

CHAPTER TEN

THE AWARD OF COSTS IN ARBITRATION

ARBITRATION ACT 1996

PART I

ARBITRATION PURSUANT TO AN ARBITRATION AGREEMENT

The Arbitration Act 1996

The Model Law

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INTRODUCTION

Be it litigation or arbitration, costs are a significant aspect of pursuing or defending a claim. It is unlikely that there will be much difference between the legal and other costs of a party to either process. The principal difference rather lies in the fact that the arbitral process is not subsidised by the state (*though the extent of that subsidy has diminished in recent times*) and accordingly the parties will have to pay for the services of the arbitrator and fund the costs of the venue where a hearing is involved. Whilst arbitration is frequently less expensive than litigation (though not always so) the economies are dependent upon tight case management by the tribunal and the adoption of cost effective informal mechanisms not available to the court.

The ability to recover costs is often central to financial success in litigation, since where the costs exceed the value of the claim the victor would enjoy a mere empirical victory. In the UK the legislature has taken steps to ensure that the claimant's returns are not unnecessarily impacted upon by the costs of litigation, though it should be noted that recoverable costs rarely account for all costs incurred in pursuing/defending a claim. This approach is not universal. In the US litigation costs are not recoverable. The jurisprudence differs in that in the US recovery of costs is viewed as a penalty that might deter a claimant from seeking justice. Thus each party bears their own costs. This is the default model adopted by the Housing Grants Construction and Regeneration Act 1996 for construction adjudication. The model is also often applied to statutory tribunal proceedings. Presumably in both cases, this is to discourage the parties from incurring excessive costs.

Whilst the general rule in the UK is that costs follow the event, i.e. the loser pays the winner's legal costs, this does not amount to an open invitation to lavish excessive funds on litigation, to pursue claims on points of principle alone, or to act in an unreasonable / obstructive manner without any due regard to the opportunity to settle and thus avoid litigation or to otherwise unlawfully impede the other party in their pursuit of a claim or defence. The concept of the *Calderbank* Letter and payment in procedures are relevant here.

The general concept underpinning the recovery of costs applies equally to arbitration and to litigation, though there are equally marked differences between both processes that result in variants of the rules. None the less, given that communality of concept the rules governing both processes are set out and discussed below. Note that there is no requirement that the tribunal slavishly emulate the courts in respect of procedure and equally with regard to costs.

s59 Arbitration Act 1996 Costs of the arbitration.

- 59(1) *References in this Part to the costs of the arbitration are to-*
- (a) *the arbitrators' fees and expenses,*
 - (b) *the fees and expenses of any arbitral institution concerned, and*
 - (c) *the legal or other costs of the parties.*
- 59(2) *Any such reference includes the costs of or incidental to any proceedings to determine the amount of the recoverable costs of the arbitration (see section 63).*

Adjudication and Costs. HGCR 1996.

There is no power under the HGCR 1996 or the Scheme for the adjudicator to award costs. It is however open to the parties to agree cost provisions in the contract.

s60 Arbitration Act 1996 Agreement to pay costs in any event.

60. *An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen.*

This prevents a party using its economic muscle to impose onerous terms at the contract negotiation stage which act as a major incentive against making a claim. This measure is also reinforced by the power of the tribunal to limit recoverable costs.

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Adjudication and Cost agreements.

Pursuant to the now infamous decision in *Bridgeway Construction Ltd v Tolent Construction Ltd* [2000]¹ it is possible for the costs of an adjudication to be allocated to a claimant whatever the outcome.

s61 Arbitration Act 1996 Award of costs.

- 61(1) *The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties.*
- 61(2) *Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.*

Article 38 Power of Tribunal to fix costs. UNCITRAL ARBITRATION RULES

- The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:*
- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;*
 - (b) The travel and other expenses incurred by the arbitrators;*
 - (c) The costs of expert advice and of other assistance required by the arbitral tribunal;*
 - (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;*
 - (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;*
 - (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.*

Article 40 Award of costs against parties. UNCITRAL ARBITRATION RULES

- 1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.*
- 2. With respect to the costs of legal representation and assistance referred to in article 38, Paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.*
- 3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.*
- 4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37.*

¹ *Bridgeway Construction Ltd v Tolent Construction Ltd* [2000] TCC 11.04.2000 : [2000]CILL 1662

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Settlement Offers and the measure of success.

In *Calderbank v Calderbank*² the English Court took into account whether or not a claimant had been successful in litigation (for the purpose of determining costs of the litigation) in the light of an offer to settle which had not been accepted. Thus successes became measures not by whether a claim had prevailed in full or in part, but rather by whether or not the party had recovered more than was available without pursuing litigation to the bitter end (offers to settle may be made during the course of litigation thereby bringing the litigation to an end). In such circumstances recoverable costs may end at the point in time when the settlement offer is made. From that time onwards, ongoing costs may then transfer to the party who made the settlement offer. The concept has been embraced by a number of commonwealth countries that follow the UK legal system, e.g. Australia. It has also been adopted as a standard feature of arbitration costs awards in England and Wales where the parties have not otherwise agreed. The Civil Procedure Rules has further introduced a formalised process for both parties to make settlement offers and to secure them by making payments in to court.

PART 36 CIVIL PROCEDURE RULES : OFFERS TO SETTLE AND PAYMENTS INTO COURT

- 36.1(1) This Part contains rules about -
- (a) offers to settle and payments into court; and
 - (b) the consequences where an offer to settle or payment into court is made in accordance with this Part.
- 36.1(2) Nothing in this Part prevents a party making an offer to settle in whatever way he chooses, but if that offer is not made in accordance with this Part, it will only have the consequences specified in this Part if the court so orders.
(Part 36 applies to Part 20 claims by virtue of rule 20.3)

Part 36 offers and Part 36 payments - general provisions

- 36.2(1) An offer made in accordance with the requirements of this Part is called -
- (a) if made by way of a payment into court, "a Part 36 payment";
 - (b) otherwise "a Part 36 offer".
(Rule 36.3 sets out when an offer has to be made by way of a payment into court)
- 36.2(2) The party who makes an offer is the "offeror".
- 36.2(3) The party to whom an offer is made is the "offeree".
- 36.2(4) A Part 36 offer or a Part 36 payment -
- (a) may be made at any time after proceedings have started; and
 - (b) may be made in appeal proceedings.
- 36.2(5) A Part 36 offer or a Part 36 payment shall not have the consequences set out in this Part while the claim is being dealt with on the small claims track unless the court orders otherwise.
(Part 26 deals with allocation to the small claims track)
(Rule 27.2 provides that Part 36 does not apply to small claims)

A defendant's offer to settle a money claim requires a Part 36 payment

- 36.3(1) Subject to rules 36.5(5) and 36.23, an offer by a defendant to settle a money claim will not have the consequences set out in this Part unless it is made by way of a Part 36 payment.
- 36.3(2) A Part 36 payment may only be made after proceedings have started.
(Rule 36.5(5) permits a Part 36 offer to be made by reference to an interim payment)
(Rule 36.10 makes provision for an offer to settle a money claim before the commencement of proceedings)
(Rule 36.23 makes provision for where benefit is recoverable under the Social Security (Recovery of Benefit) Act 1997[44])

² *Calderbank (Jacqueline Anne) v Calderbank (John Thomas) [1975] ADR.L.R. 06/05*

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Defendant's offer to settle the whole of a claim which includes both a money claim and a non-money claim

- 36.4(1) This rule applies where a defendant to a claim which includes both a money claim and a non-money claim wishes -
- (a) to make an offer to settle the whole claim which will have the consequences set out in this Part; and
 - (b) to make an offer in respect of both the money claim and the non-money claim.
- 36.4(2) The defendant must -
- (a) make a Part 36 payment in relation to the money claim; and
 - (b) make a Part 36 offer in relation to the non-money claim.
- 36.4(3) The Part 36 payment notice must -
- (a) identify the document which sets out the terms of the Part 36 offer; and
 - (b) state that if the claimant gives notice of acceptance of the Part 36 payment he will be treated as also accepting the Part 36 offer.
- (Rule 36.6 makes provision for a Part 36 payment notice)*
- 36.4(4) If the claimant gives notice of acceptance of the Part 36 payment, he shall also be taken as giving notice of acceptance of the Part 36 offer in relation to the non-money claim.

Form and content of a Part 36 offer

- 36.5(1) A Part 36 offer must be in writing.
- 36.5(2) A Part 36 offer may relate to the whole claim or to part of it or to any issue that arises in it.
- 36.5(3) A Part 36 offer must -
- (a) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue;
 - (b) state whether it takes into account any counterclaim; and
 - (c) if it is expressed not to be inclusive of interest, give the details relating to interest set out in rule 36.22(2).
- 36.5(4) A defendant may make a Part 36 offer limited to accepting liability up to a specified proportion.
- 36.5(5) A Part 36 offer may be made by reference to an interim payment.
(Part 25 contains provisions relating to interim payments)
- 36.5(6) A Part 36 offer made not less than 21 days before the start of the trial must -
- (a) be expressed to remain open for acceptance for 21 days from the date it is made; and
 - (b) provide that after 21 days the offeree may only accept it if -
 - (i) the parties agree the liability for costs; or
 - (ii) the court gives permission.
- 36.5(7) A Part 36 offer made less than 21 days before the start of the trial must state that the offeree may only accept it if -
- (a) the parties agree the liability for costs; or
 - (b) the court gives permission.
- (Rule 36.8 makes provision for when a Part 36 offer is treated as being made)*
- 36.5(8) If a Part 36 offer is withdrawn it will not have the consequences set out in this Part.

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Notice of a Part 36 payment

- 36.6(1) A Part 36 payment may relate to the whole claim or part of it or to an issue that arises in it.
- 36.6(2) A defendant who makes a Part 36 payment must file with the court a notice ("Part 36 payment notice") which -
- (a) states the amount of the payment;
 - (b) states whether the payment relates to the whole claim or to part of it or to any issue that arises in it and if so to which part or issue;
 - (c) states whether it takes into account any counterclaim;
 - (d) if an interim payment has been made, states that the defendant has taken into account the interim payment; and
 - (e) if it is expressed not to be inclusive of interest, gives the details relating to interest set out in rule 36.22(2).
- (Rule 25.6 makes provision for an interim payment)*
(Rule 36.4 provides for further information to be included where a defendant wishes to settle the whole of a claim which includes a money claim and a non-money claim)
(Rule 36.23 makes provision for extra information to be included in the payment notice in a case where benefit is recoverable under the Social Security (Recovery of Benefit) Act 1997)
- 36.6(3) The court will serve the Part 36 payment notice on the offeree unless the offeror informs the court, when the money is paid into court, that the offeror has served the notice.
- 36.6(4) Where the offeror serves the Part 36 payment notice he must file a certificate of service.
(Rule 6.10 specifies what must be contained in a certificate of service)
- 36.6(5) A Part 36 payment may be withdrawn only with the permission of the court.

Offer to settle a claim for provisional damages

- 36.7(1) A defendant may make a Part 36 payment in respect of a claim which includes a claim for provisional damages.
- 36.7(2) Where he does so, the Part 36 payment notice must specify whether or not the defendant is offering to agree to the making of an award of provisional damages.
- 36.7(3) Where the defendant is offering to agree to the making of an award of provisional damages the payment notice must also state -
- (a) that the sum paid into court is in satisfaction of the claim for damages on the assumption that the injured person will not develop the disease or suffer the type of deterioration specified in the notice;
 - (b) that the offer is subject to the condition that the claimant must make any claim for further damages within a limited period; and
 - (c) what that period is.
- 36.7(4) Where a Part 36 payment is -
- (a) made in accordance with paragraph (3); and
 - (b) accepted within the relevant period in rule 36.11,
- the Part 36 payment will have the consequences set out in rule 36.13, unless the court orders otherwise.
- 36.7(5) If the claimant accepts the Part 36 payment he must, within 7 days of doing so, apply to the court for an order for an award of provisional damages under rule 41.2.
(Rule 41.2 provides for an order for an award of provisional damages)
- 36.7(6) The money in court may not be paid out until the court has disposed of the application made in accordance with paragraph (5).

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Time when a Part 36 offer or a Part 36 payment is made and accepted

- 36.8(1) A Part 36 offer is made when received by the offeree.
- 36.8(2) A Part 36 payment is made when written notice of the payment into court is served on the offeree.
- 36.8(3) An improvement to a Part 36 offer will be effective when its details are received by the offeree.
- 36.8(4) An increase in a Part 36 payment will be effective when notice of the increase is served on the offeree.
- 36.8(5) A Part 36 offer or Part 36 payment is accepted when notice of its acceptance is received by the offeror.

Clarification of a Part 36 offer or a Part 36 payment notice

- 36.9(1) The offeree may, within 7 days of a Part 36 offer or payment being made, request the offeror to clarify the offer or payment notice.
- 36.9(2) If the offeror does not give the clarification requested under paragraph (1) within 7 days of receiving the request, the offeree may, unless the trial has started, apply for an order that he does so.
- 36.9(3) If the court makes an order under paragraph (2), it must specify the date when the Part 36 offer or Part 36 payment is to be treated as having been made.

Court to take into account offer to settle made before commencement of proceedings

- 36.10(1) If a person makes an offer to settle before proceedings are begun which complies with the provisions of this rule, the court will take that offer into account when making any order as to costs.
- 36.10(2) The offer must -
 - (a) be expressed to be open for at least 21 days after the date it was made;
 - (b) if made by a person who would be a defendant were proceedings commenced, include an offer to pay the costs of the offeree incurred up to the date 21 days after the date it was made; and
 - (c) otherwise comply with this Part.
- 36.10(3) If the offeror is a defendant to a money claim -
 - (a) he must make a Part 36 payment within 14 days of service of the claim form; and
 - (b) the amount of the payment must be not less than the sum offered before proceedings began.
- 36.10(4) An offeree may not, after proceedings have begun, accept -
 - (a) an offer made under paragraph (2); or
 - (b) a Part 36 payment made under paragraph (3), without the permission of the court.
- 36.10(5) An offer under this rule is made when it is received by the offeree.

Time for acceptance of a defendant's Part 36 offer or Part 36 payment

- 36.11(1) A claimant may accept a Part 36 offer or a Part 36 payment made not less than 21 days before the start of the trial without needing the court's permission if he gives the defendant written notice of acceptance not later than 21 days after the offer or payment was made.
(Rule 36.13 sets out the costs consequences of accepting a defendant's offer or payment without needing the permission of the court)

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36.11 (2) If -

- (a) a defendant's Part 36 offer or Part 36 payment is made less than 21 days before the start of the trial; or
- (b) the claimant does not accept it within the period specified in paragraph (1) -
 - (i) if the parties agree the liability for costs, the claimant may accept the offer or payment without needing the permission of the court;
 - (ii) if the parties do not agree the liability for costs the claimant may only accept the offer or payment with the permission of the court.

36.11(3) Where the permission of the court is needed under paragraph (2) the court will, if it gives permission, make an order as to costs.

Time for acceptance of a claimant's Part 36 offer

36.12(1) A defendant may accept a Part 36 offer made not less than 21 days before the start of the trial without needing the court's permission if he gives the claimant written notice of acceptance not later than 21 days after the offer was made.

(Rule 36.14 sets out the costs consequences of accepting a claimant's offer without needing the permission of the court)

36.12 (2) If -

- (a) a claimant's Part 36 offer is made less than 21 days before the start of the trial; or
- (b) the defendant does not accept it within the period specified in paragraph (1) -
 - (i) if the parties agree the liability for costs, the defendant may accept the offer without needing the permission of the court;
 - (ii) if the parties do not agree the liability for costs the defendant may only accept the offer with the permission of the court.

36.12 (3) Where the permission of the court is needed under paragraph (2) the court will, if it gives permission, make an order as to costs.

Costs consequences of acceptance of a defendant's Part 36 offer or Part 36 payment

36.13(1) Where a Part 36 offer or a Part 36 payment is accepted without needing the permission of the court the claimant will be entitled to his costs of the proceedings up to the date of serving notice of acceptance.

36.13(2) Where -

- (a) a Part 36 offer or a Part 36 payment relates to part only of the claim; and
- (b) at the time of serving notice of acceptance the claimant abandons the balance of the claim, the claimant will be entitled to his costs of the proceedings up to the date of serving notice of acceptance, unless the court orders otherwise.

36.13(3) The claimant's costs include any costs attributable to the defendant's counterclaim if the Part 36 offer or the Part 36 payment notice states that it takes into account the counterclaim.

36.13(4) Costs under this rule will be payable on the standard basis if not agreed.

Costs consequences of acceptance of a claimant's Part 36 offer

36.14 Where a claimant's Part 36 offer is accepted without needing the permission of the court the claimant will be entitled to his costs of the proceedings up to the date upon which the defendant serves notice of acceptance.

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The effect of acceptance of a Part 36 offer or a Part 36 payment

- 36.15(1) If a Part 36 offer or Part 36 payment relates to the whole claim and is accepted, the claim will be stayed.
- 36.15(2) In the case of acceptance of a Part 36 offer which relates to the whole claim -
- (a) the stay(GL) will be upon the terms of the offer; and
 - (b) either party may apply to enforce those terms without the need for a new claim.
- 36.15(3) If a Part 36 offer or a Part 36 payment which relates to part only of the claim is accepted -
- (a) the claim will be stayed(GL) as to that part; and
 - (b) unless the parties have agreed costs, the liability for costs shall be decided by the court.
- 36.15(4) If the approval of the court is required before a settlement can be binding, any stay(GL) which would otherwise arise on the acceptance of a Part 36 offer or a Part 36 payment will take effect only when that approval has been given.
- 36.15(5) Any stay(GL) arising under this rule will not affect the power of the court -
- (a) to enforce the terms of a Part 36 offer;
 - (b) to deal with any question of costs (including interest on costs) relating to the proceedings;
 - (c) to order payment out of court of any sum paid into court.
- 36.15(6) Where -
- (a) a Part 36 offer has been accepted; and
 - (b) a party alleges that -
 - (i) the other party has not honoured the terms of the offer; and
 - (ii) he is therefore entitled to a remedy for breach of contract,the party may claim the remedy by applying to the court without the need to start a new claim unless the court orders otherwise.

Payment out of a sum in court on the acceptance of a Part 36 payment

- 36.16 Where a Part 36 payment is accepted the claimant obtains payment out of the sum in court by making a request for payment in the practice form.

Acceptance of a Part 36 offer or a Part 36 payment made by one or more, but not all, defendants

- 36.17(1) This rule applies where the claimant wishes to accept a Part 36 offer or a Part 36 payment made by one or more, but not all, of a number of defendants.
- 36.17(2) If the defendants are sued jointly or in the alternative, the claimant may accept the offer or payment without needing the permission of the court in accordance with rule 36.11(1) if -
- (a) he discontinues his claim against those defendants who have not made the offer or payment; and
 - (b) those defendants give written consent to the acceptance of the offer or payment.
- 36.17(3) If the claimant alleges that the defendants have a several liability(GL) to him the claimant may -
- (a) accept the offer or payment in accordance with rule 36.11(1); and
 - (b) continue with his claims against the other defendants.
- 36.17(4) In all other cases the claimant must apply to the court for -
- (a) an order permitting a payment out to him of any sum in court; and
 - (b) such order as to costs as the court considers appropriate.

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Other cases where a court order is required to enable acceptance of a Part 36 offer or a Part 36 payment

- 36.18(1) Where a Part 36 offer or a Part 36 payment is made in proceedings to which rule 21.10 applies -
- (a) the offer or payment may be accepted only with the permission of the court; and
 - (b) no payment out of any sum in court shall be made without a court order.
(Rule 21.10 deals with compromise etc. by or on behalf of a child or patient)
- 36.18 (2) Where the court gives a claimant permission to accept a Part 36 offer or payment after the trial has started -
- (a) any money in court may be paid out only with a court order; and
 - (b) the court must, in the order, deal with the whole costs of the proceedings.
- 36.18(3) Where a claimant accepts a Part 36 payment after a defence of tender before claim(GL) has been put forward by the defendant, the money in court may be paid out only after an order of the court.
(Rule 37.3 requires a defendant who wishes to rely on a defence of tender before claim(GL) to make a payment into court)

Restriction on disclosure of a Part 36 offer or a Part 36 payment

- 36.19(1) A Part 36 offer will be treated as "without prejudice(GL) except as to costs".
- 36.19(2) The fact that a Part 36 payment has been made shall not be communicated to the trial judge until all questions of liability and the amount of money to be awarded have been decided.
- 36.19(3) Paragraph (2) does not apply -
- (a) where the defence of tender before claim(GL) has been raised;
 - (b) where the proceedings have been stayed(GL) under rule 36.15 following acceptance of a Part 36 offer or Part 36 payment; or
 - (c) where -
 - (i) the issue of liability has been determined before any assessment of the money claimed; and
 - (ii) the fact that there has or has not been a Part 36 payment may be relevant to the question of the costs of the issue of liability.

Costs consequences where claimant fails to do better than a Part 36 offer or a Part 36 payment

- 36.20(1) This rule applies where at trial a claimant -
- (a) fails to better a Part 36 payment; or
 - (b) fails to obtain a judgment which is more advantageous than a Part 36 offer.
- 36.20(2) Unless it considers it unjust to do so, the court will order the claimant to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted without needing the permission of the court.
(Rule 36.11 sets out the time for acceptance of a defendant's Part 36 offer or Part 36 payment)

Costs and other consequences where claimant does better than he proposed in his Part 36 offer

- 36.21(1) This rule applies where at trial -
- (a) a defendant is held liable for more; or
 - (b) the judgment against a defendant is more advantageous to the claimant, than the proposals contained in a claimant's Part 36 offer.
- 36.21(2) The court may order interest on the whole or part of any sum of money (excluding interest) awarded to the claimant at a rate not exceeding 10% above base rate (GL) for some or all of the period starting with the latest date on which the defendant could have accepted the offer without needing the permission of the court.

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- 36.21(3) The court may also order that the claimant is entitled to -
- (a) his costs on the indemnity basis from the latest date when the defendant could have accepted the offer without needing the permission of the court; and
 - (b) interest on those costs at a rate not exceeding 10% above base rate(GL).
- 36.21(4) Where this rule applies, the court will make the orders referred to in paragraphs (2) and (3) unless it considers it unjust to do so.
(Rule 36.12 sets out the latest date when the defendant could have accepted the offer)
- 36.21(5) In considering whether it would be unjust to make the orders referred to in paragraphs (2) and (3) above, the court will take into account all the circumstances of the case including -
- (a) the terms of any Part 36 offer;
 - (b) the stage in the proceedings when any Part 36 offer or Part 36 payment was made;
 - (c) the information available to the parties at the time when the Part 36 offer or Part 36 payment was made; and
 - (d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer or payment into court to be made or evaluated.
- 36.21(6) The power of the court under this rule is in addition to any other power it may have to award interest.

Interest

- 36.22(1) Unless -
- (a) a claimant's Part 36 offer which offers to accept a sum of money; or
 - (b) a Part 36 payment notice,
- indicates to the contrary, any such offer or payment will be treated as inclusive of all interest until the last date on which it could be accepted without needing the permission of the court.
- 36.22(2) Where a claimant's Part 36 offer or Part 36 payment notice is expressed not to be inclusive of interest, the offer or notice must state -
- (a) whether interest is offered; and
 - (b) if so, the amount offered, the rate or rates offered and the period or periods for which it is offered.

Deduction of benefits

- 36.23(1) This rule applies where a payment to a claimant following acceptance of a Part 36 offer or Part 36 payment into court would be a compensation payment as defined in section 1 of the Social Security (Recovery of Benefits) Act 1997[45].
- 36.23(2) A defendant to a money claim may make an offer to settle the claim which will have the consequences set out in this Part, without making a Part 36 payment if -
- (a) at the time he makes the offer he has applied for, but not received, a certificate of recoverable benefit; and
 - (b) he makes a Part 36 payment not more than 7 days after he receives the certificate.
(Section 1 of the 1997 Act defines "recoverable benefit")
- 36.23(3) A Part 36 payment notice must state -
- (a) the amount of gross compensation;
 - (b) the name and amount of any benefit by which that gross amount is reduced in accordance with section 8 and Schedule 2 to the 1997 Act; and
 - (c) that the sum paid in is the net amount after deduction of the amount of benefit.
- 36.23(4) For the purposes of rule 36.20, a claimant fails to better a Part 36 payment if he fails to obtain judgment for more than the gross sum specified in the Part 36 payment notice.

36.23(5) Where -

- (a) a Part 36 payment has been made; and
 - (b) application is made for the money remaining in court to be paid out,
- the court may treat the money in court as being reduced by a sum equivalent to any further recoverable benefits paid to the claimant since the date of payment into court and may direct payment out accordingly.

There is nothing to suggest that a tribunal should follow any of the above rules, but they demonstrate how the court approaches the question of costs and cover a very large range of potential circumstances that may be met by a tribunal, providing useful guidance on judicially acceptable outcomes.

SETTLEMENT COST CASES

Padmanor Investments Ltd v Soundcraft Electronics Ltd [1994] ADR.L.R. 06/30; Calderbank offer : Costs . Calderbank offer : impact upon costs. 1994/06/30. Lloyd HHJ Humphrey

George Fisher Holding Ltd v Multi Design Consultants Ltd [1998] EWHC TCC 329: Calderbank settlement offers and payment in under Order 62, rule 9(1)(d) & Order 22, rule 14 compared. Official Referees Business. 1998/04/06 Hicks HHJ. TCC

P4 Ltd. v Unite Integrated Solutions Plc [2006] EWHC 2924 (TCC). Costs - failure to mediate : Failure to beat payment in : failure by successful defendant to make disclosure during case management. Application of CPR Rule 36.20(2). TCC. 2006/11/17. Ramsey Mr Justice

Hepworth Building Products Ltd v The Coal Authority (1999) 3 EGLR 99 : A lapsed offer at the time of trial can still be taken into account for a costs order. CA. 1999/07/02. Gibson LJ P, Judge LJ, Waller LJ.

Munkenbeck & Marshall v Harold [2005] EWHC 356 : Costs – post settlement. Claim for claimant's pre-trial costs where the claim was settled just before the trial date. 2002/03/17. Havery HHJ Richard

Amber v Stacey [2001] 2 All ER 88 : Costs – written offer versus CPR 36.3. Defendant penalised for making a written offer as opposed to a CPR 36.3 payment in : A subsequent payment in was beaten in court (but not the written offer). Court stated 36.3 offer is more secure. Defendant ordered to pay half the costs - claimant had been precipitate and unreasonable. CA.. 2000/11/15. Brown LJ, Simon Evans Sir Anthony

Dearling v Foregate Developments [2003] EWCA Civ 913 : Costs : No winner in settlement agreement Settlement figure picked out of the air: It did not reflect potential outcome of trial : Since no clear winner, no order of costs should be made. 2003/06/09. Buxton LJ; Dyson LJ. Schiemann LJ;

Professional Information Technology Consultants Ltd v Jones [2001] EWCA Civ 2103 : Costs : Amended claim : Settlement offer. One third cost penalty awarded against successful claimant. Claim amended in court. Whilst the payment in was beaten, the defendant may have increased the sum if the final version of pleadings had been on the table. 2001/12/07 .

Bajwa v British Airways Plc [1999] EWCA Civ 1519: **Costs : Calderbank Offers.** The value of an offer for the purpose of costs under CPR 44 is the balance between the sum offered less the value of deducted benefits. The CA will only interfere with a judge's discretion to order costs if he is plainly wrong or has erred in principle. 1999/05/28. Stuart-Smith LJ Laws LJ Parker Mr J

Donald McCreery v Massey Plastic Fabrications Ltd [2003] LAWTEL AC0104769. Costs : CFA : Privilege. Once the substantive issues are settled there is no longer a justification for asserting privilege in respect of risk assessment documents and allied documents upon which a costs claim are based.. Disapproved in *Bailey v Amec* [2003] EWHC 9012 (Costs) 2003/01/23 Harrison District Judge Manchester

Federal Bank of the Middle East Ltd v Charles Hadkinson (No2) [1999] Ch.D Lawtel. Costs on indemnity basis ordered on 21st May (No1) confirmed. 1999/10/20. Arden HHJ

Perry Press v Chipperfield & Stern [2003] EWCA 484 : Costs : Indeterminate settlement offer. Settlement offer - £4K plus reasonable costs - insufficiently precise to be taken into account for a costs order. 2003/03/25. Buxton LJ, Dyson LJ.

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Painting v University of Oxford [2005] EWCA Civ 161: Costs : Payment in Part 36. Absence of counter proposal or willingness to negotiate resulted in costs penalty. CA. 3rd February 2005. Longmore LJ; Kay LJ Maurice

EQ Projects v Alavi [2006] EWHC 29 (TCC): Costs : Payment In : Indemnity costs. Construction dispute. Claimant, whilst successful did not beat payment in : Claim reduced by counterclaim : Indemnity costs awarded to defendant in respect of the trial. Conduct of trial severely criticised. Coulson HHJ Peter. 2006/01/06.

Newmans (I N) Ltd v Richard T Adlem [2004] EWHC 1563 (Ch) ; Costs : Payment in and IP disputes. Cost penalty imposed for unreasonable rejection of payment in. IP dispute - both parties entitled to use a disputed name. Ch D (Patents Court). 2004/08/12. Young QC David

Kinetics Technology v Cross Seas Shipping [1998] F1530 : Lawtel; Post payment-in costs. Claimants recovered marginally more than the defendant had paid in under CPR 36: Claimant lost on 4 out of 5 points : Held : claimant 66% liable for costs. 2001/02/16. Steel. Mr Justice David

Brawley v Marczynski [2002] EWCA Civ 756: Costs : Pre-trial costs post settlement agreement . If the parties settle out of court who pays the legal costs of court action? Held : where a party substantially wins he is entitled to costs of the litigation. 2002/10/21. Aldous LJ; Tuckey LJ; Longmore LJ.

Victor Kermit Kiam II v MGN Ltd [2002] EWCA Civ 66 : Costs : Sealed offer - standard or indemnity. Settlement offer under CPR36.3 can lead to a standard costs penalty : but not on an indemnity basis under CPR 44. 2002/02/06. Brown LJ, Simon

Lindner Ceilings Floors Partitions Plc v How Engineering Services Ltd [2000] Lawtel AC0100353 ; Costs : Sealed offer excluding cost. A sealed offer to be effective as to a costs award does not have to include costs : merely a clear indication as to whether or not costs are included. 2000/11/28. Seymour HHJ Richard

Nedlloyd Lines UK Ltd v CEL Group Ltd [2003] EWCA Civ 1871 : Costs : Settlement offer. Costs : Indemnity : Part 36 Offer beaten at 1st instance & on appeal : All costs of litigation. Failure to put up a new offer between hearings. CA : 2003/12/18. Waller LJ, Hale LJ, Carnwath LJ.

Hobin v Douglas [1998] EWCA Civ 1903 : Costs : Settlement offer – on quantum post trial on entitlement. Calderbank offer - post finding on entitlement as attempt to avoid decision on quantum. Offer not taken up. At first instance refusal taken into account regarding costs. CA overturned the decision - a hearing would be needed in any event - if only to confirm settlement. 1998/12/03 Roch LJ; Swinton Thomas LJ : Schiemann LJ.

Kopel C H v Safeways Stores Plc (2003) IRLR 753 : Settlement offer in employment disputes. Calderbank offers under CPR 36.3 do not apply to employment tribunals : but whilst there is no automatic cost penalty, the tribunal can under r.14 (*Coleman v Seceurop (UK) Ltd* (EAT/483/98) and *Monaghan v Close Thornton Solicitors* (EAT/3/01) consider whether rejection was unreasonable and award costs accordingly. EAT. 2003/04/11. Mitting J, Bilgan K, Hodgkins. DJ

Michael Humpheryes v Nedcon UK Ltd [2004] EWHC 2558 (QB) ; Failure to negotiate : Costs. Co-defendants : One prepared to settle - other not - Part 36 offer to settle by claimant rejected but subsequently beaten. Liability apportioned 66.6/33.3. 2nd defendant went into liquidation. 1st defendant liable for entire sum. Enhanced interest on costs and costs on an indemnity basis. 2004/11/10 Evans HHJ Roderick

Paul Thomas Construction Ltd v Hyland [2000] CILL 6/0 /1743 : Indemnity costs less ADR cost. Cost hearing on failed s24/25 CPR applications by a domestic house builders who provided no final account and refused to wait for D's valuation reported. 2000/03/08 Wilcox. HHJ

Tonkin v UK Insurance (No 2) [2006] EWHC 1185 (TCC) ; Payment In : Costs. Whilst successful in the litigation, the claimants failed to beat a payment in. Costs - allegations of unreasonable behaviour rejected. Costs to follow the event.: TCC. 2006/05/18 Coulson HHJ Peter

Molloy v Shell UK Ltd [2001] EWCA Civ 1272 : Payment in : Exaggerated claim : Costs. CA increased costs order against winning claimant from 75% to 100%. CA. 2001/07/06. Mummery LJ Laws LJ.

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Decoma UK Ltd v Haden Drysys International Ltd. [2005] EWHC 2429 (TCC): Payment In : Late Acceptance. Payment In : Can a claimant be said to be a successful party when he seeks to accept a payment into court after the expiry of the 21 days, which payment has been made in respect of some (but not all) of his claims, many of which have been subsequently dismissed by the court? 2005/11/04 Coulson J Peter

Walker Residential Ltd v Davis [2005] Lawtel AC9100839 ; Payment In : Mandatory costs order. A claimant is entitled to a costs order up to the date of acceptance of a Part 36 Payment In - the court cannot limit costs to the date of the original offer. . Chancery Division. 2005/12/09. Park J

Alison Dugmore v Swansea NHS Trust [2004] Lawtel AC0106818 ; Payment in beaten : Interest rate. Interest : Claimant exceeded Part 36 Payment in : Court awarded enhanced interest at 10% above bank rate to send out a message that Payment In Offers should be taken seriously. 2004/06/06. Masterman HHJ

Huck v Robson [2002] EWCA Civ 398 : Settlement Offer Part 36: Costs. Settlement offer : Costs : RTA - claim for damages. Held : a claimant who has bettered his Part 36 offer has a prima facie entitlement to indemnity costs. The general presumption that a successful claimant only receives costs on the standard basis is displaced by Part 36.21(4). 2002/03/21. Schiemann LJ Tuckey LJ, Parker LJ Jonathan

Trustees of Stokes Pension Fund v Western Power Distribution plc [2005] EWCA Civ 854 : Settlement offer : Costs. Settlement offer rejected : Lower payment in made : Award delivered in between the offer and payment in. Court treated offer as equivalent to a payment in for cost purposes. 2005/07/11. Auld LJ; Dyson LJ.

Rio Properties v Gibson Dunn & Crutcher [2005] EWCA Civ 534 ; Settlement offer : Costs. An offer to pay costs related to third party claims was held to be too vague to be evaluated and determined. Therefore it would not be taken into account as a payment in for cost purposes. 2005/04/22. Parker LJ, Jonathon : Arden LJ

Hertsmere Primary Care Trust v Estate of B & K Rabindra-Anandh [2005] EWHC 320 (Ch) ; Settlement offer : Costs. The mere fact that an offer did not include an expiry date will not necessarily prevent it being treated as a payment in for costs purposes. 2005/03/07. Lightman J.

Peter Crouch v King's Healthcare NHS Trust [2004] EWCA Civ 1332 : Settlement offer : Costs. Provided an offer to settle was in clear terms equivalent to a payment in it would be treated as such for the purpose of assessment of costs. 2004/10/15. Waller LJ, Mance LJ, Staughton. Sir C.

Mitchell v Ron James [2002] EWCA Civ 997 : Lawtel AC0101633 ; Settlement offer : Costs. A settlement offer did not specify its expiry date. That alone would not prevent it being treated as a payment in for cost purposes. However, cost offers would not be factored in by the court. In the event costs order not disturbed. 2002/07/12. Gibson LJ P, Potter LJ, Stuart-Smith Sir Murray.

Excelsior Commercial & Industrial Holdings v Salisbury & Johnson [2002] EWCA Civ 979 : Settlement offer Discusses the special circumstances in which a court may award Indemnity Costs where a Part 36 CPR Offer / Payment in was rejected by the losing party. 2002/06/12. Laws LJ. Woolf LCJ; Waller LJ;

Calderbank (Jacqueline Anne) v Calderbank (John Thomas) [1975] ADR.L.R. 06/05 ; Settlement Offer : Costs . Offer to settle beaten in court : Impact on costs. Origin of the so called "Calderbank Offer" : Family case – but general principle rolled out to cover all aspects of civil law. 1975/06/05. Cairns LJ, Scarman LJ Sir Gordon Willmer

Codent Ltd v Lyson Ltd (2005) Lawtel AC9400558 ; Settlement Offer : No payment in. Costs. The claimant failed to beat a payment offer - not followed up with a payment in and made less than 21 days before trial. At 1st instance the court made no allowance for the payment in : the CA held costs should be split 70:30. CA . 2005/12/08. May LJ, Arden LJ, Gibson. Sir Peter

Firle Investments Ltd v. Datapoint International Ltd [2000] EWHC TCC 105: Costs : Settlement offer : Claimant rejected offers and went on to achieve a victory by a slim margin. Costs awarded at 33% overall and at 15% after the final offer. 2000/05/08. Reese Colin QC

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Jill Louise Butcher v Timothy Edward & John Robert Wolfe [1998] CA30.10.98 : Lawtel ; Settlement offers : Costs. Calderbank Offers : Cost implications of rejection of a reasonable offer. Also Simon Brown LJ; 1998/10/30. Mantell LJ. Mummery LJ;

Cutts v Head [1984] 1 All ER 597 : Settlement offers : Costs. A court can look at the contents of a “without prejudice except as to costs” offer in relation to an award on costs. The traditional and accepted impact of a Calderbank without prejudice offer (Calderbank v Calderbank (1979) FAM 93) on costs reviewed and confirmed. 1983/12/07. Fox LJ. Oliver.LJ.

Court and arbitration costs and failure to mediate.

In relation to costs in court, one aspect of the CPR that has gained much attention is the power of the court to assess costs in the light of an unreasonable attitude of one party to engaging in mediation. The rationale is that the failure might amount to a lost opportunity to settle and avoid the costs of litigation. Hence the litigation costs may well have been unreasonably incurred, justifying a penalty against the party who is deemed to have acted unreasonably.

There is no jurisprudence suggesting that this practice could or should apply to arbitration. After all, since arbitration is an alternative to the court, there is no policy issue involved in respect of saving public funds and the allocation of the limited resources of the judicial system.

Wethered Estate Ltd v M&A Davis : Foundations for Living [2005] EWHC 1903 (Ch) : Costs :Delay in mediation : Whether earlier refusal pending clarification of the case of each party reasonable : Whether claimant beat a settlement offer - impact of non-pecuniary orders. 2005/07/15. Freedman QC Deputy Judge Clive.

Hardcastle (B.D. & C) v Leeds & Holbeck Building Society [2002] : Lawtel ; Costs of mediation : CFA success costs and settlement agreement. Costs : pro-se mediation regarding negligent valuation of property failed followed by a CFA supported action and settlement agreement : CFA entitled to success costs - statute barred personal injury (stress) aspect of claim discounted in reckoning of success costs since it would probably have been dropped pre-trial. 2002/10/21. Bellamy J

Eagleson v Liddell [2001] EWCA Civ 155 : Mediation costs : Following a failed appeal against a judgement of liability for personal injury, the court ordered the unsuccessful appellant to pay both the costs of the appeal and of an intervening mediation. 2001/02/02. Aldous LJ; Walker L.J. Robert : Hale LJ.

Devon County Council v Clarke [2005] EWCA Civ 266 : Failed Mediation : Damages claim for school's failure to identify dyslexia in a pupil and provide appropriate education partially succeeded. Appeal failed except as to costs. Claimant's costs reduced to 70%. Court noted there were no winners in a £150K litigation. 2005/03/17. Dyson LJ.. Mummery LJ; Keene LJ;

Holland v PKF [2004] HC02CO3821 : HM Court Service ; Costs : Failed mediation. 2004/10/11. Wright. Costs Judge, Master

Corsenso (UK) Ltd v Burden Group Plc [2003] EWHC 1805 (QB) : Lawtel ; Failed Mediation : Costs. ADR includes negotiation and mediation : B engaged in mediation but C made strenuous efforts to settle : B who won a minor counterclaim liable for costs. 2003/07/01 Reid Judge

RBG Resources Plc (In Liquidation) v Rastogi [2005] EWHC 994 (Ch) ; Failed Mediation : Costs. Mediation and subsequent settlement negotiations failed because of an insistence on an apology, which in the circumstances the liquidators could not professionally provide. This conduct deprived him of any costs allowance that might otherwise have been available to him for good conduct in the litigation. 2002/05/24. Lightman The Honourable Mr Justice

Montlake, Yarrinton & Wills v Lambert Smith Hampton Group Ltd (2004) [2004] EWHC 1503 (Comm) ; Failed Mediation Costs. Claim prevailed, exceeding a Part 36 offer, which followed a failed mediation : Held : Claimant had done all required in terms of settlement to be entitled to costs and interest. 2004/07/08 Langley. Mr Justice

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Wright v HSBC Bank Plc No2 [2006] ADR.L.R. 06/23 ; Failure to Mediate. Costs application. The applicant, who had pursued a hopeless claim, having concluded a settlement, had no grounds for a reduction of costs for a failure to mediate by the successful defendant. QBD. 2006/06/23 Jack Mr Justice

Daniels v The Commissioner of Police for the Metropolis [2005] EWCA Civ 1312: Failure to mediate – costs. There will be no cost penalty where the refusal to mediate is reasonable. The defendants, who successfully defended a claim for a work based injury, refused to negotiate to stem the flow of similar claims. The court held that this was a legitimate reason to refuse to compromise a highly defensible claim. 2005/10/20 Ward LJ; Dyson LJ

Gibson v Commission for Social Care Inspection [2004] EWCST 266(EA_Costs) : Failure to mediate : Appeal Costs – Care Homes Regulations (CHR) 2001. Regulation 24 - Care Homes Regulations 2001 - at the discretion of the tribunal appellant can be ordered to pay costs of appeal where conduct of appeal is unreasonable. Held : No duty to mediate. Plus Mrs L.Elliot, Mr J.Cohen. 2005/06/21 Hunter Mr S. (Chairman),

Willis Management (Isle Of Man) Ltd v Cable and Wireless Plc [2005] EWCA Civ 806 : Failure to mediate : Costs. No binding agreement concluded between parties. An agreement to subsequently agree an essential term cannot create a binding contract. It is not for the courts to determine the terms in the absence of agreement between negotiators. Appeal from C&W v Valentine allowed. 2005/06/30. Rix LJ Tuckey LJ, Wilson. J

Wills (Alexandra) v Mills Solicitors [2005] EWCA Civ 591 : Failure to mediate : Costs. Defendant did not engage in negotiations or mediation because claimant failed to provide basis of claim. Held : Halsey cost discount not-applicable. 2005/06/30. Behrens LJ Mance LJ

Askey v Wood [2005] EWCA Civ 574: Failure to mediate : Costs : Per Chadwick LJ "An ADR which sought to agree whether liability should be 50/50, 75/25 or 74/26, as suggested in a Part 36 letter -- is likely to be a sterile exercise if the parties do not know, at least in broad terms, what quantum figure is to be apportioned in accordance with what they agree." Therefore no cost implications for a failure to mediate as recommended when application to appeal granted. Appeal failed. 2005/04/21 Chadwick LJ

Longstaff International Ltd v Evans [2005] EWHC 4 (Ch) ; Failure to mediate : costs. Unreasonable conditions imposed for the conduct of a mediation attracted adverse cost consequences. 50/50. Fault on both sides. 2005/01/21. Warren QC Nicholas

Chaudry v Yap : Re Midland Linen Services Ltd (2004) : Lawtel AC9100146 ; Failure to mediate : Costs. Impact of costs on Payment In versus refusal to mediate - where party proposing mediation's attitude to mediation was inconsistent. Claimant accepted an uplifted payment in. Defendant sought a reduction in costs for alleged failure to mediate. Held : there had been no serious engagement in mediation by the defendant. The claimant was the clear winner and thus entitled to recover litigation costs. 2004/10/28 Kosmin QC Deputy Judge Mr Leslie

Reed Executive Plc v Reed Business Information Ltd [2004] EWCA CIV 887 : Failure to mediate : Costs. Defendant twice rejected overtures to mediate. Following Halsey, the court declined order costs against defendant. Large distance between the parties positions; novel issues needed a judicial decision so prospects poor. 2004/07/14. JacobsLJ; Rix LJ;

Yorkshire Bank v RDM [2004] QBD : CEDR ; Failure to mediate : Costs. Claimant successful on 1 of 4 points of claim. Court ordered costs on global basis as opposed to on a claim by claim basis. Defendant had refused to mediate. Court considered there was a reasonable chance of success and upped costs awarded from 50:50 to 65:35. 2004/06/30 Langan QC HHJ

Marchands Associates LLP v Thompson Partnership LLP [2004] EWCA Civ 878 : Failure to mediate : Costs . Successful appellants awarded costs up to the date they refused to take part in court advised mediation and because the central issue had been conceded by the respondents prior to the appeal. 2004/05/28 Peter Gibson LJ; Waller LJ; May LJ.

Allen v Jones [2004] EWHC 1189 ; Failure to mediate : Costs. Dispute about right of way. Held : An all or

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nothing dispute. Mediation not suitable. Costs followed the event. 2004/05/20 Livesey QC Bernard

McMillan Williams v Range [2004] EWCA (Civ) 294 : Failure to mediate : Costs. CA held first that an advance on wages is not a credit agreement that has to be in statutory form. Therefore a junior solicitor who received advance wages in excess of earnings had to repay the excess to the law firm on her departure. Appeal allowed. At 1st instance mediation was advised. Both parties contributed equally to the failure so court ordered each party to bear their own costs. 2004/03/17 Mantell LJ; Ward LJ; Parker LJ. Jonathan

Royal Bank of Canada Trust Corporation Ltd v Secretary of State for Defence [2003] EWHC 1479 (Ch) : Failure to mediate : Costs. Lawful termination of a lease turned on a question of law and interpretation of the terms of the lease : MOD refused costs due to a failure to mediate. 2003/05/14 Lewison. Mr Justice

Hurst v Leeming [2003] EWCH 499 (Ch) : Failure to mediate : Costs. Leeming, a barrister, refused to mediate a professional negligence claim : Held : entitled to costs. Reputation issue justified a trial : claimant too stubborn for ADR. 2003/03/14 Collins. Mr Justice Lawrence

Leicester Circuits Ltd v Coates Brothers PLC [2003] EWCA Civ 290 : Failure to mediate : Costs. Claimant failed to establish causation and breach of contract : respondent pulled out of mediation : Held : costs related to failure denied. 2003/03/05 Judge LJ; Longmore LJ; Thomas. Sir Swinton

McCook v Lobo [2002] EWCA 1760 : Failure to mediate : Costs. Claimant's claim dismissed at 1st instance and on appeal. A letter suggesting mediation was ignored by the defendant. Held : There was no likelihood of mediation being successful, so no cost implications for refusal to mediate. 2002/11/19 Hale LJ.. Pill LJ; Judge LJ;

SITA v Watson and Wyatt: Maxwell Batley [2002] EWHC 2401 / 2025 (Ch) : Failure to mediate : Costs. The court held that on the facts a refusal to mediate was reasonable and justified. A mediation would have achieved nothing, so there was no impact on costs. 2002/11/14 Park : Mr Justice

Neal v Jones Motors [2002] EWCA Civ 1730/1731/1759 : Failure to mediate : Costs. CA deducted £5,000 from the winning appellant's costs because of a failure to mediate which resulted in an unnecessary two day hearing. 2002/10/31 Brooke LJ; Keene LJ. Rix LJ;

Valentine v Allen, Nash and Nash [2002] EWCA Civ 1819 : Failure to mediate : Costs. Multi-party action about land rights related to a housing development : Failure to mediate attributed to all parties : Costs followed the event 70:30 on the facts. 2002/10/09. Arden LJ Laws LJ;

Malkins Nominees v Societe Finance [2002] EWHC 1221 Ch : Failure to mediate : Costs. Winning claimants failed to engage in a mediation. Court would have deducted 25% costs but because offer made late in the day only deducted 15%. 2002/05/29. Etherton. Mr Justice

Hurst v Leeming [2002] EWHC 1051 : Failure to mediate : Costs. Leeming, a barrister, refused to mediate a professional negligence claim : Held : entitled to costs. Reputation issue justified a trial : claimant too stubborn for ADR. 2002/05/09 Lightman. HHJ

Dunnett v Railtrack Plc [2002] EWHC 9020 (Costs) : Failure to mediate : Costs : CPR : ADR. Appeal for damages for a potentially arguable action for loss of livestock failed : Solicitors negligent : Railtrack refused mediation & failed to recover costs. 2002/02/22 Brooke LJ;, Sedley LJ. Robert Walker LJ

Gil v Baygreen Properties Ltd.& Ors [2004] EWHC 2029 : Failure to mediate : Costs – CPR 44 deduction. Application for costs : Mediation discussed and implication of Halsey. CPR 44 applied. Deviation from costs follow event - £20k deducted. 2004/08/19. Davidson QC Deputy Judge Mr Nicholas

Asiansky Television Plc v Bayer-Rosin [2003] EWCA Civ 1405 : Failure to mediate : Costs – delay – fault. Appeal. Also , Lady Justice Arden. 2003/11/11 Brown LJ, Laws LJ

Asiansky Television Plc v Bayer-Rosin [2001] EWCA Civ 1792 : Failure to mediate : Costs – delay – fault. Claimant & defendant toyed with mediation – no one at fault for failing to pursue – payment-in too low to bridge gap based on different premises. Trial needed. 2001/11/19 Clarke LJ, Dyson LJ. Mance LJ,

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Contractreal Ltd v Davies [2001] EWCA Civ 928 : Failure to mediate : costs – pre CPR dispute. Trial Judge applied CPR cost regime to a case where costs were incurred pre-CPR. Held : in the circumstances full costs recoverable despite refusal to mediate. Post CPR such disproportionate costs would not be recoverable. 2001/05/17. Arden LJ, Wright Mr Justice

Partridge v Lawrence [2003] EWCA Civ 1122 : Failure to mediate : Costs : A 15% reduction in costs awarded to take account of the conduct of the parties. The fact that the offer was late in the day and the offeror wanted to involve his solicitors did not change matters. 85% costs went to the defendants who had made an offer which mirrored the court's decision on width of access to a field. 2003/07/08. Clarke LJ; Dyson LJ Gibson LJ; Peter

Burchell v Bullard [2005] EWCA Civ 358: Failure to mediate : Costs and ADR. Construction litigation : offer of mediation declined : Claim and counterclaim partly successful : Disproportionate costs : Costs in light of Halsey. 2005/04/08 Rix LJ. Ward LJ;

Joyce Boyd v MOD [2003] HQ02X00875 Lawtel ; Failure to mediate : Costs –late offer to mediate. Late offer of mediation too late to impact upon right to recover costs, since case was clearly heading for a full trial. 2003/12/16. James Deputy Master

Dyson v Leeds City Council [1999] CCRTF 1998/1490/B2 : Lawtel. Failure to mediate : Costs: warning. PI – asbestosis claim : Retrial ordered : Deceased trial judge failed to provide reasons : Case finely balanced. ADR recommended with costs warning. 1999/11/22 Laws LJ. Ward LJ; Woolf LJ;

s62 Arbitration Act 1996 Effect of agreement or award about costs.

62. *Unless the parties otherwise agree, any obligation under an agreement between them as to how the costs of the arbitration are to be borne, or under an award allocating the costs of the arbitration, extends only to such costs as are recoverable.*

s63 Arbitration Act 1996 The recoverable costs of the arbitration.

- 63(1) *The parties are free to agree what costs of the arbitration are recoverable.*
- 63(2) *If or to the extent there is no such agreement, the following provisions apply.*
- 63(3) *The tribunal may determine by award the recoverable costs of the arbitration on such basis as it thinks fit. If it does so, it shall specify-*
- (a) *the basis on which it has acted, and*
 - (b) *the items of recoverable costs and the amount referable to each.*
- 63(4) *If the tribunal does not determine the recoverable costs of the arbitration, any party to the arbitral proceedings may apply to the court (upon notice to the other parties) which may-*
- (a) *determine the recoverable costs of the arbitration on such basis as it thinks fit, or*
 - (b) *order that they shall be determined by such means and upon such terms as it may specify.*
- 63(5) *Unless the tribunal or the court determines otherwise-*
- (a) *the recoverable costs of the arbitration shall be determined on the basis that there shall be allowed a reasonable amount in respect of all costs reasonably incurred, and*
 - (b) *any doubt as to whether costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party.*
- 63(6) *The above provisions have effect subject to section 64 (recoverable fees and expenses of arbitrators).*
- 63(7) *Nothing in this section affects any right of the arbitrators, any expert, legal adviser or assessor appointed by the tribunal, or any arbitral institution, to payment of their fees and expenses.*

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s64 Arbitration Act 1996 Recoverable fees and expenses of arbitrators.

- 64(1) *Unless otherwise agreed by the parties, the recoverable costs of the arbitration shall include in respect of the fees and expenses of the arbitrators only such reasonable fees and expenses as are appropriate in the circumstances.*
- 64(2) *If there is any question as to what reasonable fees and expenses are appropriate in the circumstances, and the matter is not already before the court on an application under section 63(4), the court may on the application of any party (upon notice to the other parties)-*
- (a) determine the matter, or*
 - (b) order that it be determined by such means and upon such terms as the court may specify.*
- 64(3) *Subsection (1) has effect subject to any order of the court under section 24(4) or 25(3)(b) (order as to entitlement to fees or expenses in case of removal or resignation of arbitrator).*
- 64(4) *Nothing in this section affects any right of the arbitrator to payment of his fees and expenses.*

Article 39 Fees of Tribunal. UNCITRAL ARBITRATION RULES

1. *'The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.*
2. *If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in International cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.*
3. *If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at anytime request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.*
4. *In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.*

s65 Arbitration Act 1996 Power to limit recoverable costs.

- 65(1) *Unless 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.*
- 65(2) *Any direction may be made or varied at any stage, but this must be done sufficiently in advance of the incurring of costs to which it relates, or the taking of any steps in the proceedings which may be affected by it, for the limit to be taken into account.*

The DAC Report January 1996

Clause 59	Costs of the Arbitration
Clause 60	Agreement to pay costs in any event
Clause 61	Award of Costs
Clause 62	Effect of Agreement or Award about costs
Clause 63	The recoverable costs of the arbitration
Clause 64	Recoverable fees and expenses of arbitrators
Clause 65	Power to limit recoverable costs

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265. *In these Clauses we have attempted to provide a code dealing with how the costs of an arbitration should be attributed between the parties. The question of the right of the arbitrators to fees and expenses is dealt with earlier in that part of the Bill concerned with the arbitral tribunal: see Clause 28.*
266. *Clause 59 defines costs.*
267. *Clause 60 is a mandatory provision preventing effective agreements to pay the whole or part of the costs in any event unless made after the dispute has arisen. The Clause is based on section 18(3) of the Arbitration Act 1950. The Committee are of the view that public policy continues to dictate that such a provision should remain.*
268. *Clause 62 empowers the arbitrators to make an award in relation to costs. Sub-section (2) sets out the general principle to be applied, which is the same principle that is applicable in Court.*
265. *In these Clauses we have attempted to provide a code dealing with how the costs of an arbitration should be attributed between the parties. The question of the right of the arbitrators to fees and expenses is dealt with earlier in that part of the Bill concerned with the arbitral tribunal: see Clause 28.*
266. *Clause 59 defines costs.*
267. *Clause 60 is a mandatory provision preventing effective agreements to pay the whole or part of the costs in any event unless made after the dispute has arisen. The Clause is based on section 18(3) of the Arbitration Act 1950. The Committee are of the view that public policy continues to dictate that such a provision should remain.*
268. *Clause 62 empowers the arbitrators to make an award in relation to costs. Sub-section (2) sets out the general principle to be applied, which is the same principle that is applicable in Court.*
269. *It has been suggested that arbitral tribunals should not be fettered in this way, but to our minds it is helpful to state the principle, especially for those who may not be lawyers and who otherwise might not know how to proceed. Furthermore, it seems to us that there is no reason why the general principle should not apply to arbitrations: it certainly does under the present law. The parties are, of course, free to agree on other principles, subject to Clause 60.*
270. *Clauses 63 and 64 are we hope more or less self-explanatory. Clearly there has to be a special regime for the fees and expenses of the arbitrators, for otherwise they would be left with the power to decide for themselves whether or not they had overcharged!*
271. *Clause 64(4) preserves any contractual right an arbitrator may have to payment of his fees and expenses. If a party has agreed these, then it would in our view be wrong to allow the Court to adjust the amount ie to rewrite that agreement.*
272. *Clause 65 contains a new proposal. It gives the tribunal power to limit in advance the amount of recoverable costs. We consider that such a power, properly used, could prove to be extremely valuable as an aid to reducing unnecessary expenditure. It also represents a facet of the duty of the tribunal as set out in Clause 33. The Clause enables the tribunal to put a ceiling on the costs, so that while a party can continue to spend as much as it likes on an arbitration it will not be able to recover more than the ceiling limit from the other party. This will have the added virtue of discouraging those who wish to use their financial muscle to intimidate their opponents into giving up through fear that by going on they might be subject to a costs order which they could not sustain.*

SUBSTANTIVE & PROCEDURAL LAW OF ARBITRATION

FURTHER READING

N.R. Morris. Keeping Costs Down. Masons.

D.Stephenson – Arbitration Practice Blackwell Chapter 9 COSTS

J.Tackaberry. Calderbank Letters SCL. 2001.

Russel on Arbitration. Chapter 6 The Award. Costs

R.Merkin. Arbitration Act Annotated Guide Costs of the arbitration

D.Cormes. Orders for capping of costs and recoverable costs in arbitration. Winward Fearon.

Guidelines for Arbitrators as to how to formulate their terms of remuneration. Guideline 4 CI Arb.

Self Assessment

In a dispute referred to arbitration in May 2005, the Claimant sought payment of a debt amounting to £100,000 which became due on 2 January 2005. The Respondent's defence raised a set-off of £50,000 arising out of the same facts and due on 1 February 2005. Both parties claimed interest. On 27 April 2006 the Respondent paid £20,000 to the Claimant. On 8 October 2006 the Respondent made a Calderbank offer to compromise the claim and the set off in the sum of £20,000 plus interest at a specified rate from the respective dates that the claim and set-off were due. The Calderbank offer was rejected on 19 October 2006. The matter came to a hearing on 2 November 2006 following which the arbitrator published his award by which on the substantive issues the Claimant was to receive £65,000 after taking account, as a deduction, of the £20,000 paid on 27 April 2006; and that the Respondent succeeded on its set-off in the amount of £45,000; according the Respondent should pay £20,000 to the Claimant.

- A) As arbitrator, what would you award on the costs of the arbitration and interest on those costs in the absence of any other circumstances, explaining why you would make such an award on costs.
- B) Explain the principles, but do not provide calculations, that you, as arbitrator, would apply in awarding interest claimed on the claim and the counterclaim.

CHAPTER TEN

CIVIL PROCEDURE RULES : PART 43 SCOPE OF COST RULES AND DEFINITIONS

Scope of this Part

43.1 This Part contains definitions and interpretation of certain matters set out in the rules about costs contained in Parts 44 to 48.
(Part 44 contains general rules about costs; Part 45 deals with fixed costs; Part 46 deals with fast track trial costs; Part 47 deals with the detailed assessment of costs and related appeals and Part 48 deals with costs payable in special cases)

Definitions and application

- 43.2(1) In Parts 44 to 48, unless the context otherwise requires -
- (a) "costs" includes fees, charges, disbursements, expenses, remuneration, reimbursement allowed to a litigant in person under rule 48.6 and any fee or reward charged by a lay representative for acting on behalf of a party in proceedings allocated to the small claims track;
 - (b) "costs judge" means a taxing master of the Supreme Court;
 - (c) "costs officer" means -
 - (i) a costs judge;
 - (ii) a district judge; and
 - (iii) an authorised court officer;
 - (d) "authorised court officer" means any officer of -
 - (i) a county court;
 - (ii) a district registry;
 - (iii) the Principal Registry of the Family Division; or
 - (iv) the Supreme Court Costs Office,
whom the Lord Chancellor has authorised to assess costs.
 - (e) "fund" includes any estate or property held for the benefit of any person or class of person and any fund to which a trustee or personal representative is entitled in his capacity as such;
 - (f) "receiving party" means a party entitled to be paid costs;
 - (g) "paying party" means a party liable to pay costs;
 - (h) "assisted person" means an assisted person within the statutory provisions relating to legal aid; and
 - (i) "fixed costs" means the amounts which are to be allowed in respect of solicitors' charges in the circumstances set out in Part 45.
- 43.2(2) The costs to which Parts 44 to 48 apply include -
- (a) the following costs where those costs may be assessed by the court -
 - (i) costs of proceedings before an arbitrator or umpire;
 - (ii) costs of proceedings before a tribunal or other statutory body; and
 - (iii) costs payable by a client to his solicitor; and
 - (b) costs which are payable by one party to another party under the terms of a contract, where the court makes an order for an assessment of those costs.

Meaning of summary assessment

43.3 "Summary assessment" means the procedure by which the court, when making an order about costs, orders payment of a sum of money instead of fixed costs or "detailed assessment".

Meaning of detailed assessment

43.4 "Detailed assessment" means the procedure by which the amount of costs is decided by a costs officer in accordance with Part 47.

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PART 44 GENERAL RULES ABOUT COSTS

Scope of this Part

44.1 This Part contains general rules about costs and entitlement to costs. (The definitions contained in Part 43 are relevant to this Part)

Solicitor's duty to notify client

44.2 Where -
(a) the court makes a costs order against a legally represented party; and
(b) the party is not present when the order is made,
the party's solicitor must notify his client in writing of the costs order no later than 7 days after the solicitor receives notice of the order.

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

44.3 (1) The court has discretion as to -
(a) whether costs are payable by one party to another;
(b) the amount of those costs; and
(c) when they are to be paid.

44.3(2) If the court decides to make an order about costs -
(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
(b) the court may make a different order.

44.3 (3) The general rule does not apply to the following proceedings -
(a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or
(b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.

44.3 (4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including -
(a) the conduct of all the parties;
(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36).
(Part 36 contains further provisions about how the court's discretion is to be exercised where a payment into court or an offer to settle is made under that Part)

44.3 (5) The conduct of the parties includes -
(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;
(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
(c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and
(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

CHAPTER TEN

- 44.3(6) The orders which the court may make under this rule include an order that a party must pay -
- (a) a proportion of another party's costs;
 - (b) a stated amount in respect of another party's costs;
 - (c) costs from or until a certain date only;
 - (d) costs incurred before proceedings have begun;
 - (e) costs relating to particular steps taken in the proceedings;
 - (f) costs relating only to a distinct part of the proceedings; and
 - (g) interest on costs from or until a certain date, including a date before judgment.
- 44.3(7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c).
- 44.3(8) Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed.
- 44.3 (9) Where a party entitled to costs is also liable to pay costs the court may assess the costs which that party is liable to pay and either -
- (a) set off the amount assessed against the amount the party is entitled to be paid and direct him to pay any balance; or
 - (b) delay the issue of a certificate for the costs to which the party is entitled until he has paid the amount which he is liable to pay.

Basis of assessment

- 44.4(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 48.3 sets out how the court decides the amount of costs payable under a contract)
- 44.4 (2) Where the amount of costs is to be assessed on the standard basis, the court will -
- (a) only allow costs which are proportionate to the matters in issue; and
 - (b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.
- (Factors which the court may take into account are set out in rule 44.5)
- 44.4 (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.
- 44.4(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.
- 44.4(5) This rule and Part 47 (detailed assessment of costs by a costs officer) do not apply to the extent that regulations made under the Legal Aid Act 1988[55] determine the amount payable.
- 44.4(6) Where the amount of a solicitor's remuneration in respect of non-contentious business is regulated by any general orders made under the Solicitors Act 1974 [56], the amount of the costs to be allowed in respect of any such business which falls to be assessed by the court will be decided in accordance with those general orders rather than this rule and rule 44.5.

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

- 44.5(1) The court is to have regard to all the circumstances in deciding whether costs were -
- (a) if it is assessing costs on the standard basis -
 - (i) proportionately and reasonably incurred; or
 - (ii) were proportionate and reasonable in amount, or
 - (b) if it is assessing costs on the indemnity basis -
 - (i) unreasonably incurred; or
 - (ii) unreasonable in amount.
- 44.5(2) In particular the court must give effect to any orders which have already been made.
- 44.5 (3) The court must also have regard to -
- (a) the conduct of all the parties, including in particular -
 - (i) conduct before, as well as during, the proceedings; and
 - (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
 - (b) the amount or value of any money or property involved;
 - (c) the importance of the matter to all the parties;
 - (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
 - (e) the skill, effort, specialised knowledge and responsibility involved;
 - (f) the time spent on the case; and
 - (g) the place where and the circumstances in which work or any part of it was done.
- (Rule 35.4(4) gives the court power to limit the amount that a party may recover with regard to the fees and expenses of an expert)

Fixed costs

- 44.6 A party may recover the fixed costs specified in Part 45 in accordance with that Part.

Procedure for assessing costs

- 44.7 Where the court orders a party to pay costs to another party (other than fixed costs) it may either -
- (a) make a summary assessment of the costs; or
 - (b) order detailed assessment of the costs by a costs officer,
- unless any rule, practice direction or other enactment provides otherwise.
- (The costs practice direction sets out the factors which will affect the court's decision under this rule)*

Time for complying with an order for costs

- 44.8 A party must comply with an order for the payment of costs within 14 days of -
- (a) the date of the judgment or order if it states the amount of those costs; or
 - (b) if the amount of those costs (or part of them) is decided later in accordance with Part 47, the date of the certificate which states the amount.
- (Part 47 sets out the procedure for detailed assessment of costs)

Costs on the small claims track and fast track

- 44.9(1) Part 27 (Small claims) and Part 46 (Fast track trial costs) contain special rules about -
- (a) liability for costs;
 - (b) the amount of costs which the court may award; and
 - (c) the procedure for assessing costs.
- 44.9 (2) Those special rules do not apply until a claim is allocated to a particular track.

CHAPTER TEN

Limitation on amount court may allow where a claim allocated to the fast track settles before trial

- 44.10(1) Where the court -
- (a) assesses costs in relation to a claim which -
 - (i) has been allocated to the fast track; and
 - (ii) settles before the start of the trial; and
 - (b) is considering the amount of costs to be allowed in respect of a party's advocate for preparing for the trial,
- it may not allow, in respect of those advocate's costs, an amount that exceeds the amount of fast track trial costs which would have been payable in relation to the claim had the trial taken place.
- 44.10(2) When deciding the amount to be allowed in respect of the advocate's costs, the court shall have regard to -
- (a) when the claim was settled; and
 - (b) when the court was notified that the claim had settled.
- 44.10(3) In this rule, "advocate" and "fast track trial costs" have the meanings given to them by Part 46. (Part 46 sets out the amount of fast track trial costs which may be awarded)

Costs following allocation and re-allocation

- 44.11(1) Any costs orders made before a claim is allocated will not be affected by allocation.
- 44.11(2) Where -
- (a) a claim is allocated to a track; and
 - (b) the court subsequently re-allocates that claim to a different track,
- then unless the court orders otherwise, any special rules about costs applying -
- (i) to the first track, will apply to the claim up to the date of re-allocation; and
 - (ii) to the second track, will apply from the date of re-allocation.
- (Part 26 deals with the allocation and re-allocation of claims between tracks)

Cases where costs orders deemed to have been made

- 44.12(1) Where a right to costs arises under -
- (a) rule 3.7 (defendant's right to costs where claim struck out for non-payment of fees);
 - (b) rule 36.13(1) (claimant's right to costs where he accepts defendant's Part 36 offer or Part 36 payment);
 - (c) rule 36.14 (claimant's right to costs where defendant accepts the claimant's Part 36 offer); or
 - (d) rule 38.6 (defendant's right to costs where claimant discontinues),
- a costs order will be deemed to have been made on the standard basis.
- 44.12(2) Interest payable pursuant to section 17 of the Judgments Act 1838[57] or section 74 of the County Courts Act 1984[58] on the costs deemed to have been ordered under paragraph (1) shall begin to run from the date on which the event which gave rise to the entitlement to costs occurred.

Special situations

- 44.13(1) Where the court makes an order which does not mention costs no party is entitled to costs in relation to that order.
- 44.13(2) The court hearing an appeal may, unless it dismisses the appeal, make orders about the costs of the proceedings giving rise to the appeal as well as the costs of the appeal.
- 44.13(3) Where proceedings are transferred from one court to another, the court to which they are transferred may deal with all the costs, including the costs before the transfer.
- 44.13(4) Paragraph (3) is subject to any order of the court which ordered the transfer.

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Court's powers in relation to misconduct

44.14 (1) The court may make an order under this rule where -

- (a) a party or his legal representative fails to conduct detailed assessment proceedings in accordance with Part 47 or any direction of the court; or
- (b) it appears to the court that the conduct of a party or his legal representative, before or during the proceedings which gave rise to the assessment proceedings, was unreasonable or improper.

44.14(2) Where paragraph (1) applies, the court may -

- (a) disallow all or part of the costs which are being assessed; or
- (b) order the party at fault or his legal representative to pay costs which he has caused any other party to incur.

44.14(3) Where -

- (a) the court makes an order under paragraph (2) against a legally represented party; and
- (b) the party is not present when the order is made,
the party's solicitor must notify his client in writing of the order no later than 7 days after the solicitor receives notice of the order.

Self Assessment

A engaged B to refurbish a retail outlet for £45,000, the work to be carried out between 1st June and 31st July 2005, A to cease retail trading for the duration of the refurbishment. On 19th July, as the project neared completion a dispute arose regarding the installation of floor covering. The projected cost of laying a floor covering was £8,000. By the 2nd of August, having failed to resolve the dispute A dismissed B and hired another contractor to complete the works. The works were completed by the 13th August.

B submitted a bill to A for the full £45,000. A initially refused to pay B anything at all and claimed £20,000 for ripping out and relaying the concrete floor and £20,000 for loss of trading profits for the period 2nd August to 13th August.

The dispute was referred to Arbitration in January 2006. B sought payment of £45,000 due on 1st August 1998. A claimed a set off of £40,000. Both parties claimed interest. Subsequently, on the 1st April A paid B £5,000. On 1st May A offered to compromise the claim and set off in the sum of £30,000 plus interest at a specified rate from the respective dates that the claim and set-off were due. The offer was rejected. The matter came to a hearing on the 30th August 1999 following which the arbitrator published his award, by which, on the substantive issues B was to receive £31,000 after taking account as a deduction the £5,000 paid on 1st April, £8,000 to cover the cost of the flooring which was not laid and £2,000 loss of trading profit, having decided that the delay was partly the fault of B but mainly the fault of A.

As arbitrator, what would you award on the costs of the arbitration and interest on those costs in the absence of any other circumstances, explaining why you would make such an award on costs ?

CHAPTER TEN

CASE LAW

Petursson v Hutchison 3G UK Ltd [2004] EWHC 2609 (TCC) ; Cost cap – litigation. Claimant unsuccessfully sought to cap the defendant’s legal costs in advance. Kirham HHJ Francis. 2004.11.12. TCC

Legal Services Commission v Aaronson [2006] EWHC 1231 (QB) ; Cost of application for stay s9. Following a successful application for a stay the LSC argued that costs should not follow the event because their attempts to settle outside arbitration were frustrated because the applicants had refused to disclose documents outside the arbitration. Held : Whilst obstructive, this was not a reason to deprive the applicants of costs of the application. Jack Mr Justice. 2006.06.26. QBD

Clare v Buckle Mellows [2005] EWCA Civ 1611 ; The defendant solicitors were in breach of their contractual duty when they advised a client to dissolve a partnership. However, the claimant failed to recover damages because she failed to prove any loss. Accordingly costs were awarded against her. Pill LJ; Smith LJ; Sir Christopher Staughton. 2005.12.21. CA

Skanska Construction UK Ltd. v Egger (Barony) Ltd. [2005] EWHC 284 ; Award of costs - costs to follow event - 55% of costs recovered. Wilcox HHJ David. 2005.02.02. TCC

Home Office v Lownds [2002] EWCA Civ 365 ; Proportionality and costs : Meaning of under CPR. Laws, LJ Dyson LJ, Master Hurst.. 2002.03.21. CA

Knight v Beyond Properties Pty Ltd [2006] EWHC 1242 (Ch) ; Costs – capping. Application to court to make a capping order analogous to that under s65 Arbitration Act. Order refused – but costing judge could take issues into account if costs spiralled. Such an order might be possible in other circumstances. Mann, Mr Justice. 2006.05.26. QBD Chancery Division

Agassi v HM Inspector of Taxes [2005] EWCA Civ 1507 ; Costs – expert advice. General principles regarding the recovery of the costs of non-legal expert advice in support of litigation. Brook LJ; Dyson LJ; Carnwath LJ. 2005.12.02. CA

Agrimex Ltd. v Tradigrain SA [2003] EWHC 1656 (Comm) ; Costs : Arbitrator’s fees s28(2) & (3). Recovery of winning party’s costs before a GAFTA appeal tribunal from the losing party. “In my judgment, the size of the team employed and the time spent was wholly excessive and disproportionate to the issues involved. The Claimants had been prepared to pay, prior to the hearing, the sum of £6,500; that was in my view a generous amount in all the circumstances, but I will not go below it. I summarily assess the costs at £6,500.” Thomas Mr Justice. 2003.07.09. QBD Commercial Court

Callery v. Gray [2001] EWCA Civ 1246 ; Costs : CFA. Recoverability under CFA and premium for legal insurance. Phillips M.R. Brooke LJ. 2001.07.31. CA

Omnibridge Consulting Ltd. v Clearsprings (Management) Ltd. [2005] EWHC 90016 (Costs) ; Costs : CFA : Success fee. Court assessed the appropriate success fee in the circumstances, where there was a high chance of successfully challenging an arbitral award as 50% each for the solicitors and the barristers. O’Hare Master. 2005.10.10. Costs Office

Ashley Bell & George Wimpey v East Renfrewshire Council [2006] CSOH 9 ; Costs : Co-defenders. Scottish procedure : Held : the losing party will not be required to pay out twice for legal costs of winning party - where the winning parties should have provided joint representation : they have the right to separate presentation but only the first party's costs are recoverable. R F MacDonald QC (Sitting as a Temporary Judge. 2005.12.09. Outer House Court of Session

Painting v University of Oxford (2005) CA Lawtel ; Costs : Exaggerated claim. Claimant exaggerated claim £5m for personal injury. Payment in of £180K rejected. Defendant reduced this to £10K after seeing video evidence of the claimant's mobility. Claimant recovered 80% of £30K plus costs. On appeal, costs element post rejection of payment in overturned - in absence of exaggeration a deal could have been cut. Longmore LJ Kay LJ Maurice. 2005.02.03. CA

Danepoint Ltd v AUA [2005] EWHC 2809 (TCC) ; Costs : Indemnity. Circumstances when costs will be ordered on an indemnity basis. Coulson HHJ Peter. 2005.11.28. TCC

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Wates Construction Ltd. v HGP Greentree Allchurch Evans Ltd. [2005] EWHC 2174 (TCC) ; Costs on indemnity basis : When applicable. Coulson HHJ Peter. 2005.10.10. TCC

John Mowlem Construction Plc v Neil Jones & Co. Solicitors [2003] EWHC 1477 (TCC) ; Costs : insurance cover. Whether and if so how much costs of arbitration recoverable under insurance policy. Wilcox Mr Justice David. 2003.06.23. TCC

Tonkin v UK Insurance (No 2) [2006] EWHC 1185 (TCC) ; Payment in. Whilst successful in the litigation, the claimants failed to beat a payment in. Costs - allegations of unreasonable behaviour rejected. Costs to follow the event. Coulson HHJ Peter. 2006.05.18. TCC

Ian McGlin v Waltham Contractors Ltd [2005] EWHC 1419 ; Preaction protocol. Costs of fulfilling pre-action protocol not recoverable. Coulson HHJ Peter. 2005.07.06. TCC

Daejan Investments Ltd v The Part West Club Ltd (part 20) Buxton Associates [2003] EWHC 2872 (TCC) ; Costs : Pre-action protocol. Non-compliance with the requirements of the Professional Negligence Preaction Protocol - resulting in costs thrown away by the other parties, which in an application to amend, the claimant was required to cover. Wilcox HHJ David. 2003.11.03. TCC

Sea Trade Maritime Corp v Hellenic Mutual War Risks Assoc (Bermuda) Ltd. [2006] EWHC 578 (Comm) ; Costs : s47 & 57 : Reservation to subsequent award. Where a tribunal reserves costs to a subsequent award it deals with the matter (s47) so that the provisions of s57 do not come into play. Clarke Mr Justice Christopher. 2006.02.24. QBD Commercial Court

Cunningham v Collett & Farmer [2006] EWHC 148 (TCC) ; Costs Thrown Away : Interim costs hearing. Detailed analysis of the procedure to be applied when considering assessment of costs thrown away. Coulson HHJ Peter. 2006.02.09. TCC

Crown Resources Ag v Sumitomo Corporation (Singapore) [2004] EWHC 1670 (Comm) ; Wasted costs order. Solicitors challenged a paper only wasted costs order – apparently on the instructions of the client for costs pursuant to a failed arbitration. The director ostensibly giving those instructions no longer had authority since the client had filed for bankruptcy in Switzerland. By the time of the hearing that replaced the written order it became clear the client had been declared bankrupt. Solicitor held liable for a wasted costs order. Should have clarified instructions with the client at which stage the bankruptcy application would have been discovered. Morison Mr Justice. 2004.07.13. QBD Commercial Court.

Rotary Watches Ltd. v Rotary Watches (USA) Inc [2004] EWHC 90038 (Costs) ; Costs s63. Summary assessment of costs subsequent to dispute over the arbitrator's costs award. Bitter protracted dispute where the claimant made a negligible recovery and where the defendant made a substantial recovery under a counterclaim (though a small percentage of the actual counterclaim) in circumstances where the counterclaim would not have been mounted were it not for the need to defend the action. £600K costs awarded to the respondent UK watchmaker. Rodgers Cost Master. 2004.12.17. Costs Court