multiple of no more than 4), on the basis that punitive damages awards of this size would be unlikely to satisfy due process requirements.[383]
- Most recently, in *Exxon Shipping Co. v. Baker*, 554 U.S. ___ (2008), the US Supreme Court limited punitive damages awards in federal maritime cases to an amount equal to compensatory damages. In dicta, the decision detailed the history of punitive damages awards in American jurisprudence, and suggested that punitive damages awards generally should be no higher than compensatory damages. The decision has been the subject of much recent commentary and debate within the US legal community.

(ii) "Reasonable" attorney fees: changes to hourly billing practices?

4.9 Much recent public debate has focused on the hourly fees charged by lawyers working in private law firms. The National Law Journal ("NLJ")[384] conducts an annual billing survey into the billing practices of the largest 250 law firms in the United States. In the 2008 survey, 127 firms responded to billing questions posed.[385] Nearly 71% of the firms responding reported an increase in billing rates in 2008 compared with rates in 2007. Average firm-wide billing rates increased 4.3% to $363 per hour, compared to $348 in 2007. Partner billing rates ranged from $190 per hour to $1,260 per hour, and associate billing rates ranged from $100 per hour to $920 per hour. In comparison, the average US inflation rate rose from 2.85% in 2007 to 3.85% in 2008.[386]

4.10 Much debate within the legal community has emerged regarding the negative aspects of hourly billing, and firm-mandated requirements for the number of hours billed per lawyer to client work.[387] Concerns centre on two primary factors: low level

[379] Commerce Report, p. 9.
[380] *Id.* at p. 8.
[381] *Id.* n 41, citing "*2008 U.S. Chamber of Commerce State Liability Systems Ranking Study*".
[382] *See* www.atra.org: Punitive Damages Reform: SB 25 (1995): Tex. Civ. Prac. & Rem. Code §§ 41.003, 41.008.
[383] Commerce Report, p. 8.
[384] The NLJ is the leading legal publication in the US.
[385] *See* Leigh Jones, "*Law Firm Fees Defy Gravity*", National Law Journal (8th December 2008) and attached data. Of the 127 firms responding in 2008, 109 firms responded in 2007, and year-to-year comparisons are based on the responses of those 109 firms.
[386] US inflation rates are available on ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt.
[387] See e.g., Evan R. Chesler, Kill the Billable Hour, Forbes Magazine (1st December 2008) ("*Clients have long hated the billable hour, and I understand why. The hours seem to pile up to fill the available space. The clients feel they have no control, that there is no correlation*

of professional satisfaction among lawyers, attributed in large part to the "minimum billable" requirements at private firms; and the corresponding inefficiency that the hourly billing regime generates. At least one commentator has found that contingent fees offer better incentives to the attorney to exert efficient effort rather than hourly fee charges, which tend to induce shirking.[388] This view has also been expressed by practitioners working within an hourly-charging environment.[389]

4.11 Criticism of hourly billing practices has pushed more US firms to utilise alternatives. In the NLJ 2008 survey, approximately 52% of firms reported that at least some of their revenues were obtained by "alternative billing methods", such as fixed or flat fees, contingency fees, hybrid fees and retrospective fees based on value. Of those firms, 5% reported 30% or more of their revenue as obtained by alternative billing methods; and 11% reported 20% or more of their revenue as obtained by such methods. Anecdotal evidence suggests that, given the current economic downturn, even more private law firms will need to investigate billing alternatives for their corporate clients.

(iii) Changes to the American Rule? More Tort Reform

4.12 The American Rule has also been the subject of review as part of the "tort reform" movement. In 1992, for example, the Bush Administration included the "English Rule" of fee-shifting in proposed tort reform legislation[390] and commentators today continue to advocate for abandonment of the American Rule.[391]

4.13 Arguments for English Rule. Commentators in favour of adopting a loser-pays rule argue that lawyers working on a contingency basis often take on weak cases with the aim of reaching a settlement rather than actually bringing the case to court. Defendants often settle such "nuisance suits", these commentators argue, because the legal fees in defending them at court are higher than the amount needed to settle.[392] Similarly, meritorious claims are kept out of courts by litigants who would likely recover less than the actual cost of pursuing the litigation. Adoption of the English Rule would thus curb frivolous lawsuits and encourage meritorious claims. At least one commentator has interpreted Kritzer's survey of contingent fee lawyers (as discussed above) as suggesting that nuisance filings would decrease under a loser-pays rule.[393]

4.14 Arguments for American Rule. On the other hand, proponents of the American Rule argue that participation in the justice system should not be penalised as a matter of principle. The Supreme Court stated in 1967: "In support of the American rule, it has been argued that since litigation is at best uncertain, one should not be penalised for merely defending or prosecuting a lawsuit...".[394] Similarly, a cost-shifting regime might discourage more socioeconomically disadvantaged claimants from asserting meritorious claims because of the uncertainty of litigation.

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between cost and quality."). The author is presiding partner at the New York law firm Cravath, Swaine & Moore LLP.

[388] Emons, p. 92 (citations omitted).

[389] See Panel 1: *Lawyers in a Fee Quandary: Must the Billable Hour Die?*, 6 DePaul Bus. & Com. L.J. 487, 488 ("*[I]t's in your firm's financial incentive not to work quickly but to work at a 'reasonably measured pace' where you maximize your dollars as opposed to getting the thing done for your client.*").

[390] CRS Report, Introduction.

[391] See Gryphon, *supra* footnote 313.

[392] *Id.*

[393] *Id.*, p. 8.

[394] *Fleischmann v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

4.15 Alaska. As noted above in paragraph 2.19, Alaska is singular among US states for its cost-shifting rule. Despite Alaska's long history of cost-shifting, the effects of the rule are ambiguous. The Alaska Judicial Council found that the rate of civil filing in Alaska in 1992 was only slightly below the national median, and comparable with other states of similar rural geography.[395] However, Alaska's tort claims constitute a smaller share of Alaska's litigation than in other states, suggesting that the partial loser-pays rule encourages more selective filing of tort claims.[396] These inconclusive results may reflect the fact that Alaska's rule permits only a percentage of attorneys' fees to be awarded, rather than compensating the prevailing party fully for costs.

4.16 Florida. It has been suggested that Florida's short-lived experiment with medical malpractice suit cost-shifting was responsible for a reduction in medical malpractice suits, from halving the number of suits that went to trial, to a decrease in small settlements and increase in the average trial award (indicating that less weak suits were filed under the rule).[397] However, given the law's short lifespan, it is difficult to discern whether these initial findings would have persisted had the statute remained in effect.

(iv) *Pro-bono* representation and legal aid

4.17 *Pro-bono* representation. *Pro-bono* representation donated by private practice lawyers and legal aid provide significant benefits to individuals unable to pay for civil legal services or otherwise eligible to receive free legal assistance. In some but not all states, law firms are required to report the amount of *pro-bono* work undertaken to their state bar associations. The position as at August 2008 was as follows: seven states have mandatory reporting[398]; eight states have rejected mandatory reporting[399]; ten states have voluntary reporting[400]; and two states are considering voluntary reporting.[401] ABA records of the eight states where pro bono reporting is mandatory reveal that there was a high level of compliance with ABA Rule 6.1.[402]

4.18 The ABA conducted a survey in 2004 to measure US lawyers' *pro-bono* activity and level of compliance with the annual 50 hour *pro-bono* target. Of the 1,100 lawyers surveyed, 46% of the attorneys surveyed met or exceeded the ABA's goal. The average attorney provided approximately 77 hours of pro bono legal work: 39 hours of free legal service to persons of limited means or organisations serving the poor; and an additional 38 hours on pro bono work for other non-profits, civil rights and activities to improve the legal profession.

4.19 Legal aid. Through LSC, as described above in paragraph 2.30, states contribute millions of dollars annually to fund legal services for the poor. In 2009, LSC oversaw 137 programs with more than 920 offices nationwide. For example, in

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[395] S. Di Pietro, T.W. Carns and P. Kelley, *Alaska's English Rule: Attorney's Fee Shifting in Civil Cases* (Alaska Judicial Council 1995).
[396] Gryphon, *supra* footnote 313, at p. 14.
[397] James W. Hughes and Edward A. Snyder, "*Litigation and Settlement Under the British and American Rules: Theory and Evidence*", 38 J.L. & Econ. 1 (April 1995), 225-50.
[398] Florida, Hawaii, Illinois, Maryland, Mississippi, Nevada and New Mexico.
[399] Colorado, Indiana, Massachusetts, Minnesota, New York, Pennsylvania, Tennessee and Utah.
[400] Arizona, Georgia, Kentucky, Louisiana, Missouri, Montana, Oregon, Texas, Utah and Washington.
[401] Michigan and Vermont. All data available at http://www.abanet.org/legalservices/probono/report.pdf.
[402] *See* http://www.abanet.org/legalservices/probono.

2008 California allocated US$43,035,619 in state funding for legal aid programmes; New York allocated US$24,128,318; and Texas allocated US$27,971,331.[403]

4.20 The average legal aid funding across the U.S. is US$9.22 per means-eligible individual (i.e. individual falling below the federal poverty line and thus eligible, in terms of means, for legal aid). The amount of funds available per eligible individual ranges among states from a low of US$8.84 in New Hampshire to a high of US$18.42 in South Dakota.[404]

(v) The vanishing trial and the costs of discovery

4.21 In the US, as in England and Wales, there has been a marked decline in the number of civil actions going to trial. Several judges drew my attention to the phenomenon of the vanishing trial, which they attribute to the mounting costs of litigation. Discovery is seen to be the principal driver of costs, especially since the advent of e-discovery. It is said that many cases settle, regardless of merits, because the costs (especially the costs of discovery) are prohibitive.[405] One federal court judge told me that she feared that the courts were pricing themselves out of the market. Increasingly parties are resorting to mediation or arbitration to resolve disputes, which (in her view) is not satisfactory because these processes do not have the same transparency as litigation.

4.22 The concerns of judges are shared by practitioners. On 20th March 2009 the American College of Trial Lawyers ("ACTL") Task Force on Discovery and the Institute for the Advancement of the American Legal System published a revised joint report ("the joint report") in which they examined the role of discovery in perceived problems in the US civil justice system. The joint report was the culmination of an 18 month project, which included a survey of 3,812 fellows of the ACTL with a response rate of 42%. The major findings from the survey included the following:

(i) The system takes too long and costs too much. "Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them."

(ii) The contested issues are not identified early enough, resulting in lack of focus in discovery. "As a result discovery can cost too much and become an end in itself...Electronic discovery, in particular, needs a serious overhaul."

(iii) Judges should have a more active role in controlling discovery.

The joint report (which bears reading in full) concludes "Unfortunately, because of expense and delay, both civil bench trials and civil jury trials are disappearing." The report goes on to recommend a number of procedural reforms to combat these problems.

4.23 The Federal Judicial Centre[406] is planning to undertake a survey of the costs of civil litigation in order to assess whether the concerns expressed in the joint report

[403] *See* http://www.lsc.gov/map/state_T32_R51.php.
[404] *Id.*
[405] In this regard, Senior Costs Judge Peter Hurst received similar feedback from judges and practitioners in Los Angeles to that which I received from meetings in Washington.
[406] This is the education and research agency for the US federal courts. It not only provides training for judges, but also carries out extensive empirical research, including research on the likely effect of prospective amendments to civil procedure rules. The staff are multi-disciplinary, including both lawyers and social scientists. I visited the Federal Judicial Centre

are well founded. This will be followed up by a conference on the costs of civil justice in May 2010.

(vi) World Bank assessment

4.24 World Bank's "*Doing Business Report*" (2009) ranks the US at 6th position in the world for ease of enforcing contracts, with legal costs on average representing 9.4% of the claim value. The World Economic Forum's "Global Competitiveness Report 2008-9" puts the US in 28th place (out of 134 countries) for the efficiency of its legal framework.

on 7th April 2009.

CHAPTER 61. CANADA

1. INTRODUCTION

1.1 Canada operates a federal system of government. Laws are made at a federal and provincial[407] level.[408] Generally speaking, in Canada the cost shifting rule is applied.

1.2 For the sake of brevity not all of the Canadian provinces and territories will be considered in this preliminary report. The principal focus will be upon Ontario, which is the most populous province with the largest economy (although aspects of the laws of other provinces will also be considered).

1.3 The legal profession in Canada is fused, so that qualified lawyers may practise as solicitors or counsel. Thus the Law Society of Upper Canada regulates the conduct of both solicitors and counsel in Ontario.

1.4 In Canada, as in most other common law jurisdictions, many of the pre-Woolf terms are used: i.e. "plaintiff" means claimant; "discovery" means disclosure; etc. It should be noted that in Canada, as in the USA, the process of discovery involves the oral questioning of representatives of the parties.

2. RELEVANT RULES AND LEGISLATION

(i) Cost rules

2.1 Cost shifting. Although the courts have a broad discretion as to how they award costs,[409] in practice it is common for courts to award costs on a "loser pays" basis.[410] In Ontario, the court in exercising its discretion is entitled to consider, among other things:

> "the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer";[411] and
>
> "the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed."[412]

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[407] There are ten provincial governments, being those of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Québec and Saskatchewan. There are also three territories (the Northwest Territories, Yukon and Nunavut) which have no inherent jurisdiction, and only have powers delegated to them by the Federal Government.

[408] The cost rules applicable in Canada are set at both Federal and Provincial levels. The Supreme Court of Canada is the ultimate appellate court, hearing appeals from both federal and provincial courts.

[409] *Courts of Justice Act*, R.S.O. 1990 s131(1) (Ontario). There are numerous factors that a court may consider in deciding how costs should be awarded, e.g. the complexity of the proceedings, and the conduct of the parties: Rules of Civil Procedure, R.R.O. 1990, rule 57.01(1).

[410] See, for example, *1465778 Ontario Inc. v 1122077 Ontario Ltd* (Ct. Appeal for Ontario, 25 October 2006) para [26].

[411] Rules of Civil Procedure, R.R.O. 1990, rule 57.01(1)(0.a).

[412] Rules of Civil Procedure, R.R.O. 1990, rule 57.01(1)(0.b). This rule was introduced after

2.2 Recoverable costs. Legal costs in Ontario are recoverable usually as a "*partial indemnity*"[413] or "*substantial indemnity*"[414] in accordance with scales of "Tariffs" (where applicable).[415] The court may also, in exceptional cases, order that costs be paid as a "full indemnity".[416] As noted below, it is usual for the judge who awards costs also to fix their amount, which involves determining the appropriate recoverable rate of costs.[417] The question of whether to award costs, and if so what the amount of those costs should be, are bound up as issues that the judge must decide.

2.3 Assessment of costs. In Ontario, costs are usually fixed in amount by the court that awards costs.[418] It is only in exceptional cases the court may refer the assessment of costs to an "assessment officer".[419]

2.4 Proportionality. As is noted below in section 4, attempts have been made in recent years to reform the civil litigation systems in Canada so as to ensure, among other things, that costs are kept proportionate to the amount in dispute. This objective is now reflected, for example, in article 4.2 of the Québec Code of Civil Procedure, which provides as follows:

> "4.2 In any proceeding, the parties must ensure that the proceedings they choose are proportionate, in terms of costs and time required, to the nature and ultimate purpose of the action or application and the complexity of the dispute; the same applies to proceedings authorized or ordered by the judge".[420]

The Ontario Rules Committee has recently amended the Rules of Civil Procedure by inserting a proportionality rule, which will come into effect on 1 January 2010, in the following terms:

> "1.04 (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding".

Boucher v. Public Accountants Council for the Province of Ontario (2004), 71 O.R. (3d) 291 (C.A.). A party who wishes to seek a costs order in its favour for a step in proceedings will be required to bring to the hearing a costs outline, unless the parties have agreed on the costs that it would be appropriate to award: rule 57.01(6). If, therefore, there is an exchange of cost outlines, the parties will know each other's expectations.

[413] Meaning costs awarded according to the Tariff scale.

[414] Costs awarded on a "substantial indemnity" basis are recoverable at 1.5 times the Tariff scale amount for the particular item of work or step in the proceedings.

[415] Rules of Civil Procedure, R.R.O. 1990, rule 58.05(1)(a). The Tariffs are set out at the end of the Rules of Civil Procedure. I understand from Professor Watson that in Ontario, costs are very seldom assessed by strict reference to the Tariffs.

[416] Rules of Civil Procedure, R.R.O. 1990, rule 57.01(4). A full indemnity covers a party for all costs that were reasonably incurred.

[417] The maximum rates for costs recoverable on a "partial indemnity" basis are set out in the guidelines of the Costs Subcommittee of the Ontario Civil Rules Committee (see www.ontariocourts.on.ca). The maximum rates are as follows: (i) law clerk Cdn$80/hr; (ii) student-at-law Cdn$60/hr; (iii) lawyer (less than 10 years) Cdn$225/hr; (iv) lawyer (10-20 years qualification) Cdn$300/hr; and (v) lawyer (20 years or more qualification) Cdn$350/hr. These are guidelines only and the judge usually exercises his discretion having regard to the factors listed in rule 57.01(1).

[418] Rules of Civil Procedure, R.R.O. 1990, rule 57.01(3).

[419] Rules of Civil Procedure, R.R.O. 1990, rule 57.01(3.1).

[420] This provision was introduced in 2002.

(ii) Funding arrangements

2.5 Contingency fees. Contingency fee agreements are allowed in Ontario[421] and other parts of Canada. Under the law of Ontario, in order to be valid a contingency fee agreement must be in writing and the contingency fee payable in the event of success must be reasonable. There are statutory provisions that regulate the amount of money recoverable by a party, or payable by a party to its lawyer, where the party's lawyer is operating under a contingency fee agreement. Section 16 of the Solicitors Act, R.S.O. 1990 provides:

> "Awards of costs in contingency fee agreements
>
> 20.1(1) In calculating the amount of costs for the purposes of making an award of costs, a court shall not reduce the amount of costs only because the client's solicitor is being compensated in accordance with a contingency fee agreement.
>
> (2) Despite subsection 20 (2), even if an order for the payment of costs is more than the amount payable by the client to the client's own solicitor under a contingency fee agreement, a client may recover the full amount under an order for the payment of costs if the client is to use the payment of costs to pay his, her or its solicitor.
>
> (3) If the client recovers the full amount under an order for the payment of costs under subsection (2), the client is only required to pay costs to his, her or its solicitor and not the amount payable under the contingency fee agreement, unless the contingency fee agreement is one that has been approved by a court under subsection 28.1 (8) and provides otherwise."

2.6 Nature of contingent fee in the event of success. The premium for success may be either a multiple of the ordinary fee (up to a multiple of about 5) or, alternatively, a percentage of the sum recovered by the plaintiff. In class actions, the premium for success is a multiple of the fee.[422] In other actions (in practice mainly personal injury actions) the premium for success is a percentage of the damages recovered.

2.7 Insurance. Legal expenses insurance and ATE insurance are permitted under the laws of Canada.

2.8 Third party funding. Third party funding, or "lawsuit loans" as they are sometimes referred to in Canada, are permissible under Canadian law.

2.9 Legal aid. Legal aid is available for limited types of civil cases (e.g. workers' compensation cases), but not generally. It is means tested.[423] In Canada every person has the right to be represented in legal proceedings, but there is no general right to access legal representation at the expense of the State even to persons who cannot afford to be legally represented.[424]

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[421] Solicitors Act, R.S.O. 1990, s28 and Ontario Regulation 195/04.

[422] This is because a percentage of any substantial sum recovered by the plaintiffs would yield a higher reward than the courts would approve. The multiple approach has the merit of being related to the amount of work done by the lawyers.

[423] See www.legalaid.on.ca.

[424] *British Columbia (Attorney General) v Christie* [2007] 1 S.C.R. 873.

2.10 Class actions. Special arrangements have been made in Ontario and Québec for the funding of class actions. These are described in chapter 18, above.

(iii) Small claims and simplified procedures

2.11 Small claims. In Ontario, there is a "Small Claims Court" which functions as part of the Ontario Superior Court of Justice. It has a Cdn$10,000 jurisdictional limit, and the court deals with cases summarily.[425] The Small Claims Court does have the power to award costs, but the amount of costs which may be awarded is not allowed to exceed 15% of the amount claimed, or the value of the property sought to be recovered, unless the court considers a higher amount should be paid to penalise the costs payer for unreasonable behaviour.[426] As from 1st January 2010 the jurisdictional limit of the small claims court will be increased to Cdn$25,000.

2.12 Simplified procedures. There are simplified, expedited case tracks in several Provinces for claims up to certain monetary thresholds. The threshold is Cdn$100,000 in British Columbia, but only Cdn$25,000 in Québec and Prince Edward Island.[427] In Ontario, a simplified procedure applies to claims exclusively concerned with money, real property or personal property where the amount in dispute is Cdn$50,000 or less.[428] As its name suggests, simplified procedure cases utilise a simplified process, e.g. by placing limitations on discovery and the examination of witnesses,[429] to try to ensure that costs are kept proportionate and the time taken to resolve a case is shorter than in larger cases.

(iv) No-fault scheme

2.13. Motor vehicle claims. In Ontario, there is a no-fault compensation regime in respect of motor vehicle accidents. Any dispute is resolved by a statutory mediation and arbitration. The statutory scheme provides compensation for financial losses (e.g. loss of earnings or costs of care), but not general damages for pain and suffering. A plaintiff can only proceed in court if his or her injuries pass a specified, high-level threshold of seriousness. In that event, the plaintiff can recover general damages for pain, suffering and loss of amenity from any tortfeasor who is responsible for the injuries.

3. INTERPRETATION BY THE COURTS

3.1. Generally. The approach taken by the courts to the Canadian cost rules is, broadly speaking, similar to that taken by the courts of England and Wales in civil litigation, i.e. generally the "loser pays", unless there is conduct concerning the proceedings which warrants a departure from such an approach. In Ontario costs are usually awarded on a "partial indemnity" basis, unless there are circumstances in the case which justify recovery of a greater amount than that provided by the "partial

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425 Courts of Justice Act, R.S.O. 1990, s25 (Ontario).
426 Courts of Justice Act, R.S.O. 1990, s29 (Ontario).
427 "*Access to Justice: Report on Selected Reform Initiatives in Canada*" (June 2008), a report of the Sub-Committee on Access to Justice (Trial Courts) of the Administration of Justice Committee of the Canadian Judicial Council, page 6 (www.cjc-ccm.gc.ca).
428 Rules of Civil Procedure, R.R.O. 1990, rule 76.02(1). On 1st January 2010 the threshold will increase to Cdn$100,000.
429 Rules of Civil Procedure, R.R.O. 1990, rule 76.04.

indemnity" scale.[430] There are, however, some aspects of the approach taken by the Canadian courts that warrant special mention.

3.2. Cost rules used to effect justice. The Supreme Court of Canada has held that although cost rules have long been applied to indemnify a successful party against its legal costs, "it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice".[431] What this often means in practice is that a court may make a cost order other than one that involves cost shifting where the justice of the case requires it.[432]

3.3. Expectations of the unsuccessful party. The Ontario rules of civil procedure mentioned above entitle the court, in exercising its discretion as to costs (whether to award them, and if so in what amount), to take into account "the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed".[433] It can be seen that this rule permits the court to limit the recovery of the successful party's costs if they were out of proportion to what was reasonably required for the litigation. By way of illustration, in *Canadian National Railway Co v. Royal and Sun Alliance Insurance Co of Canada* (2005) 77 O.R. (3d) 612,[434] the court considered a successful claimant's bill of costs totalling Cdn$1,261,364, plus Goods and Services Tax and disbursements. This was approximately four times the amount spent by the defendant on its own legal fees. It was held by Justice Ground that only Cdn$800,000 should be recoverable. In reaching this decision, the judge held as follows:

> "[10] In the present case, although there is no evidence before the court, the Defendants have stated in their submissions that "the Defendants could not have reasonably expected the Plaintiffs to spend approximately 4 times more than what they spent on the litigation". Although one would normally expect more time to be spent by the Plaintiffs than by the Defendants in pre-trial proceedings and preparation for trial, the comparison of the fees charged to the Defendants and the cost being claimed by the Plaintiffs is persuasive in determining the reasonable expectations of the losing party.
>
> [11] It has been stated many times that the fixing of costs by a judge is not an assessment and it is not the role of the judge to minutely examine and dissect docket entries or to second guess the utilization of personnel and resources by counsel. In reviewing the bill of costs submitted by the Plaintiffs, I must, however, conclude that there appears to have been a "money is no object" approach taken by counsel toward the preparation for trial and that the maximum number of hours was expended by counsel in a very thorough, perhaps, in some cases, to a fault, preparation of documents and other materials for trial.

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[430] *Meditel Inc. v. Baldhead Systems Inc.*, 2008 CanLII 68173 at [7], per Himel J (ON S.C.).

[431] *British Columbia (Minister of Forests) v Okanagan Indian Board* [2003] 3 S.C.R. 371 at [25], per LeBel J.

[432] E.g. in some cases where a successful party is represented pro bono, the court may order that the unsuccessful party pay an amount of money to the successful party in respect of its notional legal fees. Also, as discussed in chapter 35 above, where a claim for judicial review fails, the court quite often makes no order for costs, rather than ordering the plaintiff to pay costs.

[433] Rules of Civil Procedure, R.R.O. 1990, rule 57.01 (1) (0.b). As noted above, this rule was introduced as a consequence of the court's decision in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.).

[434] The decision in this case went to the Ontario Court of Appeal, and then to the Supreme Court of Canada, although those appellate proceedings are not presently relevant.

> This approach may have been perfectly acceptable to the Plaintiffs in view of the amount of money involved in the action and the complexity and importance of the matter to the Plaintiffs. The question, however, for the court is what amount would constitute fair and reasonable costs to be paid by the Defendants to the Plaintiffs".

3.4. Contingency fees. Contingency fee agreements were regarded as unlawful in Ontario (for being champertous, among other things) until the decision of the Ontario Court of Appeal in *McIntyre Estate v Ontario* (A-G) (2002), 61 O.R. (3d) 257. The effect of this decision was to prompt the legislature to amend the Solicitors Act, R.S.O. 1990 to legitimise contingency fee agreements expressly. Where a party with a contingency fee agreement succeeds in litigation, costs are awarded in favour of that party on the conventional basis, without regard to any of the terms of the contingency fee agreement.

3.5. The rewards for success under contingency fee agreements. The success premium of a plaintiff (whether a multiple of the regular fee or a percentage of the damages) must be borne by the client. It is irrecoverable from an unsuccessful defendant. The Supreme Court of Canada has affirmed that all litigants face the same cost risks:

> "Unsuccessful defendants should expect to pay similar amounts by way of costs across similar pieces of litigation involving similar conduct and counsel, regardless of what arrangements the particular plaintiff may have concluded with counsel".[435]

I understand from Professor Watson[436] of Osgoode Hall Law School that Canadian lawyers and academics find the English "recoverability" principle most surprising.

4. PRACTICAL CONSEQUENCES

(i) General

4.1. Basis of charging. It is common for lawyers to charge according to hourly rates in civil litigation. In some types of proceedings it is common for contingency fees to be used (see below). It is possible for lawyers to work for a fixed fee in civil litigation, but this is unusual.

4.2. Recoverable fees. There would appear to be a lack of empirical evidence as to the percentage of actual legal costs that a successful party may recover on a costs assessment in Canada. It has been reported, however, the amount is usually less than 50%.[437] Professor Watson estimates that in Ontario the level of recovery is now in the region of 60%. When I raised this same question at meetings with solicitors and judges in Ontario,[438] it was emphasised that much depended on the type of case and its location. Subject to that qualification, the estimate given was 50% or less of actual costs. However, if costs were awarded on the substantial indemnity basis, then

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[435] *Walker v Ritchie*, [2006] 2 S.C.R. 428 at [28].

[436] A leading commentator on Canadian civil procedure and a former member of the Ontario Civil Procedure Rules Committee

[437] Manitoba Law Reform Commission, "*Costs Awards in Civil Litigation*" (Report no. 111, September 2005) page 10. The position may be different in other provinces: see page 32 of the MLRC report.

[438] On 9th April 2009.

perhaps a recovery of 75-80% could be expected. It was emphasised, however, that there is a large element of discretion in the judge's determination of costs.

(ii) Funding

4.3. Contingency fees. Contingency fee agreements are a common feature of civil litigation in Canada, including in Ontario. Where the reward for success is a multiple of the regular fee, contingency fee agreements are conceptually similar to CFAs in England and Wales. However, the permissible multiples are higher and there is no principle of recoverability beyond the ordinary fee for the solicitors' work. As mentioned above, this form of contingency fee agreement is generally confined to class actions. The alternative form of contingency fee agreement (which is generally used outside the realm of class actions) provides for the plaintiffs' lawyers to receive a percentage of any sums recovered. Such contingency fee agreements are principally used in personal injury actions. The contingency fee charged is often in the region of 20% (although in some cases it may go up to 30%). I understand from practitioners that in such cases the costs awarded by the court often turn out to be very close to 15% of the damages. Thus in a typical personal injuries case (where the defendant agrees or is ordered to pay damages and costs) the claimant may end up losing about 5% of his damages as a contribution to costs. This does not appear to be a source of general concern or complaint. Contingency fee agreements (with the reward for the lawyers being a percentage of the sum recovered) are sometimes used outside personal injury litigation, for example in contract claims. I am told that contingency fee agreements are now beginning to be used in commercial litigation.

4.4. Liability for adverse costs. It is, apparently, not unusual for lawyers in contingency fee agreements to undertake to indemnify the client against any liability for adverse costs. This then forms part of the risk for which the contingency fee compensates the lawyer in the event of success. In the context of class actions (where the financial interest of the lawyers is often much greater than the financial interest of any of the plaintiffs) there is an economic logic to this arrangement. In many class actions, no rational person would agree to put his or her name forward as plaintiff without such an indemnity.

4.5. Third party funding. Third party funding is available in Canada and is used in various types of civil litigation. I am informed, however, that there is currently little evidence of widespread use of third party funding in Canada.

4.6. Insurance. Legal expenses insurance is available in Canada, although its use would appear to be limited to certain areas, e.g. unionised workers in the automotive industry. After the event insurance would not appear to have any significant usage.

(iii) Civil litigation procedures and initiatives to control costs

4.7. Court procedure. Most aspects of civil litigation in Canada are similar to those in the courts of England and Wales, e.g. in relation to pleadings, discovery (disclosure) and examination of witnesses. It has, however, been observed that "The most common trend in discovery reforms is the adoption of rules which place time limits on discovery and even prohibit discovery outright for simplified procedure cases".[439] It should be noted, however, that in Canada (unlike England and Wales) there is pre-trial oral examination for discovery of the parties. This is regarded as a

[439] "*Access to Justice: Report on Selected Reform Initiatives in Canada*" (June 2008), a report of the Sub-Committee on Access to Justice (Trial Courts) of the Administration of Justice Committee of the Canadian Judicial Council, page 12 (see www.cjc-ccm.gc.ca).

useful procedure, but it can also be time consuming and expensive. The simplified procedure rules typically forbid or strictly limit oral examination for discovery.[440]

4.8. Simplified procedures. The simplified procedure rules for smaller claims would appear to have had some success in keeping legal costs proportionate to the amount in dispute.[441] As the Chief Justice of Ontario said in a relatively recent speech regarding the cost of civil litigation and the reforms proposed by the Osborne report (mentioned below):

> "Our justice system meets the needs of most people more or less effectively. Unfortunately, though, for a number of Ontarians, the justice system is becoming less and less accessible. An expanding group of Ontarians are finding that the system is often too expensive, too complicated and too slow in assisting them with their legal problems.
>
> In our search to improve on our weaknesses, I often suggest that we should begin by looking to our successes. We have already taken concrete steps to improving access to justice. Over 60% of civil lawsuits in Ontario are heard either in Small Claims Court or under simplified procedural rules. With the anticipated implementation of the Osborne Report, we can expect that even more civil matters will be dealt with under these more straight-forward, proportionate and affordable processes, and that other reforms will be implemented to streamline our often too cumbersome civil litigation process".[442]

4.9. Law Reform.[443] As can be seen form the foregoing, the costs of litigation in Canada can be very substantial, as well as disproportionate to the sums at issue.

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[440] In January 2010, when the upper limit for the simplified procedure in Ontario is increased from Cdn $50,000 to $100,000, two hours of oral examination in respect of discovery will be permitted.

[441] However, questions have been raised as to whether the use of the simplified procedure should be limited according to monetary thresholds. In "*Access to Justice: Report on Selected Reform Initiatives in Canada*" (June 2008), a report of the Sub-Committee on Access to Justice (Trial Courts) of the Administration of Justice Committee of the Canadian Judicial Council (www.cjc-ccm.gc.ca), it is noted (at page 7) that, in Alberta and British Columbia, it has been suggested that the application of a simplified, fast-track procedure not be linked to monetary thresholds – *"This was based on feedback indicating that valuing a case with respect to a threshold was problematic and that limits on procedural steps should be set on a case-by-case basis according to the full criteria of proportionality*". One of the apparent concerns is that the use of monetary thresholds for smaller claims gives rise to a "two-tiered" system of justice that leaves litigants with smaller claims without access to beneficial court procedures: see Russell Brown (an Associate Professor at the University of Alberta), "*Do Civil Reforms Mean Universal Access or a Two-Tiered System?*" (26th May 2006) (www.lawyersweekly.ca).

[442] Chief Justice Warren K. Winkler, "*Opening of the Courts*" (9th September 2008) (see www.ontariocourts.on.ca). However, Chief Justice Winkler has also noted that in the past the simplified procedure did not always lead to costs being kept proportionate. In relation to the period of 2001-2004, he observed that: *"…in the Toronto region, counsel often conducted the equivalent of a discovery during the trial, thereby consuming excessive amounts of valuable court time. More generally, there was a lack of proportionality and trials involving $20,000 or $30,000 were dragging on for four of five days*": see his report "*Evaluation of Civil Case Management in the Toronto Region*" (February 2008), page 12 (downloadable at www.ontariocourts.on.ca). Subsequent law reform measures, including changes to case management, had the effect of shortening the length of cases: see pages 19-23 of the report.

[443] See generally the CJC's "*Access to Justice: Report on Selected Reform Initiatives in Canada*" (June 2008), *ibid*.

Indeed one Canadian judge expressed the view to me that the expense of discovery is killing litigation.[444] There has therefore been pressure to find ways of reducing those costs. Law reform projects throughout Canada have been very active in recent years, considering changes that ought to be made to the civil justice systems in the various Provinces. Three of these sets of law reform proposals are mentioned below.

4.10. Ontario. It was recommended by the Osborne report[445] that the Ontario Rules of Civil Procedure should include "as an overarching principle of interpretation, that the court and the parties must deal with a case in a manner that is proportionate to what is involved, the jurisprudential importance of the case and the complexity of the proceedings".[446] The Osborne report made numerous recommendations, intended to reduce the costs of civil litigation, including reforms to discovery, case management and expert evidence. A further recommendation was that counsel should be required to prepare a litigation budget and review it with a client prior to commencing or defending any proceedings.[447] Most of the recommendations of the Osborne report will be implemented with effect from 1st January 2010.[448] The proposed "overarching principle" will appear in rule 1.04 (1.1).[449] The proposal for litigation budgets has not so far been adopted.

4.11. Manitoba. In 2005, the Manitoba Law Reform Commission[450] conducted a review of costs awards in civil litigation. The Commission recommended the retention of the tariff system of determining costs, with the tariff levels being adjusted with the objective of providing an indemnification of approximately 60% of reasonable counsel fees in a typical case.

4.12. British Columbia. British Columbia is also about to bring in sweeping reforms to civil procedure.[451] These will include measures to restrict the costs of discovery, to control expert evidence and to compel mediation if a party serves a notice to mediate. The proposed new rules have generated some debate during the consultation period. It is not anticipated that they will be introduced until mid 2010.

(iv) Comment on Canadian class actions

4.13. The types of class action brought in Canada. The Canadian provinces have mature procedures for class actions, including "opt out" and provisions for certification. I understand from discussions with Ontarian judges and practitioners that the number of class actions is steadily growing and that they fall into two broad categories. First, there are class actions brought on behalf persons with a serious grievance, who are keenly seeking redress. Examples of such plaintiffs are persons who have been seriously injured by defective drugs or investors who have suffered financial loss. A typical recent example (cited to me by one Ontarian judge) was a class action brought by pensioners who had lost a large part of their pension fund and desperately needed to make good their capital loss. Secondly, there are class actions

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444 This echoed comments made to me earlier by a US judge – "*we are killing the golden goose*".

445 Hon. Coulter A. Osborne QC, *Civil Justice Reform Project – Summary Findings & Recommendations* (November 2007), downloadable at www.attorneygeneral.jus.gov.on.ca.

446 Osborne report, page xxiii paragraph 79 and page 135.

447 See recommendation 80.

448 The reforms were explained to Michael Napier QC and myself by the Ontario Ministry of Justice at a presentation on 9th April 2009.

449 See paragraph 2.4, above.

450 See www.gov.mb.ca.

451 These were explained by the British Columbia Ministry of Justice to Michael Napier QC, one of my assessors, at a presentation on 8th April 2009.

brought on behalf of persons who have no serious grievance and are often unaware that they have any claim. Indeed in some cases the "plaintiffs" cannot be traced at all and any sums recovered are paid to charity or otherwise disposed of. Claims in the second category were described to me by some judges and practitioners as "manufactured", because they are manufactured by lawyers. It was suggested by one practitioner that a typical sign of the manufactured[452] claim was a token outcome, just sufficient to constitute "success" for the purpose of costs recovery. Examples cited of token recovery were (a) the issue of vouchers or coupons to particular groups of consumers or (b) an agreement by the defendant to modify its practice in some way.

4.14. Whether class actions of the second type perform a useful social function is a matter of debate. On one view, they do perform such a function, for example because they provide an incentive for proper behaviour by businesses. On the alternative view, such litigation is stirred up be lawyers purely for their own financial gain and is inherently undesirable. As a visitor who spent only two days in Canada discussing civil justice issues, I do not venture into that debate. I did, however, enquire how many class actions brought in Ontario fall into each of the two categories. The estimates given judges and practitioners varied. On average, the consensus seems to be that about one third of class actions fall into category one (i.e. brought on behalf of persons with a serious grievance, who are keenly seeking redress); about two thirds of class actions fall into category 2 (i.e. manufactured by lawyers). It must be emphasised that this is a very tentative estimate. Also, some class actions may be seen as falling part way between the two categories.

(v) Cost effectiveness of litigation in Canada

4.15. The World Bank's "*Doing Business Report*" (2009) ranks Canada at 58th position in the world for the ease of enforcing contracts, with legal costs on average representing 22.3% of the claim value. The World Economic Forum's "Global Competitiveness Report 2008-2009"[453] puts Canada 14th (out of 134 countries) for the efficiency of its legal framework.

[452] I adopt the term "manufactured", because it was used by the Canadians. I am not using the term in order to argue one side or the other of the class actions debate.
[453] See www.weforum.org.

CHAPTER 62. THE EASTERN CARIBBEAN

1. INTRODUCTION

1.1 The Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("ECCPR") apply in Antigua and Barbuda, Dominica, Grenada, St. Kitts-Nevis, St. Lucia, St. Vincent and the Grenadines and three British Overseas Territories namely, Anguilla, the British Virgin Islands and Montserrat. They provide a procedural code with notable similarities to the English CPR.

1.2 The costs provisions of the ECCPR are, however, markedly different from those of their English counterpart, and include as the standard means of quantifying costs a matrix which relates the costs payable to the value of the case and the stage of the proceedings at which it concludes.

1.3 Such a costs system bears, at the most general level, some similarity to the German model. It was, however, thought useful to consider it for the purpose of the present review since it involves a predictable costs matrix operating within a procedural system remarkably similar to that in England; one which, of course, has its origins in the English legal system.

2. RELEVANT RULES

(i) The award of costs

2.1 Part 64 of the ECCPR governs the exercise of the court's discretion to award costs. It includes rules which are little different from those of CPR 44.3, as well as rules governing applications for wasted costs and costs against non-parties which are substantially similar to the English provisions. No useful purpose would be served by further explanation of Part 64.

(ii) The quantification of costs

2.2 It is Part 65, which deals with the quantification of costs, which is of interest for present purposes.

2.3 Rule 65.2. Rule 65.2 provides that if the court has a discretion as to the amount of costs to be allowed to a party the sum to be allowed is (a) the amount that the court deems to be reasonable if the work were carried out by a legal practitioner of reasonable competence; and (b) which appears to the court to be fair both to the person paying the costs and the person receiving such costs. It goes on to say that in deciding what would be reasonable the court must take into account all the circumstances, including (a) any order that has already been made; (b) the care, speed and economy with which the case was prepared; (c) the conduct of the parties before as well as during the proceedings; (d) the degree of responsibility accepted by the legal practitioner; (e) the importance of the matter to the parties; (f) the novelty, weight and complexity of the case; and (g) the time reasonably spent on the case.

2.4 It will be seen that this rule bears some similarity to the English "seven pillars of wisdom", now to be found in CPR 44.5(3). The ECCPR, however, reject the English standard and indemnity bases, differing from one another in burden of proof and the requirement of proportionality. They also contain an express provision that

the amount to be allowed should be fair both to the receiving and the paying party (r.65.2(1)(b)). This provision has no equivalent in the English rules, although it has some similarity to Canadian rules.[454]

2.5 The major difference from the English rules lies, however, in the ways in which costs are quantified.

2.6 Rule 65.3. Rule 65.3 provides that costs are to be quantified in one of four ways:

(i) fixed costs;

(ii) "prescribed costs";

(iii) "budgeted costs"; or

(iv) assessed costs.

2.7 Fixed costs. Fixed costs apply to determine the amounts to be entered on a claim form, the amounts to be added on entry of default judgment and the amounts to be allowed in respect of various enforcement procedures. They are mandatory in the cases to which they apply, save that the court has a discretion to allow larger sums in respect of the enforcement procedures. The fixed costs provisions are in principle remarkably similar to the English CPR Part 45 Section I, and no more need be said about them here. The other three methods of quantifying costs are discussed more fully below.

(iii) Prescribed costs

2.8 The general rule is that where fixed costs do not apply and a party is entitled to the costs of any proceedings, those costs must be determined as "prescribed costs" in accordance with Appendices B and C to Part 65 (r.65.5(1)).

2.9 Value of case for costs purposes. The prescribed costs system is value based. In the case of a claimant's costs the value of the claim is the amount agreed or ordered to be paid (r.65.5(2)(a)). In the case of a defendant's costs it is (a) the amount claimed by the claimant in the claim form; or (b) if the claim is for damages and the claim form does not specify an amount that is claimed, such sum as is agreed between the parties or, in default of agreement, stipulated by the court as the value of the claim; or (c) if the claim is not for a monetary sum EC$50,000 unless the court makes an order under r.65.6(1)(a).[455]

2.10 The court does have power to vary these provisions. R.65.6(1) provides that a party may apply at a CMC (a) to determine the value to be placed on a case which has no monetary value, or (b) if the likely value is known, to direct that the prescribed costs be calculated on the basis of some higher or lower value. R.65.6(2) provides that the court may make an order under (b) only if it is satisfied that the costs as calculated under r.65.5 are likely to be either excessive or substantially inadequate, taking into account the nature and circumstances of the particular case. If an application is made for costs to be prescribed at a higher level the written consent of

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[454] See Ontario Rules of Civil Procedure, rule 57.01 (1) (0.b) and *Canadian National Railway Co v. Royal and Sun Alliance Insurance Co of Canada* (2005) 77 O.R. (3d) 612, discussed in chapter 61 above.

[455] Although the rule applies expressly only to defendant's costs, the practice is to apply it equally to claimant's costs – *Maxymych v Global Convertible Megatrend Ltd* BVIHC Claim No.246 of 2006.

the client has to be filed, such consent being set out in a separate document including, *inter alia*, an estimate of the total costs of the proceedings as between legal practitioner and client.

2.11 The value of the case for costs purposes having been ascertained, the amount of prescribed costs is determined by reference to Appendices B and C.

2.12 Costs for the entire case. Appendix B prescribes costs by reference to the value of the claim. There are ten bands of value, the lowest being "not exceeding $30,000" and the highest "exceeding $10m". The percentage of value recoverable as costs in the lowest band is 30% and in the highest is 0.25%. The costs for each stage of the scale are cumulative as illustrated below.

> A claim worth EC$225,000 will engage the first four bands in the scale and will be calculated as follows:

Value	Costs
First $30,000 @ 30%	$9,000
>$30k but not>$50k @ 25%	$5,000
>$50k but not>$100k @ 20%	$10,000
>100k but not>$250k @ 15%	$18,750
Total costs:	$42,750

2.13 Assessment of costs for the stage at which a case concludes. Appendix B gives recoverable costs for the case as a whole. In order to ascertain the actual recoverable costs, having regard to the stage at which the case concludes, one has to look at Appendix C. This provides as follows:

	Stage of proceedings	Percentage
(1)	Up to and including service of defence	45%
(2)	After defence and up to and including CMC	55%
(3)	From CMC and up to and including listing questionnaire	70%
(4)	From listing questionnaire and up to and including PTR (if any)	75%
(5)	To trial	100%
(6)	Up to default judgment and including assessment of damages	60%

2.14 Accordingly if the case illustrated in paragraph 2.13 discontinued after the CMC the defendant would be entitled to 70% of the total costs of EC$42,750, namely EC$29,925.

2.15 What is covered by the prescribed costs. What is included in the figure for prescribed costs is laid down by r.65.7. They are to include all work required to prepare the proceedings for trial including, in particular, instructing any expert, considering and disclosing any expert's report, arranging the expert witness' attendance at trial, and attendance and advocacy at trial including attendance at any CMC or PTR. Prescribed costs exclude experts' fees, costs incurred in enforcing any

order, the cost of obtaining a daily transcript if the trial judge certifies that this is a reasonable disbursement and the making or opposing of any application except at a CMC or PTR.

(iv) Budgeted costs

2.16 R.65.8 provides that a party may apply to the court at or before the first CMC to set a costs budget for the proceedings. An order may only be made by consent if all relevant parties are bodies corporate.

2.17 Application. An application for a costs budget must be accompanied by a statement of the amount that the party seeking the order seeks to be set as the budget, and a statement showing how the budget has been calculated. The statement of the budget calculation has to make clear, *inter alia*, whether it includes experts' fees and what procedural steps or applications are or are not included in the budget.

2.18 All applications must be accompanied by the written consent of the client, the form of which is prescribed by r.65.9(b). This is a separate document dealing only with budgeted costs, estimating the total costs of the proceedings as between legal practitioner and client, stating the practitioner's estimate of what the prescribed costs appropriate to the proceedings would be and setting out the basis of that estimate.

2.19 Order for budgeted costs. The court may not make an order for budgeted costs unless it satisfied itself that each party fully understands the consequences of the order as to (i) legal practitioner/client costs, (ii) the liability to pay budgeted costs to the opponent if an adverse costs order is made and (iii) what these liabilities would be if prescribed costs applied (r.65.9(1)).

2.20 Variation. The court has power to vary the terms of a budgeted costs order at any time prior to the commencement of trial if satisfied that there has been a change of circumstances which became known after the order was made (r.65.8(5)).

2.21 The rule as to what costs are included in a budget is the same as the rule as to what costs are included in prescribed costs (see paragraph 2.16 above) unless the costs budget specifies otherwise (r.65.10).

(v) Assessed costs

2.22 Assessed costs apply principally in relation to procedural applications[456] not covered by prescribed or budgeted costs. Such costs are summarily assessed by the court hearing the application. The court is bound to allow such sum as it considers fair and reasonable (r.65.11(4)). A party seeking assessed costs must supply a brief statement of costs. The costs allowed under the rule may not exceed 1/10th of the amount of the prescribed costs appropriate to the claim unless the court considers that there are special circumstances of the case justifying a higher amount (r.65.11(7)).

2.23 Where costs fall to be assessed other than on a procedural application, then if the assessment relates to court proceedings it must be carried out by the judge, master or registrar hearing the proceedings (r.65.12(2)). If the assessment does not fall to be carried out at the hearing of any proceedings then the person entitled to

[456] Although the rule is said to govern "procedural applications", in fact it applies to any application other than at a CMC, PTR or trial – *Norgulf Holdings v Michael Wilson & Partners*, BVI Civil Appeal No. 8 of 2007 at [6].

costs must apply to a master or registrar for directions as to how the assessment is to be carried out (r.65.12(3)).

(vi) Costs of appeals

2.24 Under r.65.13, unless the Court of Appeal makes an order for budgeted costs, the prescribed costs rules apply, save that the sums allowed under Appendix B are limited to two thirds of the amount that would otherwise be allowed.

(vii) Part 35 offers

2.25 Part 35. ECCPR Part 35 contains the equivalent of the English Part 36. The rules are generally quite similar as far as costs are concerned, but the following differences are notable. The general rule on defendants' offers is that a claimant who rejects a defendant's offer will pay the defendant's costs from the latest date on which the offer could have been accepted without court permission if, in a damages case, the court awards less than 85% of the defendant's offer and, in any other case, the court considers the claimant's rejection of the offer was unreasonable. In the case of a defendant who fails to beat a claimant's offer of damages, or who unreasonably rejects a claimant's offer in a non-damages case, the court may allow penal interest according to a set table.

3. INTERPRETATION BY THE COURTS

(i) Prescribed costs

3.1 Flexibility. The rules allow scope for flexibility and the courts will exercise that flexibility in appropriate cases. In *Cleveland Donald v The Attorney General for Grenada*[457] Saunders JA stated:

> "The Rules do not intend that once a claim is to be concluded after trial the prescribed costs regime should inflexibly be applied in order to determine the costs payable."

3.2 Flexibility can be achieved through the powers of the court to award only a proportion of prescribed costs,[458] to award costs from or to a certain date or relating only to a distinct part of the proceedings[459] and through variations in the value which would otherwise be attributed to a case.[460] On one occasion a judge achieved flexibility where prescribed costs would have operated unreasonably by determining instead that the costs to be awarded should be the costs of various applications comprised in the proceedings, the costs of applications being assessed rather than prescribed.[461] In another case the court relied on the statement in r.65.5(3) that "the general rule" was that the amount of costs was to be calculated in accordance with Appendix B to deduce that it was not bound to do so if it was inappropriate in the particular circumstances of the case.[462]

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[457] Grenada Civil Appeal No. 32 of 2003.
[458] R.65.5(4)(a).
[459] R.65.5(4)(b).
[460] R.65.6.
[461] *Pacific International Sports Clubs v Comerco Commercial Ltd*, BVIHCV No. 70 of 2005 at [26-28].
[462] *Frett v Wheatley and others*, BVI Civil Appeal No.2 of 2006 at [35].

3.3 Illustrations. Examples of the court awarding only a proportion of prescribed costs are:

- *Rochamel Construction Ltd v National Insurance Corporation:*[463] here the figure determined by the application of Appendices B and C was halved as the successful party did not adduce any evidence and was represented by the same legal practitioner as a co-defendant.

- *St.Lucia Furnishings Ltd v St. Lucia Co-operative Bank Ltd*:[464] the figure of EC$7,700 which would have resulted from the application of Appendices B and C was reduced to EC$5,000 on the ground that neither party had taken any steps in the case after a defence was filed, and the case had been brought to an end by the court of its own motion summoning a CMC and making the orders terminating the case on its own.

3.4 When an application for adjustment of value may be made. R.65.6 enables a party to apply at a CMC for an adjustment of the value which would otherwise attach to a claim. Although lip service is sometimes paid to the procedural requirement that the application be made at a CMC,[465] an application made before any CMC was allowed in *Pacific International Sports Clubs v Comerco Commercial Ltd*,[466] and an order made on an application after CMC and PTR but before trial was upheld by the Court of Appeal in *Noel v First Caribbean International Bank (Barbados) Ltd*.[467] Moreover, in an excoriating judgment in *Astian Group v Alfa Petroleum Holdings Ltd*,[468] a party was not allowed to rely on the fact that no specific application for a determination of value had been made under the rule, when it had persuaded the court to grant security for costs on the express basis that the claim was worth a stated value (in excess of EC$383m).

3.5 Judicial decisions on value. As might have been expected, there are numerous authorities on the determination of the value of a claim. Issues which have been determined include:

- The value of a claim includes interest - *Cleveland Donald v The Attorney General for Grenada*.[469]
- Where the trial is of an issue, the value is based on the value of the issue - *Rochamel Construction Ltd v National Insurance Corporation.*[470]
- In *Cletus Dolor v Alcide Antoine and others*[471] the court reduced the amount of prescribed costs to a lump sum one fifth of the prescribed figure as it did not think "that the nature and complexity of the case warrants such a hefty sum."
- Where no application had been made for the determination of the value to be placed on the case in a case which was not a claim for a monetary sum, the default value of EC$50,000 would be applied – *Re RBG Global SA*.[472]

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[463] St. Lucia Civil Appeal No.10 of 2003.
[464] St. Lucia Civil Appeal No.15 of 2003.
[465] As by Rawlins JA, Penn-Sallah JA concurring, in *Josephine Gabriel & Co Ltd v Dominica Brewery and Beverages Ltd*, Dominica Civil Appeal No.10 of 2004 at [33].
[466] BVIHCV No. 70 of 2005.
[467] Grenada Civil Appeal No. 29 of 2006.
[468] BVI Civil Appeal Nos. 11 and 17 of 2004.
[469] Grenada Civil Appeal No. 32 of 2003.
[470] Supra.
[471] St. Lucia Claim No. SLUHCV2001/0555. This is an early decision, pre-dating some of the concerns expressed by the Court of Appeal about lack of reasons in costs awards, and may not be of strong precedent value in those circumstances.

- In asking the court, in a non-monetary case, to depart from the default value, the applicant had to demonstrate that the costs resulting from the default basis would be inadequate, and the burden lay on it to do so - *Maxymych v Global Convertible Megatrend Ltd*.[473] In that case the court refused to depart from the default value where "*The case was a straightforward one and fell, to use a cricketing analogy, at the first ball*."
- In *Asiacorps Development Ltd v Green Salt Group Ltd*,[474] a non-monetary claim case, the court was persuaded to determine the value of the case at the level required, on the application of Appendices B and C, to enable the successful party to recover its actual costs. In other words the determination of value was an entirely artificial exercise carried out by working back from the desired costs figure. In so doing the court noted that the conduct of the unsuccessful party was blameworthy and that the costs claimed were fair and reasonable.
- In *Frett v Wheatley and others*,[475] which was a case with a monetary value, the court artificially reduced the value of the case in respect of one of the awards of costs to take account of the fact that the party successful in a counterclaim had not had to file a separate defence or witness statement and did not have to engage counsel solely on the counterclaim.

(ii) Budgeted costs

3.6 Budgeted costs do not appear to have excited much attention in the cases.

(iii) Assessed costs

3.7 Assessed costs have given rise to some litigation, partly because the rules are not entirely clear. Assessed costs apply principally in relation to applications, and in jurisdictions such as the BVI, where heavy commercial litigation takes place, very substantial costs can be incurred in interlocutory skirmishing by application.

3.8 In *Norgulf Holdings Ltd v Michael Wilson and Partners Ltd*,[476] the complex provisions of r.65.11 and 65.12 for the assessment of the costs of applications were considered by the Court of Appeal, and the inter-relationship between the two rules was analysed.

3.9 Costs of applications assessed under r.65.11 are subject to a cap of 10% of the appropriate prescribed costs, unless the court considers that there are special circumstances justifying a higher amount.

3.10 In *Michael Wilson & Partners Ltd v Temujin International Ltd and others*[477] the judge held that where the 10% cap was exceeded, the prescribed costs ceased to operate as any sort of cap, and it was possible for the amount to be assessed to be 200% or 300% of the costs prescribed for the case as a whole.

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[472] BVI Civil Appeal No.6 of 2003.
[473] Supra.
[474] BVIHCV1005/0189 as noted in *Maxymych v Global* (supra).
[475] BVI Civil Appeal No.2 of 2006.
[476] BVI Civil Appeal No.8 of 2007.
[477] Claim No. BVIHCV2006/0307.

4. THE WORKING OF THE RULES IN PRACTICE

4.1 In some of the early judgments on the new regime[478] the EC Court of Appeal lamented the inconsistency of application of the rules in practice and sought to impose requirements that whenever a costs order was being made the judge should identify the rule which was being applied and, if discretion was being exercised, give the reason. It also sought to encourage practitioners to help the court by providing costs information and submissions as early as possible.

4.2 Judicial concern about satellite litigation. Nevertheless in late 2005 Joseph-Olivetti J was still lamenting that "*although those [sc.the new costs] provisions are a substantial improvement on the old rules .... the question of costs still seem [sic] to beset our Courts to such an extent that we run the real danger of issues of costs using up more resources than the substantive issues – a situation that could eventually erode the credibility of the civil justice system.*"[479]

4.3 Limited feedback obtained. Attempts have been made[480] to get feedback on the new rules from local practitioners, but unfortunately very little information has been obtained and the comments that follow, which are based largely on the views of one firm of commercial lawyers in the BVI, cannot safely be taken as representative. In particular there has been no feedback on the extent to which clients are happy with a regime under which the amounts recovered in successful cases are based on a tariff which may leave considerable shortfalls between the amount recovered and the amount payable by clients to their own lawyers.

4.4 Comments obtained from BVI solicitors. The main points from the views of the BVI solicitors are:

- Whilst the rules were designed to promote certainty, there has been considerable satellite costs litigation in the BVI. There are a number of reasons for this but principally, the rules leave some uncertainty as to the basis for assessment and secondly, litigation in the BVI is often concentrated on substantial and complex interlocutory applications for which the rules were not specifically designed.
- The language of r.65.6 (1) has been interpreted permissively. Applications to value claims have been made (and allowed) after the judgment in a case has been handed down - rather than at the CMC. In practice, this can act as an incentive for a successful party to apply for as high a value as possible to maximise the prescribed costs to which they are entitled. This in turn has prompted further contested litigation.
- Certain proceedings, for example a claim for an account, cannot have a value until such time as the necessary process has been undertaken. It can be argued that parties who do not know the extent of their loss or damage will not be able to ascertain the likely level of their recoverable costs until the very end of proceedings.
- Applying a value to claims, especially "non-monetary" claims, is not always a straightforward process.
- The larger cases in the BVI are often ancillary to proceedings elsewhere and as a result, the focus is often on early interlocutory applications. These applications are often complex or evidence heavy; for example applications for a stay of

[478] Eg *Rochamel Construction* (supra).
[479] *Pacific International Sports Clubs Ltd* (supra) at [34].
[480] By Jeremy Morgan QC, one of the assessors to the Costs Review.

proceedings based on *forum non conveniens* grounds, for reverse summary judgment or to discharge a freezing or receivership order. There is therefore an emphasis on the rules relating to the costs of applications in the BVI. The rules were designed to bring some flexibility within the prescribed cost parameters and for the ECSC jurisdiction as a whole. They could not have envisaged the situation which has developed in the BVI of large and costly interlocutory applications increasingly dominating the court lists.

- Budgeted costs have only been deployed on a limited basis in the BVI. Whilst the limited feedback is generally good and the client enjoys far more certainty as to any potential costs liability, practitioners have shied away. A possible cause is the unwillingness to be bound by a regime (new circumstances must be shown to have costs varied upwards), especially early on in proceedings when thoughts are commonly concentrated elsewhere.
- The nature of the BVI as an international incorporation jurisdiction has meant that there has been a considerable amount of high value litigation. Inevitably, the costs incurred are high (often involving senior and junior counsel from overseas) and there is often an expectation of a high costs recovery.
- The flexibility underlying the costs regime has provided opportunity for argument designed to maximise recoveries. As further precedent is produced, it is expected that these opportunities will narrow and bring increased certainty.
- The general feedback however on lower value litigation is that the costs regime has worked well, especially where parties have a firm understanding of their costs liability before embarking on litigation.

PART 12. CONCLUSION

CHAPTER 63. PLAN FOR PHASE 2 OF THE COSTS REVIEW

1. WRITTEN SUBMISSIONS AND EVIDENCE

1.1 Comments on this report. Whilst the report is (inevitably) of some length, it is anticipated that any reader will focus upon those parts which are most relevant to his or her own field of work. I would be grateful if readers could send in their comments upon the issues raised in this report by 31st July.

1.2 Evidence, data and comments. My general request for evidence and data was placed on the Judiciary website[1] in November 2008. Much material has been supplied to me in response to that request, some of which appears in appendices to this report. This report contains requests for further evidence and data, as well as requests for comments on a wide variety of issues. I would be grateful for all further evidence, data and comments which readers of this report may wish to submit by 31st July 2009.

1.3 Procedure. All comments, evidence and data submitted during Phase 2 should be sent both in hard copy and electronically. Hard copies should be sent to:

Ms Abigail Pilkington

Clerk to the Civil Litigation Costs Review

Royal Courts of Justice

Strand,

London WC2A 2LL

Electronic copies should be sent to costs.review@judiciary.gsi.gov.uk. It is essential that electronic copies are sent to the above address, not to Ms Pilkington's email address.

1.4 Confidentiality. In certain instances people who have submitted evidence and data for Phase 1 requested confidentiality. I have respected those requests. In most instances, however, no confidentiality was attached to the information submitted and I am grateful for that. I will, of course, respect any stipulations of confidentiality during Phase 2. I would, however, ask that such requests be made sparingly. The issues upon which I am asked to report are of considerable importance. It is highly

[1] http://www.judiciary.gov.uk/about_judiciary/cost-review/docs.htm.

desirable that I should be entitled to set out in my final report the evidence and data upon which I rely when coming to my conclusions and recommendations.

2. MEETINGS AND SEMINARS DURING PHASE 2

2.1 Seminars organised by the Master of the Rolls' office. Four seminars have been organised by the Master of the Rolls staff (principal private secretary – Judy Anckorn) for the purpose of discussing the issues raised by this report. These seminars will be held on the following dates:

19th June 2009	150 places	Cardiff
26th June 2009	200 places	Birmingham
3rd July 2009	150 places	Manchester
10th July 2009	200 places	London

2.2 Meetings and seminars organised by others. A number of organisations have arranged meetings or seminars during Phase 2, which I will be attending. I look forward to attending any similar events which may be set up during the period 8th May to 31st July 2009.

2.3 In principle (and subject to available dates in the diary), I shall welcome every opportunity during Phase 2 to discuss the issues raised by this report with persons or organisations who are affected by those issues.

2.4 Past meetings. As can be seen from chapter 10, I attended many meetings with interest groups and organisations concerned with civil justice during January and February 2009. However, it was not possible to attend meetings with all such bodies.

2.5 Interest groups and organisations whom I have not yet met. I hope that during Phase 2, any other interest groups and organisations concerned with civil justice, who wish to debate the issues with me, will liaise with Ms Abigail Pilkington,[2] clerk to the Costs Review, in order to arrange mutually convenient dates. In particular, it would be helpful to debate the issues with organisations concerned on both sides with clinical negligence claims.[3] Since I have not yet had an opportunity to discuss the issues specific to clinical negligence with the principal protagonists, this report does not include a chapter on clinical negligence. However, many of the matters discussed in the chapters concerning personal injuries litigation and the chapters concerning complex litigation are of relevance to clinical negligence.

3. POSITION AT THE END OF PHASE 2

3.1 I hope that by 31st July 2009, everyone who wishes to submit comments, evidence or data to the civil justice Costs Review will have done so; and that every

[2] abigail.pilkington@hmcourts-service.gsi.gov.uk.

[3] Unfortunately, AVMA's annual conference clashes with one of the seminars mentioned in paragraph 2.1 above, but I hope to attend some similar event. It is also unfortunate that the meeting convened by clinical defence and NHSLA solicitors to debate the issues was held during March, when I was not available. I hope that they will consider re-running the March meeting during a month when I am available (i.e. May, June or July).

interest group or organisation which wishes to meet with me and debate the issues will have done so.

3.2 After 31st July 2009 I propose to consider all of the comments, evidence and data which I have received. I shall then prepare a report addressing the issues set out in my terms of reference.

CHAPTER 64. FINAL REMARKS

1. PURPOSE OF THE COSTS RULES

1.1 Costs rules between parties. The costs rules as between parties perform three functions:

(i) To apportion the total costs of the litigation in a manner which is just.

(ii) Within the confines of what is possible (and accepting that legal services must be paid for) to promote access to justice.

(iii) In the context of the Civil Procedure Rules, to provide incentives for all parties (a) to conduct the litigation economically, (b) to make or accept reasonable settlement offers in respect of the substantive litigation and (c) to agree the proper assessment of costs with minimum court involvement.

The third function is important, because properly formulated costs rules tend to drive down the total costs litigation, whereas ill-formulated rules have the opposite effect.

1.2 Costs rules between solicitor and client. It is the function of the Solicitors Act 1974 and the Solicitors Code of Conduct to regulate the relationship between solicitor and client and to protect the client against exploitation. The function of the costs rules as between solicitor and client is essentially procedural, namely to provide the mechanism for assessing the remuneration due to the solicitor in default of agreement. Those costs rules are not the principal subject of the present review, but they form the framework within which parties operate and their relevance is obvious.

2. THE PURPOSE OF THIS REPORT

2.1 I hope that this report will assist readers in considering the extent to which the current costs rules perform their intended functions and whether any reforms might be appropriate. Chapters 54 to 62 describe the costs rules in other jurisdictions and will, hopefully, provide a helpful basis for comparison with our own costs rules. Such a comparison is required by the fifth bullet point of my terms of reference.

2.2 The costs of civil litigation, although influenced by the costs rules, are a function of the whole process. The second bullet point of my terms of reference calls for a review of that process, although not (of course) for a re-run of the Woolf Inquiry. I therefore have addressed in this report a number of aspects of the civil litigation process, where reforms may possibly enable costs to be reduced.

2.3 This is a preliminary report. It is intended to provide a basis for discussion during the consultation period, which forms Phase 2 of the Costs Review. I shall not make up my mind about the issues identified in this report until the end of the consultation period. It is hoped that the facts set out in this report and the data assembled in the appendices will be of assistance to those who wish to send in written submissions or to contribute during the various debates and seminars which will be held during Phase 2. The panel of assessors will be fully involved during the consultation period, so far as their other commitments allow.

3. PLAN FOR PHASE 3

3.1 During Phase 3 (September to December 2009) I shall continue to consult the assessors and will draft my final report. That report will make proposals for the reform (so far as appropriate) of civil procedure and of the costs rules in order to promote access to justice at proportionate cost. The supporting evidence relied upon in my final report will be that gathered during Phases 1 and 2 of the Costs Review.

Rupert Jackson
Royal Courts of Justice
London

8th May 2009

REVIEW OF
CIVIL LITIGATION COSTS

ANNEXES 1 - 3

ANNEX 1: PHASE 1 SUBMISSIONS RECEIVED BY 31 JANUARY 2009

ACE European Group
Adrian Jack, Enterprise Chambers
ARAG plc
Association of British Insurers (ABI)
Association of Law Costs Draftsmen (ALCD)
Association of Personal Injury Lawyers (APIL)
AXA Insurance
Bartletts Solicitors
Bond Pearce LLP
Boys & Maughan Solicitors
Brachers
Chartered Institute of Patent Attorneys (CIPA)
Chubb Insurance Company of Europe SE
Civil Committee of the Council of Circuit Judges
Clifford Chance LLP
CMS Cameron McKenna LLP
Coalition for Access to Justice for the Environment
Cocks Lloyd Solicitors
Commercial Litigation Association (CLAN)
Compass Costs Consultants Ltd
Costs Sub-committee of the Commercial Court Users Committee
David Armitt
David Halpern QC, 4 New Square
Dr Anthony Barton, Solicitor and Medical Practitioner
Dr Richard Bloore
Dr Stephen Merrill
Field Fisher Waterhouse LLP
FirstAssist Legal Expenses Insurance Ltd
Forum of Insurance Lawyers (FOIL)
Freshfields Bruckhaus Deringer LLP
Gray Hooper Holt LLP
Hart Brown
Herbert Smith LLP
Howrey LLP
Irwin Mitchell Solicitors
Jacqueline Webb & Co. (Rehab Cost Consultancy)
Jim Boff, Phillips & Leigh
John Baron MP
Jonathan Steinberg
Kennedys
Keoghs LLP

Kirkpatrick & Lockhart Preston Gates Ellis LLP
Leigh Day & Co.
Lewis Silkin
Marc Beaumont
Media Lawyers Association (MLA)
Medical Protection Society (MPS)
Morgan Cole Solicitors
Mr G. P. Jones
Mr Roy Pain
Mr Sam Hotchin
Mrs Jenny Morgan
Mrs Maureen Evershed
Munich Reinsurance Company
NHS Litigation Authority (NHSLA)
Paul Jenkins, Treasury Solicitor
Personal Injuries Bar Association (PIBA)
Professional Negligence Bar Association
Professional Negligence Lawyers' Association
Property Bar Association
QBE
Raworths Solicitors
Reputability Ltd
Richard Buxton Solicitors
Ross Aldridge Solicitors
Rushton Hinchy Solicitors Ltd
Scrivenger Seabrook Solicitors
Smith Jones Solicitors
Society for Computers and Law (SCL)
Technology and Construction Bar Association (TECBAR)
The Law Society
Thompsons Solicitors
Tom Goff
Trades Union Congress (TUC)
Underwoods Solicitors
Union of Shop, Distributive and Allied Workers (UsDaw)
UNISON
Unite
Weightmans LLP
Wilkin Chapman Solicitors

ANNEX 2: CONFERENCES, SEMINARS AND MEETINGS ATTENDED WITH REPRESENTATIVE BODIES DURING PHASE 1

1st December 2008	Professional Negligence Bar Association Annual General Meeting
13th January 2009	Meeting with GC100 Group
14th January 2009	Meeting with the Employment Law Association
15th January 2009	Meeting with the Media Lawyers Association
19th January 2009	Meeting with the Association of British Insurers
20th January 2009	Meeting with a number of after-the-event insurers, underwriting agents and brokers
21st January 2009	Institute of Advanced Legal Studies Lecture by Professor Richard Moorehead, 'An American Future? The Pros and Cons of Contingency Fees: Evidence from Employment Tribunals'
22nd January 2009	Meeting with a number of third-party funders
22nd January 2009	Commercial Court Users' Committee Costs Sub-Committee
26th January 2009	Meeting with the Association of Personal Injury Lawyers
28th January 2009	Meeting with the Forum of Insurance Lawyers
29th January 2009	Meeting with the Commercial Litigators Forum and City of London Law Society Litigation Committees
30th January 2009	Meeting with Which? (Consumers Association)
4th February 2009	Meeting at firm of claimant personal injury solicitors
5th February 2009	Meeting with the Association of Law Costs Draftsmen
6th February 2009	Meeting with Trade Union representatives
9th February 2009	London Solicitors' Litigation Association, 'Contingency Fees, Costs Shifting, Disclosure and Summary Assessment'
10th February 2009	Meeting with members of the Technology and Construction Court and the Technology and Construction Solicitor and Bar Associations
17th February 2009	Meetings with Liverpool and Merseyside District Judges, the Liverpool Civil Court Users Committee, and a further group of court users and practitioners
19th February 2009	Meeting with the Motor Accidents Solicitors Society

20th February 2009	Meeting with a number of before-the-event insurers
24th February 2009	Meeting with the Law Society Civil Justice Committee
25th February 2009	Meeting with Consumer Focus
26th February 2009	Practical Law Seminar, 'Costs, collective redress, contingency fees... the way forward?'
20th March 2009	The University of Oxford Law Faculty Conference in conjunction with the Association for International Procedural Law, 'Litigation in England and Germany: Legal Professional Services, Key Features and Funding'
22nd – 23rd April 2009	Association of Personal Injury Lawyers' Annual Conference 2009

ANNEX 3: MEETINGS ATTENDED WITH OVERSEAS ORGANISATIONS AND PERSONS IN PHASE 1

Cologne, Germany **27th January 2009**	**Meetings attended with:**
	members of the judiciary
	practitioners
	members of Cologne University and the Soldan Institute for Law Practice Management
Hong Kong **24th – 26th March 2009**	**Meetings attended with:**
	the Hong Kong Legal Aid Department
	the Hong Kong Law Society
	representatives of City firms
	the Hong Kong Bar Association
	members of the Hong Kong judiciary
	the Hong Kong Law Reform Commission
Perth, Australia **27th March 2009**	**Meetings attended with:**
	members of the Supreme Court judiciary
	the Western Australia Law Society Costs Committee
	the Western Australia Legal Aid and Community Legal Centre
Melbourne, Australia **30th – 31st March 2009**	**Meetings attended with:**
	the Advisory Group on Victorian Law Reform Committee recommendations
	the Legal Service Commission
	members of the Federal Court judiciary
	members of the Supreme Court and Court of Appeal judiciary

practitioners

academics

the Anglo-Australian Lawyers Society, Melbourne

the Law Institute of Victoria

the Attorney-General and Deputy Prime Minister

Sydney, Australia

31st March – 2nd April 2009

Meetings attended with:

the New South Wales Law Society

representatives of an Australian litigation funder

the Federal Attorney-General

members of the Federal Court and Supreme Court judiciary

the Anglo-Australian Lawyers Society, Sydney

the Legal Services Commissioner

the Director General of the Attorney-General's Department

practitioners

Auckland, New Zealand

3rd April 2009

Meetings attended with:

the New Zealand Bar Association

members of the High Court judiciary

practitioners and members of the Auckland District and New Zealand Law Societies

the New Zealand Rules Committee

Washington D.C., U.S.A.

6th – 7th April 2009

Meetings attended with:

practitioners at an international law firm

members of the District of Columbia Superior Court judiciary

members of the Federal Court judiciary

members of the Federal Judicial Center

Toronto, Canada
8th – 9th April 2009

Meetings attended with:

the Deputy Attorney-General and Ministry of Attorney-General officials

members of the Court of Appeal for Ontario judiciary

members of the Superior Court judiciary

the Law Society of Upper Canada

the Advocates' Society

the Ontario Bar Association

Paris, France
17th April 2009

Meetings attended with:

practitioners

Meetings attended by assessors on behalf of the Costs Review:

Brisbane, Australia
2nd – 3rd April 2009

Meetings attended with:

the Public Interest Law Clearing House and Legal Aid Queensland

the Department of Justice and Attorney-General

the Queensland Law Society

the Queensland Bar Association

the Legal Services Commission

Los Angeles, U.S.A.
6th April 2009

Meetings attended with:

members of the Federal and State Courts judiciary

practitioners

New York, U.S.A.

8th April 2009

Meetings attended with:

members of the Federal and State Courts judiciary

practitioners

academics

Vancouver, Canada

6th – 7th April 2009

Meetings attended with:

members of the Supreme Court of British Columbia judiciary

the Canadian Bar Association, British Columbia

the Law Society of British Columbia

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