

# Welcome to Landmark Chambers' 'Costs for Planners' webinar

The recording may be accessed [here](#).

# Your speakers today are...



**Tom Morris (Chair)**

**Topic:**

The elements of  
the assessment:  
CPR Part 47  
And some relevant  
points of law



**Rupert Cohen**

**Topic:**

Quantum of  
planning costs



**Nick Grant**

**Topic:**

Awards of  
planning costs

## Awards of planning costs



**Nick Grant**

## Jurisdiction to award costs

- For inquiries: s. 250(5) Local Government Act 1972  
 The Minister causing an inquiry to be held under this section *may make orders as to the costs* of the parties at the inquiry and as to the parties by whom the costs are to be paid...
- Power extended to inspectors (para. 6(5) Town and Country Planning 1990) and hearings/written reps (s. 322 and 322A TCPA 1990).
- If not standard TCPA planning, check the legislation. Government list [here](#).
- SoS may recover administrative costs inquiry: s. 42 Housing and Planning Act 1986

## SoS Policy on Costs

- SoS policy set out in the [PPG](#), inspectors err if they do not apply it: Swale BC v SSHCLG [2020] EWHC 3482 (Admin) [58].
- Parties usually bear their own costs. Costs may be awarded where
  - A party has behaved unreasonably, and
  - That unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process
- So – costs do not follow the event.
- Costs may be full or partial.

## Unreasonable behaviour

- “Unreasonable” is used in its ordinary sense, not *Wednesbury* unreasonableness: Swale BC [52]-[56].
- Unreasonable procedural behaviour can include e.g. failing to meet deadlines, witnesses failing to attend, failing to prepare resulting in an adjournment, failing to resolve SoCGs, introducing new technical evidence halfway through the inquiry.
- Unreasonable substantive behaviour includes running points with no legal basis or evidence.
- See e.g.s in the [Inspector's Training Manual](#) (2020)

## Directly caused unnecessary expense

- Any application for costs must “clearly demonstrate” how unreasonable behaviour resulted in unnecessary or wasted expense.
- Direct expense may extend to, e.g., time spent by appellants and representatives in preparing for the appeal, including use of consultants to provide technical detailed advice.
- Does not extend to
  - Costs unrelated to the appeal or proceedings
  - Indirect losses, such as those causing by delays in obtaining planning permission

## The who and how of applications

- The Appellant, LPA and any interested parties who have taken part in the process may apply. Inspector may make an award of their own initiative.
- When and how to make an application is set out in the [PPG](#).
  - Written rep planning appeals – unless app relates to site visit, no later than final comments stage unless alternative set.
  - Hearings and inquiries – must be made before closure,
    - Good practice to make in writing before hearing or inquiry
    - If relates to behaviour at inquiry, tell inspector before adjournment or close, make application.
  - If relating to withdrawn matters, 4 weeks after notification using [PINS form](#)

## The award itself

- Should clearly specify what the SoS considers the nature of the wasted costs to be: Scrivens v SSCLG [2013] EWHC 3549 (Admin); Mayor of London v SSHCLG [2020] EWHC 1176 (Admin).
- Once award is made:
  - Costs judge cannot go behind it: Maiden London Ltd v Ruddick & Anor [2018] EWHC 3684 (QB), [21]
  - Cannot look at ex post facto explanations: Maiden London Ltd [31]-[32]
  - May look at decision: Braintree DC v SSHCLG [2021] EWHC 651 (QB), [62]-[63].
- Challenging costs award made by JR: Maiden London Ltd [21].

## Enforcing

- S. 250(5) LGA 1972
  - ...and every such order may be made a rule of the High Court on the application of any party named in the order.
- So,
  - Agree
  - If cannot agree, apply to High Court under s. 250
  - Then, commence detailed assessment in accordance with CPR Part 47
- For an e.g. see Maiden London Ltd.

# The elements of the assessment: CPR Part 47 And some relevant points of law



**Tom Morris**

## Key terms

- “Detailed Assessment Proceedings”: the process by which a party’s recoverable costs are quantified by a costs judge.
- “Receiving Party”: the party entitled to be paid its costs.
- “Paying Party”: the party liable to pay the receiving party’s costs.
- The procedure is set out in Part 47 of the Civil Procedure Rules and the Practice Direction to Part 47:
  - <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-47-procedure-for-detailed-assessment>

## Key procedural points

- Detailed assessment proceedings are commenced by the receiving party serving on the paying party a notice of commencement and a bill of costs (CPR r. 47.6).
- The time period for commencing detailed assessment proceedings: see CPR r.47.7.
- Venue for detailed assessment in planning matters: the Senior Courts Cost Office.

## Key documents (1): Bill of Costs

- See precedents attached to PD.
- Title page – para 5.10 PD
- Brief description of the proceedings up to the date of commencement; hourly rates claimed for each legal representative; details of any agreements relating to costs between receiving party and representative – para 5.11 PD
- Sets out costs claimed under particulars “heads of costs” – para 5.12 PD
- Includes time spent on documents, attendances on client, opponents and tribunal.
- Also includes disbursements – expert witnesses and counsel – and expenses.

## Key documents (2): Points of Dispute (“PoDs”)

- The Paying Party’s response to the receiving party’s case – 21 days after bill.
- Sets out Paying Party’s objections to the costs claimed.
- PD para 8.2 – must be short and to the point, and follow Precedent G annexed to the PD.
- They must:
  - Identify any general points or matters of principle which require decision before the individual items in the bill are assessed, such as evidential issues, or categories of cost outside the scope of the costs order.
  - Identify specific points, stating concisely the nature and grounds of dispute.
- The paying must in an open letter accompanying points of dispute what sum, if any, it offers to pay in settlement of the total costs claimed.

## Key documents (3): Reply

- Receiving party's optional response to the paying party's points of dispute – 21 days after service of PoDs.
- Must be limited to points of principle and concessions only.
- Must not contain general denials, specific denials or standard form response.
- Precedent G to PD.

## Key documents (4): certificates

- Default costs certificate: where paying party fails to serve PoDs in 21 days.
- Interim costs certificate: an order that the paying party pay an amount of costs to the receiving party on an interim basis, before the assessment has concluded. Note: the court has the discretion to make an interim costs certificate on the application of the receiving party, but there is no presumption that one will be made: see *Blakemore v Cummings* [2010] 1 WLR 983.
- Final costs certificate: an order that the paying party pay the sum stated in the Bill once the detailed assessment is completed.

## Sanctions for breaking time limits

- If receiving party fails to commence assessment proceedings in time (r.47.8):
  - Paying party may apply for an order requiring it to do so and the court may order that if the receiving party does not do so it may be disallowed some of its costs.
  - If the paying party does not make such an application, the court disallow all or part of the interest otherwise payable.
- If the receiving party fails to serve PoDs within 21 days (r.47.9):
  - They may not be heard in the assessment proceedings without permission.
  - The receiving party may apply for a default costs certificate.

## Costs orders: what is within the scope?

- Costs ‘of and incidental to the proceedings’ – s.51 Senior Courts Act 1981.
  - must arise from the litigation (i.e. not from non-contentious work)
  - Includes pre-action costs
  
- The *Gibson* principles (see *Re Gibson’s Settlement Trusts* [1981] Ch 179)
  
- Recoverable if:
  - (1) The work was of use and service in the claim
  - (2) The work was of relevance to an issue in the claim
  - (3) The need for the work attributable to paying party’s act or omission

## Attributable to paying party

- Not attributable to paying party if the work in question was already done before put in issue by paying party even if later relevant to that issue:
  - e.g. surveys and reports prior to the LPA raising an issue even if it was subsequently used in an appeal.
- Attributable if the need for the work was caused by the paying party raising the issue:
  - e.g. surveys and reports carried out after the LPA's reasons for refusal.
- Note: the work may not be reasonable even if properly speaking attributable to the paying party's act or omission.

## Expert evidence

- Important distinction between expert and non-expert work: the cost of ‘marshalling the facts’ on which expert evidence is to be based are non-recoverable in principle.
- Receiving party cannot usually recover costs paid to its employees – unless the employees’ work was properly speaking that of an expert witness: *Re Nossen’s Patent* [1969] 1 WLR 638.
- The cost of company directors attending an inquiry is not recoverable – these are part of the costs of being a litigant, and not within the scope of the costs order.

## Factual vs expert evidence: illustration

*Richards & Wallington (Plant Hire) Ltd v Monk & Co Ltd* [1997] Costs LR (Core Vol) 79, Bingham J:

*“I have no doubt that a great deal of work needed to be done, part of this perhaps being attributable to the difficulties of proof in which Richards & Wallington found themselves and various problems that they had to overcome. But essentially, I think, these two gentlemen were engaged on a factual exercise; they were certainly not independent experts; they were not, in truth, acting as experts at all and, in my judgment, these costs fall within the ordinary costs that a litigant must bear of digging out his own factual material, through his own employees, to prove his own case. Had outside experts been introduced to carry out this work then it by no means seems to me to follow that it would in any event have been recoverable as a cost of the litigation.”*

## Other points relating to experts' fees

- Experts must confine their evidence to matters within the area of their expertise – of they do not then it is open to the court to disallow all or part of their fee on the basis of relevance and reasonableness: *Whitehouse v Jordan* [1981] 1 WLR 246.
- Expert's fee must not include the fee of providing ordinary professional services to their client – e.g. an employed architect carrying out routine work in relation to an appeal.
- In a case where the experts' fees are considerable, then evidence as to market rate may be admissible in determining the reasonableness of the costs claimed.

## The assessment of experts' proofs of evidence in practice

- Evidence: the bill of costs must be accompanied by written evidence as to any disbursement exceeding £500 (para 5.2(d) PD)
  - the proof of evidence; the expert's fee note; explanation of the work involved.
  - evidential requirements less stringent than solicitors' costs but the evidence must be sufficient for the court to be able to assess the reasonableness and proportionality of the amount claimed
- Commonly, cost judge will look at the proof of evidence and use experience to form a view as to how much time was reasonably spent writing it.
- *Deutsche Bank AG v Vik* [2020] 3 WLUK 118.

## Quantum of planning costs



**Rupert Cohen**

## Standard basis – CPR 44.3

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

## Indemnity basis – CPR 44.3

- (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.
- 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.

## Reasonableness

- Two concepts determine the quantum of an assessment
- Reasonableness – evaluative assessment of the item of cost against the factors in CPR 44.4 (‘all the circumstances’)
- Proportionality – comparing the total to the importance, complexity and development of the litigation.
- On neither basis will costs which are unreasonably incurred or unreasonable in amount be allowed (CPR 44.3) – no hindsight permitted re. reasonableness (Francis v Francis and Dickerson).

## Proportionality – 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

## Tips for receiving party

- When drafting the bill each document relating to an item of cost should be marked with the same item number as the item of cost has been assigned in the bill.
- Every call needs an accompanying attendance note.
- Emphasise conduct and complexity in the narrative to the bill.
- If you don't ask you won't get – blocks of costs are often compromised in the hearing / the judge will take a broad brush so more is more.
- Target your defensive points at the big ticket items.
- Always provide evidence of haggling over the quantum of disbursements.
- Guideline hourly rates: Ohpen Operations UK Ltd v Invesco Fund Managers Ltd [2019] EWHC 2504 (TCC)

## Tips for paying party

- Duplication.
- Attack disbursements: *“A proper measure for Counsel’s fees is to estimate what fee a hypothetical Counsel, capable of conducting the case effectively, but unable or unwilling to insist on the higher fees sometimes demanded by Counsel of pre-eminent reputation, would be content to take on the brief: but there is no precise standard of measurement and the judge must, using his or her knowledge and experience, determine the proper figure”* (Per Pennycuik J in Simpsons Motor Sales (London) Ltd v Hendon BC [1965] 1 W.L.R. 112.)
- Costs incurred in arranging the retainer / client care information not recoverable.
- Always demand evidence of product.
- Hourly rates → both to attack solicitor time cost and expert costs
- Attack retainer

## Tips for both

- Always make offers – Part 36 applies to the costs of the assessment.
- Use costs draftsmen for the bill, counsel for the big ticket items and then costs draftsmen for the line by line assessment.
- Follow PD 47 to the letter.
- Use technology.
- Don't use counsel who isn't a costs specialist.....
- If you are a solicitor use a costs draftsman; your time is better spent elsewhere

## Costs of the assessment proceedings

- CPR 47.20: (1) The receiving party is entitled to the costs of the detailed assessment proceedings except where –(a) the provisions of any Act, any of these Rules or any relevant practice direction provide otherwise; or (b) the court makes some other order in relation to all or part of the costs of the detailed assessment proceedings
- (3) In deciding whether to make some other order, the court must have regard to all the circumstances, including –
  - (a) the conduct of all the parties;
  - (b) the amount, if any, by which the bill of costs has been reduced; and
  - (c) whether it was reasonable for a party to claim the costs of a particular item or to dispute that item.

# Thank you for listening

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