

# An introduction to costs - basis of assessment



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# Costs generally

- Crucial to clients – determining factor in deciding to litigate
- Main rules in CPR 44 to 47 and their accompanying PDs
  - CPR 44 = general rules, qualified one-way costs shifting for certain claims, damages-based agreements, payment on account, summary assessment
  - CPR 45 = fixed costs
  - CPR 46 = costs in special cases (e.g. disclosure applications)
  - CPR 47 = procedure for detailed assessment
- CPR 25 = interim remedies and security for costs



# Assessment

- CPR 44.2(2)(a) 'Loser pays' – but how much?
- CPR 44.6 Procedure for assessment = summary or detailed
  - Following a costs order determining who is the receiving party for recovery of costs, costs in litigation are **assessed**, if not already fixed or agreed, so that the amount to be paid can be established
  - N260 costs schedule for summary assessment
- CPR 44.3 Basis of assessment = standard or indemnity
- Different from the indemnity principle! See the signature on the final page of N260
  - The amount which the paying party has to pay cannot exceed the amount which the successful party has to pay their own legal representatives



# Basis of assessment

- CPR 44.3 Basis of assessment = standard or indemnity
  - (1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –
    - (a) on the standard basis; or
    - (b) on the indemnity basis,
  - but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.
  - (Rule 44.5 sets out how the court decides the amount of costs payable under a contract.)



## CPR 44.3 Basis of assessment

(2) Where the amount of costs is to be assessed on the **standard basis**, the court will—

(a) only allow costs which are **proportionate** to the matters in issue. Costs which are **disproportionate** in amount may be disallowed or reduced even if they were **reasonably** or **necessarily** incurred; and

(b) resolve any **doubt** which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount **in favour of the paying party**.

(Factors which the court may take into account are set out in rule 44.4.)



## CPR 44.3 Basis of assessment

(3) Where the amount of costs is to be assessed on the **indemnity** basis, the court will resolve any **doubt** which it may have as to whether costs were **reasonably incurred** or were reasonable in amount in favour of the receiving party.



# CPR 44.4 Factors to be taken into account in deciding the amount of costs

(1) The court will have regard to **all the circumstances** in deciding whether costs were –

(a) if it is assessing costs on the **standard basis** –

(i) **proportionately and reasonably incurred**; or

(ii) **proportionate and reasonable in amount**, or

(b) if it is assessing costs on the **indemnity basis** –

(i) **unreasonably incurred**; or

(ii) **unreasonable in amount**.



	Standard basis	Indemnity basis	Both standard basis and indemnity basis
Allowed	Costs proportionate to the amount in issue	Costs where there is some doubt as to whether they were reasonably incurred  Costs where there is some doubt as to whether they were reasonable in amount	Reasonably incurred costs  Costs which are reasonable in amount
Disallowed / unlikely to be recovered	Costs which are disproportionate in amount, even if reasonably or necessarily incurred		Unreasonably incurred costs  Costs which are unreasonable in amount



# Similarities - reasonableness

- Costs which are:
  - Reasonably incurred
  - Reasonable in amount
  
- An evaluative assessment of the item of cost against the factors in CPR 44.4 ('all the circumstances' – e.g. parties' conduct; value; complexity)
  
- Does not allow for the application of hindsight – reasonableness of an item of costs is to be determined as at the facts known at the time
  - *Francis v Francis and Dickerson* [1955] 3 All ER 836 : the correct viewpoint to be taken by a costs officer in considering whether any step was reasonable is that of a sensible solicitor considering what, in the light of his then knowledge, was reasonable in the interest of his client



# Differences

## (1) Proportionality – relevant to the standard basis

- Comparing the total to the importance, complexity and development of the litigation – e.g. instructing senior counsel in a Ground 8 possession claim
- CPR 44.3(5) Costs incurred are proportionate if they bear a reasonable relationship to –
  - (a) the sums in issue in the proceedings;
  - (b) the value of any non-monetary relief in issue in the proceedings;
  - (c) the complexity of the litigation;
  - (d) any additional work generated by the conduct of the paying party; and
  - (e) any wider factors involved in the proceedings, such as reputation or public importance.
- West v Stockport NHS Foundation Trust [2019] EWCA Civ 1220

## (2) Doubt as to reasonableness/proportionality - presumptions

- Standard: in favour of PAYING party
- Indemnity: in favour of RECEIVING party



# Indemnity basis - benefits

- **More costs recovered – benefit of the doubt; proportionality not considered**
  - Very advantageous to clients in ‘low value’ claims
- **CPR 3.18 Costs budgets – reluctance to depart does not apply to indemnity costs orders**
  - In any case where a costs management order has been made, when assessing costs on the standard basis, the court will ...(b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so.



# When will the standard basis be ordered?

- The default
- CPR 44.3(4) Where –
  - (a) the court makes an order about costs **without indicating the basis** on which the costs are to be assessed; or
  - (b) the court makes an order for costs to be assessed on a basis **other than the standard basis or the indemnity basis**,
  - the costs will be assessed on the **standard basis**.
- CPR 44.9(1)(d) Where -
  - a right to costs arises under r.38.6 (Liability for costs on discontinuance), a costs order will be deemed to have been made on the standard basis unless the court orders otherwise (i.e. indemnity basis)



# When will indemnity basis be ordered?

- CPR Part 36 offers
  - C makes Part 36 offer **which D does NOT accept**;
  - Case proceeds to trial (r36.17(1)(b));
  - C awarded judgment at least as advantageous (equal or beat) than Part 36 offer = PENALTIES
  - Costs (including any recoverable pre-action costs) **on the indemnity basis** from the date on which the relevant period expired
- Contractual entitlement to “all costs”, no express requirement for reasonableness, issue of contractual construction, ultimately the court retains discretion exercised in accordance with the contractual provision
  - See e.g. *Bank of Baroda v Panessar* [1987] 1 Ch 335 and *Rabilizirov v A2 Dominion London Ltd and others* [2019] EWHC 863 (QB) – cf *Alafco Irish Aircraft Leasing Sixteen Ltd v Hong Kong Airlines Ltd* [2019] EWHC 3668 (Comm)



# When will indemnity basis be ordered?





- Discretion!
- *Excelsior Commercial and Industrial Holdings Ltd* [2002] EWCA Civ 879. Appropriate in circumstances where: (1) the conduct of the parties or (2) other particular circumstances of the case (or both) was such as to take the situation “**out of the norm**” in a way which justifies an order for indemnity costs. Infinite variety of possible situations
- *Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883. The weakness of a legal argument is not, without more, justification for an order for costs to be assessed on the indemnity basis. The position might be different if proceedings or steps taken within them are not only based on a plainly hopeless case but are motivated by some ulterior commercial or personal purpose or otherwise for purely tactical reasons unconnected with any real belief in their merit
- For examples and applications of principles see WB 44.3.8 and 44.3.9 – e.g. bringing a dishonest claim



# Thank you

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