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

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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

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- 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")

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- 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

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- 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

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- 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

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- 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

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- 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.

Thank you for listening

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