'their costs' and not the client's. This is completely wrong, even where the client has been told that the solicitor will take whatever can be recovered from the other side and render no additional bill to the client.

It may well be that the client has rights against other persons or funds, which will ultimately pay the solicitor's fees. The trustee looks to a trust fund for reimbursement; a successful party in litigation can expect an order for costs against the loser; the landlord may provide in the lease that his legal costs be paid by the tenant, but none of this affects the solicitor and client relationship between the trustee, the successful litigant or the landlord and their respective solicitors. The solicitor on behalf of his client seeks to recover money due to the client from the trust fund, the unsuccessful litigant or the tenant, but he does not have any personal relationship with them. The solicitor looks to his client for payment of the costs whether or not the client is reimbursed by a third party. The solicitor must therefore deliver a bill to his client for the whole of his costs and give credit for any sum that has been received. This is the strict legal position and has been since at least 1908. In *Cobbett v Wood* [1908] 2 KB 420, 77 LJKB 878, CA, the Court of Appeal held that a bill of costs which excluded the between the parties' items and simply referred to the excess chargeable as between solicitor and own client was not a proper bill. Whether a court would take such a strict line now must be open to question. But the fact that the costs are the client's rather than the solicitor's is beyond doubt.

Misunderstandings about this arise frequently when a third party who is paying the client's costs wishes to have an invoice on which he can recover the VAT. For example, leases regularly contain clauses where the landlord has obtained an undertaking from the tenant to pay his costs. Such a clause also regularly provides that the landlord should be 'compensated fully' or 'indemnified' for costs and expenses incurred as a result of the tenant's breach of the lease. Similar clauses appear in most mortgage deeds. The solicitor is providing legal services to his client, not the third party tenant (for example), and that tenant cannot obtain a VAT invoice even though he has ultimately funded payment of the client's bill.

The Court of Appeal decided in *Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA, that mortgagees were entitled to recover costs on the indemnity basis following a review of the meaning of 'indemnity costs' clauses. The Court of Appeal in *Church Comrs v Ibrahim* [1997] 1 EGLR 13, [1997] 03 EG 136, CA, confirmed that the principles in *Gomba Holdings* are not confined to mortgage cases. It held that in general the landlord is not to be deprived of a contractual right to indemnity costs. Although the court always retains a discretion on costs, that discretion should be used to reflect the contractual agreement between the landlord and the tenant unless the landlord's conduct is improper or unreasonable. This decision clarified the landlord's position on costs and made it easier either to negotiate or obtain from the court adequate compensation for the costs of litigation against defaulting tenants. However, the wording of the indemnity clause must be clear and a claim to costs should be fully pleaded in the particulars of claim.

INTERIM BILLS

[2.4]

Solicitors have always been free to agree the terms of their retainer with their clients in respect of both non-contentious and contentious business. It is only in recent years that solicitors have realised what has long been appreciated in every other walk of life: that without stage payments by the client the entire burden of financing the work falls upon he who is doing it. 'Cash is King' as every managing partner, chief executive and their bank manager can tell you without hesitation. Without cash flow, any business is in difficulties.

Litigation in particular can be protracted, complicated and lingering, as can some non-contentious work. An agreement with a client that the firm will render interim bills at monthly, three-monthly or six-monthly intervals will transform a firm's cash flow. Any basic system of time recording and costing will enable simple interim bills to be produced based on time spent and hourly rates. If done correctly (see below) any anomalies or inequities can be rectified in the final bill. The clients will be grateful. Solicitors live in fear of offending their clients with requests for payments on account of costs and disbursements, but it is nothing compared with the fear of the clients of the ever-growing size of an unknown bill which they know they will inevitably receive. (This is true now even of CFA clients who used to have the luxury of being told that they would receive all their compensation and not have to pay any costs to their solicitor or their opponent, whatever the circumstances.) Clients welcome knowing the amount of costs they have incurred to date, even if it may mean them crying 'Halt!' before any more costs are incurred; they will (generally) also welcome the opportunity of making stage payments. Furthermore, clients appreciate that a solicitor who is efficient in the conduct of his own affairs is likely to be no less efficient in looking after theirs.

There are two kinds of interim bill, and the difference between them is crucial. When deciding what sort of interim bills you want to send out, you need to consider in particular whether you think you might need:

- to sue the client on such bills (and not simply on a final bill); and/or
- to seek a different amount from your client at the end of the case for the period the interim bill covers

Keep these questions in mind as we now look at interim bills on account and interim statute bills.

(a) Interim bills on account

[2.5]

A bill on account is really nothing more than a request for payment on account in fancy dress. Not being a statute bill it cannot be sued on by the solicitor, the client cannot apply for a detailed assessment of it and, therefore, the time limits for applying for a detailed assessment do not run.

In *Turner & Co v O Palomo SA* [1999] 4 All ER 353, [2000] 1 WLR 37, CA, five bills rendered during the course of litigation had been headed 'on account of charges and disbursements incurred or to be incurred'. It was held these could not be construed as final or statute bills in respect of the work covered by them, and accordingly the time limits for applying for a detailed

More usually a solicitor brings proceedings to have his costs assessed under the Solicitors Act 1974 by using CPR Part 8 (as modified by CPR 67.3) if it is an originating application (as is usually the case) or CPR Part 23 in existing proceedings.

The application is normally made in the Senior Courts Costs Office. But, where a solicitor's bill of costs relates wholly or partly to contentious business done in a county court and the amount of the bill does not exceed £5,000, then the powers of the court relating to assessment of the solicitor's bill under the Solicitors Act 1974, ss 70 and 71 may be exercised and performed by the county court (s 69(3)).

The Claim Form is accompanied by the bill (or bills) to be assessed. There are model precedents in the Schedule of Costs Precedents to the CPR to assist. Precedent J is the model Claim Form. If the costs relate to a CFA, a copy of that agreement also needs to accompany the Claim Form.

Default judgments and interim payments

[3.12]

There is no mechanism for a default judgment or costs certificate in solicitor and client assessment because CPR 47.11 is disapplied. But there is no similar disapplication of CPR 44.2(8) and so the court ought to consider making an interim payment order unless there is good reason not to do so. If such an order is not made, the solicitor can seek an interim payment on account of costs using the procedure set out in Part 25.

Directions

[3.13]

Upon receipt of the court file the judge will give directions for a breakdown of the bill to be served by the solicitor. The breakdown includes both 'details of the work done' and a cash account (see **[2.12]** above). Thereafter the directions will deal with service of Points of Dispute and any Replies. Standard directions also include a stay on any proceedings for the bills in question and a resolution of the solicitors lien on papers once the bills have been assessed. The judge may also give directions regarding inspection of the solicitor's files by the client or his representative.

Once the directions have been complied with the parties may then request a hearing date if no settlement has been reached. There is a specific Notice to be used (N258C). The court will then fix a date for the hearing. In practice at the SCCO a date will already have been provisionally fixed as part of the directions being given.

Basis of assessment

[3.14]

This is the indemnity basis used for some between the parties' assessments. It is sometimes described as being a 'modified indemnity basis' because CPR 46.9(3) says that:

> ' . . . costs are to be assessed on the indemnity basis but are to be presumed-
>
> – to have been reasonably incurred if they were incurred with the express or implied approval of the client:
> – to be reasonable in amount if their amount was expressly or impliedly approved by the client;
> – to have been unreasonably incurred if-
> – they are of an unusual nature or amount: and
> – the solicitor did not tell the client that as a result the costs might not be recovered from the other party.'

You might question what is left of the indemnity basis after these significant presumptions have been imposed. The answer in a nutshell is that there is no proportionality test to be imposed, as there would be if the costs were assessed on the standard basis. The other distinction between standard and indemnity basis costs is the reversal of the benefit of the doubt. But 'where there's no doubt, there's no difference' and the presumptions in CPR 46.9(3) go a long way to dispelling any doubt the court might have on most items in the bill.

Costs of the assessment

[3.15]

The award of costs of the proceedings is not left to the discretion of the judge in the way of between the parties' assessments. Section 70(9) expects the order made to be based on the outcome. If one-fifth of the amount of the bill is disallowed, the solicitor pays the costs, if not, the client pays. There is some discretion left to the costs officer by s 70(10) but he has to certify that there are special circumstances relating to the bill, or the assessment of it, to vary the one-fifth rule. Where some of the costs claimed are outside the scope of the solicitor's retainer, such costs are to be ignored when calculating the one fifth. If a significant amount of such costs were originally claimed from the client this may amount to a special circumstance entitling the court to award costs to the client even though the 'in scope' costs were reduced by less than one-fifth (see *Bentine and Bentine v The Official Solicitor and Wilsons Solicitors LLP* [2013] EWHC 3098 (Ch)).

A client may seek an order for detailed assessment (see **[3.19]**). Where he does so, and with this provision in mind, the client may think it prudent to limit the order to the profit costs only if there are substantial disbursements which he does not wish to challenge or, conversely, limited to counsel's or expert's fees if these are all that he wishes to challenge (s 70(6)).

Where the bill being assessed is a gross sum bill, it is important to appreciate that any breakdown ordered by the court is for the purposes of the assessment only and it is still the original gross sum bill delivered to the client that at the end of the assessment will be either upheld or reduced. Accordingly, although the detailed breakdown may quite properly justify a figure considerably higher than the amount of the gross sum bill, it is of no relevance to the question of whether or not the gross sum bill has been reduced by one-fifth.

One slightly peculiar aspect to s 70(9) is that if the client does not attend the detailed assessment (and the proceedings had been started by the solicitor rather than the client) the one-fifth rule does not apply. It may be that no costs are payable but it is more likely that the court will consider the imposition of a costs order based on special circumstances where the client has not settled the costs prior to a hearing and then not turned up for it.

nett QC (now Burnett J) poetically put it in *Hollins v Russell* [2003] EWCA Civ 718, CFAs are 'islands of legality in a sea of illegality.' They have now been joined in this situation by Damages-Based Agreements as of April 2013.

So the Golden Rule to remember in respect of CFAs is that they need to comply with the Courts and Legal Services Act 1990 and any subordinate legislation. If they do not, they become unenforceable contingency fee agreements. They are then unenforceable against the client and, by operation of the indemnity principle, fees generated under such an agreement cannot be recovered from the opponent.

This effect is the root cause of the so-called 'Costs Wars' in the early part of this century. Non-compliance was comparatively easy to demonstrate based on the original regulations. Much of those have been swept away but new Regulations and a new CFA Order came into being on 1 April 2013 and there may be more attempts by paying parties to render successful parties' agreements unenforceable.

REQUIREMENTS

[4.3]

The requirements to create a valid CFA are now quite limited. A CFA needs to:

- be in writing;
- not be in relation to family or criminal proceedings.

Any success fee:

- must be no more than 100% of the base fees; and
- may need to be limited to a percentage of the client's damages.

Let us look at each one of these in turn

In writing

[4.4]

All of the terms need to be in writing. There have been various decisions at first instance to the effect that other documents, such as the client care letter, can be looked at in addition to the CFA itself to ascertain the terms. But agreements which are partly in writing and partly oral do not comply with the requirements and such agreements are unenforceable.

Not in relation to family or criminal proceedings

[4.5]

The precise wording of the requirement is that the CFA 'must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement' (s 58(3)(b)). The provisions of s 58A(1) of the CLSA 1990 describes those proceedings as 'criminal proceedings, apart from proceedings under s 82 of the Environmental Protection Act 1990' or 'family proceedings.' There then follow 11 sub-sections defining the relevant statutes which are considered to be family proceedings. The impact in a nutshell is that, for public policy reasons, it is inappropriate for a solicitor advising his client in criminal or family matters to be paid depending upon the outcome.

Any success fee must be no more than 100% of the base fees

[4.6]

A CFA does not need to have any success fee but if there is one, it must not be more than a doubling of the base fees.

So in *Oyston v Royal Bank of Scotland* [2006] EWHC 90053 (Costs) an agreement for the solicitors to receive a £50,000 bonus if the damages recovered were over £1m rendered the CFA invalid where the solicitor was already entitled to a 100% success fee.

This case came hard on the heels of *Jones v Wrexham Borough Council* [2007] EWCA Civ 1356 where the Court of Appeal held that a success fee set at 120% rendered the agreement unenforceable even though on assessment the claim was limited to 100%. The Court of Appeal was clear that claiming a success fee over and above the maximum allowed by the CFA Order 2000 (now replaced by the CFA Order 2013) was contrary to the administration of justice even if not so obviously contrary to the interest of the client (who would never pay it).

Any success fee may be limited to a percentage of the client's damages

[4.7]

When the subordinate legislation bringing the CLSA 1990 into effect was originally introduced in 1995, the success fee in a CFA was not recoverable from the opponent and there was no limit on the extent to which the client's damages could be depleted to pay for that success fee by the client. The Law Society gave professional conduct guidance that the limit should be 25% of the client's damages but there was nothing in the legislation to require this. When recoverability of success fees was introduced in April 2000 the need to seek payment of any fees by the client dissipated. The 'market' in personal injury and debt recovery work (the main areas for using CFAs) was very much the need to offer the client a 100% recovery of damages with the solicitor taking whatever fees could be recovered. Some firms did still seek payments from their clients but that was relatively rare and the sums sought limited.

With the ending of recoverability from the opponent by LASPO 2012, the issue of payment of the success fee has reappeared. This time, the secondary legislation has prescribed limits to the amount that can be claimed from the client in personal injury and clinical negligence cases, albeit not in any other case.

Personal injury and clinical negligence cases

[4.8]

A new provision (s 58(4B)) has been added to CLSA 1990 by LASPO 2012 with which the CFA needs to comply:

> '(4B) The additional conditions are that—
>
> (a) the agreement must provide that the success fee is subject to a maximum limit,
>
> (b) the maximum limit must be expressed as a percentage of the descriptions of damages awarded in the proceedings that are specified in the agreement,

ENDING THE RETAINER BEFORE THE CASE CONCLUDES

[5.18]

As is always said, a client can end a retainer at any time, a solicitor only for good reason and with reasonable notice. The position changes with a funding arrangement in respect of terminating that arrangement. A client can still effectively end it at any time because he is free to instruct the solicitor of his choice. If he decides to move his case to another firm, that is the end of the funding arrangement as well as the retainer. The client may have to pay costs to retrieve his papers but is not limited otherwise. The difference comes with the solicitor's entitlement to end the CFA. As we have seen in *Kris Motor Spares Ltd v Fox Williams LLP* above, the CFA funding arrangement can be ended without the underlying retainer of the solicitor bringing proceedings on the instruction of the client concluding.

Why would you want to end the CFA? The usual reasons for ending a CFA before the end of a case are:

(a) a different form of funding is more appropriate
(b) the prospects of success are not sufficient to continue
(c) the client is not co-operating

Let us take these in turn

Other funding

[5.19]

Alternative funding enquiries are meant to have been carried out at the beginning of the case so a decision that another option is more appropriate during the case ought to be rare. It is likely to be the case that BTE insurance has come to light either through more diligent searching or a belated response from a potential insurer. It could possibly be – though this is now extremely rare – that the client is now eligible for legal aid funding but was not previously. Even if this is so, it is not necessarily the case that to continue with a CFA would be an unreasonable choice and the decision would be very much case specific. The same is true if a different form of funding, such as union backing, became available part way through a case.

It was not always the case that the use of CFAs and ATE insurance was always to be the last resort purely because they would be more expensive for the opponent. Nevertheless, that was generally the approach taken on assessment by the courts where the party could have used Legal Aid or BTE insurance (or had started off doing so but changed to a CFA and ATE insurance during the case). Now that these additional liabilities are no longer recoverable from the opponent the concept of a CFA being a last resort has presumably ended. It may still have been an unreasonable choice on its facts, but that would be a matter for the client to take up, not the opponent.

Lack of Prospects

[5.20]

Much CFA litigation is conducted with ATE insurance firmly in tow. If the prospects drop below the insurer's minimum threshold, the diminution in

prospects has to be reported and the likelihood is that the ATE insurance will be cancelled from that point. The consequence for the solicitor is that any further disbursements will not be recoverable from the ATE insurer if they are not recovered from the opponent. This is a sizeable hurdle to surmount even if the solicitor is prepared to spend more time and effort in trying to improve the prospects, difficult though that almost always is.

Where the prospects have deteriorated slowly, particularly in ways about which the opponent is not yet aware, the solicitor will be expected to try to bring a resolution to the claim so that the policy does not have to be formally cancelled and potentially notification given to the opponent. Acceptance of a nuisance offer, even out of time, or a drop hands settlement has been preferable to a discontinuance from the ATE insurer's point of view and they are likely to allow the solicitor a little time in which to try to bring this about. The arrival of Qualified One Way Costs shifting will affect some of the assumptions made to date since the ATE insurer will not have a liability in respect of a discontinuance unless there is some suggestion of fraud, but the ATE insurer will not want to be backing cases with slim prospects of success in any event.

Since payment is based on the outcome of the case, all CFAs contain a clause allowing the solicitor to bail out if the prospects have reduced. To do otherwise would be to lock in the legal team to a case that could not win but would involve the lawyers in (potentially considerable) irrecoverable costs. The existence of this bail out clause has been used by paying parties to argue that the risk assessment of a case is skewed in the solicitor's favour because the case will not always reach the end of the litigation, ie a trial. Accordingly, the prospects are improved in the solicitor's favour. See **[6.31]** for a discussion of the case of *McCarthy v Essex Rivers Healthcare NHS Trust (Case No HQ06X03686)* (13 November 2009, unreported) QBD on this point.

Non-cooperation

[5.21]

Some forms of non-cooperation are not always the client's fault eg, death or insolvency but they still impact on the solicitor's ability to run the case.

The provision of inadequate instructions is problematic whether looked at through the prism of the CFA or the retainer as a whole. If the situation is bad enough to end the CFA through it, the relationship with the client is likely to be at end in any event.

Which rate?

[5.22]

If the CFA comes to an end at a point where it can be said that the client may still win, the solicitor should be entitled to seek his costs at the successful rate. The usual provisions allow for such base costs to be paid out upon termination. Alternatively the base costs and any success fee will be paid if and when the client has been successful.

If the CFA comes to an end because the case is unlikely to win, then the unsuccessful rates will apply. In a personal injury case, this rate may well be nothing. But in a commercial matter, there is likely to be a lower rate payable

The most recent re-iteration of its preference for staged success fees by the Court of Appeal was in *Motto v Trafigura* [2008] EWCA Civ 1150. A single stage success fee of 100% was reduced to 58% with the court again stressing that a more sympathetic view might be taken of relatively high success fees where the level is 'reviewable as the case progresses'. Again the Court of Appeal seems to have in mind a success fee that changes in response to changes in prospects once the case is up and running. It is hard to see how such a provision in a CFA could satisfy the statutory requirement to state the success fee at the time the CFA is made. The concept of a staged success fee is that different percentages are fixed at the outset to reflect the progress of the case. (This is the approach taken by the fixed figures set out in the old Part 45).

We do now at least have recognition that the mere fact that a success fee is staged does not remove the need for it also to be reasonable. In *Fortune v Roe* [2011] EWHC 2953 (QB), [2012] RTR 480, [2012] 2 Costs LR 288 the CFA was entered into after an admission of liability and judgment entered on liability in a catastrophic injury case. The staged success fee was 100% payable if the case settled within three months of the trial date and 25% for any earlier settlement. The case settled less than a month before trial. The risk assessment identified Part 36 as the major risk. The claimant pointed to the fact that if the case had been within the Part 45 scheme a 100% success fee would be recoverable as the fixed success fee at a trial. On appeal it was held that the mere fact that a success fee is staged does not mean it is reasonable. The question still remains as to what the level of risk was and what success fee was justified. There was an admission on liability and no risk of any substance until any Part 36 offer was made. Such an offer was likely to be made only close to the trial in this particular case. The Claimant's solicitors' costs up to that time, which would have been substantial, were secured. A success fee of 100% in such circumstances was unreasonable. A reasonable success fee, whether single or second stage, in the circumstances which pertained when the CFA was entered into, was 20%.

For an example of a staged success fee in defamation see *Peacock (Matthew) v MGN Ltd* [2010] EWHC 90174 (Costs). The success fee was in three stages: 100% of the basic charges, where the claim proceeds to 28 days after service of the defence; 50% if the case settles after proceedings are issued but before 28 days after the defence is served; or 25% if the case settles before proceedings are issued. Given MGN continued with a reasoned defence to stage three Master Campbell allowed the 100% success fee.

Routine or straight forward cases

[6.30]

In *Bensusan v Freedman* [2001] All ER (D) 212 (Oct), SCCO the Senior Costs Judge equated a simple clinical negligence case, which involved a dental tool being dropped in the claimant's mouth who then swallowed it, with a personal injury action arising out of a rear-end shunt. While the costs judge accepted that the risk of failure in a clinical negligence action can be greater than in a personal injury case, this particular case was 'simple and straightforward'. In *Callery v Gray* the Court of Appeal indicated that in a routine road traffic

accident action the success fee should not exceed 20% and the Senior Costs Judge took the same view in this case, reducing a success fee of 50% to 20%. Using *Callery* as 'no more than a starting point', he said the effect of the Costs Practice Direction was to prevent excessive claims for success fees in cases which settle without the need for proceedings when it was clear, or ought to have been clear, from the outset that the risk of having to commence proceedings was minimal.

In *Edwards v Smiths Dock Ltd* [2004] EWHC 1116 (QB), [2004] 3 Costs LR 440, the court, in approving an 87% success fee, distinguished a complicated assessment of quantum from a simple claim as in *Callery*. These early cases can be contrasted with the decision in *C v W* where a 20% success fee was allowed in a road traffic claim where liability had been admitted.

Nonetheless, similar sentiments to those expressed in *Bensusan* appear in the field of construction adjudications in *Redwing Construction Ltd v Wishart* [2011] EWHC 19 (TCC), [2011] Lloyd's Rep IR 331, [2011] 1 EGLR 13 where Akenhead J held that CFAs and ATE could be used in enforcement proceedings provided there was no exemption in the CPR from the usual rules relating to funding arrangements. It needed to be borne in mind however that the large majority of reported cases on adjudication enforcements are successful and are usually pursued (as here) via application for summary judgment because there is no realistic defence. It was important that claimants did not use CFAs and ATE insurance primarily as a commercial threat to defendants. It was legitimate for the Court to ask itself whether, in any particular case, a CFA or ATE Insurance was a reasonable and proportionate arrangement to make.

CFAs taken out at an early stage

[6.31]

The essence of *Callery v Gray* was that a client could be offered a CFA at the outset of a case. The question then arises as to how the success fee is to be calculated when at such an early stage little is known about the risks of the case. According to the judgment, *McCarthy v Essex Rivers Healthcare NHS Trust (Case No HQ06X03686)* [2010] 1 Costs LR 59 is the fourth case in which the same clinical negligence firm's CFA has been reviewed by a court. This time the point taken was that the CFA (as do most) provided that it could be terminated ' . . . if we believe that you are unlikely to win'. That, said Mackay J, was relevant to the level of a single stage success fee (claimed at 100%). Also relevant was the fact that this was not a two stage success fee. The success fee had been reduced to 80% and this appeal against that decision failed. It was accepted that the case was, at the time taken on, a 50:50 risk. Mackay J took the view that the termination clause meant that at a fairly early stage cases below a 50% chance can be removed leaving claims falling into the range of 50% to 80% prospects. In *Oliver (executor of the estate of Oliver) v Whipps Cross University Hospital NHS* [2009] EWHC 1104 (QB), 108 BMLR 181, 153 Sol Jo (no 21) 29, John Frederick Oliver had died of septicaemia in a hospital run by the defendants. The same solicitors agreed to act under the same conditional fee agreement as in *McCarthy* with a success fee of 100%, which represented a notional 50% prospect of success in the action.

Costs Capping

[9.29]

In *Barr v Biffa Waste Services Ltd* [2009] EWHC 2444 (TCC), [2009] NLJR 1513, [2010] 3 Costs LR 317 Coulson J thought it entirely random to link the amount at which a claimant's costs could be capped to the amount that a defendant could recover against the claimants under an ATE policy, particularly where the latter figure was outside the control of the defendant and, at least directly, outside the control of the court. What mattered were the criteria in CPR 44.18(5) namely:

(1) Is there a risk that costs will be disproportionately incurred?
(2) If so, can that risk be adequately controlled by case management and/or detailed assessment of costs?
(3) In all the circumstances, is it in the interests of justice to make a costs capping order?

No costs capping order was made. The case is also a good example of the point made at the end of the section headed 'paying adverse costs.' The court always seems to consider that the limit of indemnity is always available to meet the opponent's costs and does not take any note of the client's own disbursements. This can often be a significant sum.

SOLICITOR SELF INSURANCE

Client's Disbursements

[9.30]

A solicitor can carry the liability for disbursements in the event that the case fails without taking himself outside the normal practice of a solicitor and turning himself into a funder. For the reasons discussed at **[10.10]** regarding commercial litigation funders, this is fortunate. If it were not so, solicitors could find themselves not only left out of pocket in respect of disbursements in an unsuccessful case, but also having to pay the opponent's costs to the value of twice the disbursements that he agreed to meet based on the decision in *Arkin v Borchard Lines*.

This position was recently confirmed by the Court of Appeal in *Flatman v Germany* [2013] EWCA Civ 278, [2013] 4 All ER 349, [2013] 1 WLR 2676. This decision overturned the judgment of Eady J which said that a solicitor who agreed to fund disbursements as the case progressed and not to seek them from the client if they could not be obtained from the opponent at the end had put himself into the position of a commercial funder. The subsequent High Court decision in *Tinseltime Ltd v Roberts* [2012] EWHC 2628 (TCC), [2012] NLJR 1290, 156 Sol Jo (no 38) 31 doubted Eady J and held that the funding of disbursements by a solicitor was insufficient reason to make a third party costs order. The Court of Appeal in *Flatman* agreed with the judge in *Tinseltime*. The Court of Appeal had the benefit of an intervention from the Law Society who pointed out that CLSA 1990, s 58, the starting point for CFAs, referred to agreements regarding 'fees and expenses' being paid

dependent upon the outcome of the case. Notwithstanding a spirited argument from the defendant that there was a material difference between expenses and disbursements, the Court of Appeal (and the judge in *Tinseltime* who had seen the Law Society's skeleton argument) considered the solicitor was simply providing legal services in accordance with the statute.

There are postscripts to both *Flatman* and *Tinseltime* that are worth noting. In *Flatman* the appeal overall failed. It was an appeal against an order for disclosure of information in the detailed assessment proceedings. The Court of Appeal concluded that, although Eady J had fallen into error, there were other circumstances revealed on the appeal that justified the orders that Eady J had made. In *Tinseltime*, the solicitor thought that the disbursements would be modest and that, together with the fact that the company was on its uppers, persuaded him to act on the company's behalf. He also thought that the prospects were good but that was proved wrong when the claims were struck out. The solicitor was left with £22,000 to pay in disbursements: not a modest sum at all. This case is well worth reading if you are contemplating taking on any liability for your client to see just how easy it is to be led into difficulty.

Opponent's Costs

[9.31]

Offering to indemnify the client against the opponent's costs is a much more fraught undertaking than offering to meet disbursements. For a start you have much less say in the extent of the liability being incurred. Furthermore, the bargain of indemnifying the client in order to get the claim going, tends to have the appearance of champerty about it. There is also the question of whether you are acting as a quasi insurer without the necessary, regulatory approval.

The SCCO decision in *Dix v Townend* [2008] EWHC 90117 (Costs) raised the profile of champerty when the costs judge found that a solicitor undertaking to indemnify the client against adverse costs gave rise to a champertous agreement. The risk had been uninsured and the retainer was successfully challenged. Even if not champertous it was in any event contrary to public policy as explained by Lord Phillips MR in *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 2)* [2002] EWCA Civ 932 (see **[10.10]**). Dix was not followed however in the decisions of MacDuff J in *Morris v London Borough of Southwark* [2010] EWHC 901, [2010] 4 Costs LR 526 and of Master O' Hare in *Murray Lewis v Tennants Distribution Ltd* [2010] EWHC 90161 (Costs). In the former the risk to the solicitor in having to pay opponent's costs under the arrangement made with their client was small and far outweighed by the advantages of the arrangements as a whole. In the latter it was simply not accepted that an agreement to shoulder the risk of adverse costs orders ought to be regarded as threatening the integrity of any solicitor.

The decision of MacDuff J in *Morris* was the subject of a conjoined appeal in *Sibthorpe v Southwark London Borough Council* [2011] EWCA Civ 25 and in which the Law Society intervened. The claimants' solicitors did not have a legal aid contract for housing work and the claimants could not afford the premium for after-the-event insurance, even if a policy could be found. The solicitors therefore offered to provide cost protection for their two housing disrepair claims to enable the tenants to proceed. In return the clients agreed

to be disproportionate, it will tailor the directions to bring the costs down to a reasonable and proportionate level; this is particularly likely to affect those phases of the litigation where costs have traditionally been disproportionate such as disclosure, experts' reports and trial.

A CMO will record the extent to which the budgets are agreed between the parties. Where no agreement has been reached it will record the court's approval of the budgets after the court has made appropriate revisions. The court may also set a timetable, give directions for future reviews of budgets or make provision for parties to notify it of any agreed changes to the budget. In addition, the court may consider holding costs management conferences to consider revising the budgets.

COSTS MANAGEMENT PILOT SCHEMES

[15.3]

The feasibility of implementing the costs management provisions was tested in two pilot schemes:

(a) 'Costs Management in the Birmingham Mercantile and TCC courts' (Costs management scheme). This was subsequently extended to all Mercantile and TCC courts.

(b) 'Defamation Proceedings Costs Management Scheme' (the Defamation costs scheme). This ran in the Royal Courts of Justice and the Manchester District Registry.

There was a marked difference in the use of the two schemes. The costs management scheme was voluntary and used by commercial clients who, in a difficult economic climate were already making stringent costs demands on their lawyers. Those lawyers, in the main, already have relatively sophisticated time recording/case management systems which assisted in monitoring the costs expenditure in line with the budgets prescribed by the court. Indeed for many of them the Form H appears primitive when compared with the case/cost management matrices already being demanded by clients. In contrast the defamation pilot proved to be more controversial, no doubt in part for the simple reason that it was compulsory, but also because of the confrontational nature of, and the historic concerns over costs expenditure in, such litigation.

As a result feedback messages have been mixed. There have been both critics and supporters of the pilots. These are considered in the 'Costs Management Final Report'. The summary of the Final Report provides an indication of the benefits that costs management may provide to practitioners, and, more importantly, their clients. These are:

- it makes the parties focus on the issues early on, and more thoroughly analyse what is necessary to prosecute the action;
- it helps to focus on the costs of the future conduct of the case;
- it informs the parties about each other's budgets for the litigation and provides an insight into the opponent's tactics;
- it introduces a degree of certainty to the planned amount of work and costs for the client, and provides a strong incentive to keep within the budget;

- it may avoid lengthy detailed assessments of costs at the end of the litigation; and it informs the parties about the costs consequences of not settling at an early stage and thus can encourage settlement.

Despite the differing viewpoints, the simple fact is that from 1 April 2013 practitioners involved in proceedings subject to the new costs management regime need to understand how the regime works and embrace the change. Indeed whilst the regime is in its infancy astute practitioners actually have a chance to influence the way it develops. The range of opinions from panellists and the audience at the 2013 Association of Costs Lawyers conference suggests creative minds are already turning to fertile areas for dispute.

THE SCOPE OF THE COSTS MANAGEMENT REGIME UNDER CPR 3.12–CPR 3.18 AND CPR PD 3E

[15.4]

The formal costs management scheme applies to all multi-track cases commenced on or after 1 April 2013. A number of exceptions to this, set out in CPR 3.12, provide that it will not apply:

- In the Admiralty and Commercial Courts. This is regardless of the value of the claim.
- In any proceedings subject to fixed costs, eg claims for the recovery of land.
- In any proceedings subject to scale costs, eg patent cases in the county courts.
- If the court itself orders that costs budgeting will not apply. There is no provision within the rules as to why the court should make such an order and therefore it will be interesting to see the extent to which such orders are made. There is a school of thought that costs management may be unnecessary for defendants in those claims subject to the QOCS provisions. Why put the defendant to the expenditure of budget production when, in the vast majority of cases, the maximum recovery would be limited to the level of damages? There are many answers. Two obvious ones are that if there is a valid offer under CPR Part 36 in a high value case the defendant might still be able to recover all the costs by way of set off. Another is that the court needs the costs information to fulfil its function to case manage proportionately.

At the eleventh hour, two further exceptions were added and as a consequence the costs management regime will not apply to any cases in either the Chancery Division of the High Court or the Technology and Construction Court (TCC) and Mercantile Courts if the sums in dispute, as at the date of the first CMC, exceed £2 million.

The late addition of these two exceptions was due, in part, to a concern that parties and their legal advisers might seek to issue in the Commercial Court in cases that could just as comfortably be in that court as the Chancery Division, Mercantile Courts and TCC, in an attempt to avoid being subject to the new costs management regime – at least until any anticipated satellite litigation as to the interpretation of the new CPR provisions had been forthcoming. This perceived risk of forum shopping led to the exceptions.

order to make about costs CPR 44.2 requires the court to have regard to any offer whether it has been made in accordance with Part 36 or not. Given the clarity of this rule it is odd how many cases are reported where the offering party has failed to make a valid offer.

To satisfy the requirements of CPR 36.3(2) an offer must be in writing, must specifically state that it is intended to be a Part 36 offer, specify a period of not less than 21 days within which, if the offer is accepted, the defendant pays the claimant's costs ('the relevant period'), confirm whether the offer relates to all the claim or to only part of it and whether it takes into account any counterclaim. If a trial is listed to start less than 21 days after the offer then the requirement to specify the period of not less than 21 days does not apply and instead the period must be up to the end of the trial or such other period as the court determines. In certain circumstances the offer must contain more information – eg in a personal injury claim involving a claim for future pecuniary loss (CPR 36.5), where the claim involves a claim for provisional damages (CPR 36.6), and, more generally, in relation to the deduction of recoverable benefits (CPR 36.15).

Part 36.4 provides that an offer must be for a single lump sum which is payable within 14 days; if it is not it is not effective for the purposes of Part 36 unless the offer is accepted.

On the face of it the provisions seem straightforward. However, repeatedly the court has been presented with arguments over whether or not an offer falls within the Part 36 scheme. The starting and, one would have thought, the finishing point must be the wording of Part 36 because it is clear from the judgment of Moore-Bick LJ in *Gibbon v Manchester City Council* [2010] EWCA Civ 726, [2011] 2 All ER 258, [2010] 1 WLR 2081 that this part of the CPR contains a free standing procedural code outside the rules of law governing the formation of contracts:

> 'In my view, Part 36 was drafted with these considerations in mind and is to be read and understood according to its terms without importing other rules derived from the general law, save where that was clearly intended.'

The Court of Appeal concluded that Part 36 is a self-contained code, prescribing both the manner in which an offer might be made and the consequences flowing from accepting or failing to accept it. Although basic concepts of offer and acceptance clearly underpinned Part 36, it was not to be understood as incorporating all the rules governing the formation of contracts. Indeed, it was not desirable that it should so do. Certainty was to be commended in a procedural code which had to be understood by ordinary citizens, and it was with that in mind that Part 36 had been drafted. It was to be read and understood according to its terms without importing other rules derived from the general law, save where that was clearly intended.

We might be forgiven then, for wondering quite how so many arguments have arisen over the wording adopted by parties. We suspect that the reason is that the wording in CPR 36.2 still comes as a surprise to those regularly making what they believe to be valid Part 36 offers. In *Thewlis v Groupama Insurance Co Ltd* [2012] EWHC 3 (TCC), 142 ConLR 85, [2012] BLR 259 HHJ Behrens sitting as a Judge of the High Court determined that an offer that

did not state that it was intended to have the consequences of section 1 of Part 36 could not be a valid Part 36 offer. He concluded that the regime was a free standing one and that compliance with its terms was mandatory.

WHO MAY MAKE A PART 36 OFFER?

[20.3]

Nowhere in Part 36 does it state specifically that an offer may be made by any party. The wording of CPR 36.2 creates further uncertainty by referring to the offer providing the period during which the defendant will be liable to pay the claimant's costs if the offer is accepted. However, CPR 36.14, which sets out the consequences after judgment if an offer has not been accepted, leaves no room for argument. It is clear that the rule contemplates offers from both claimants and defendants.

WHEN MAY A PART 36 OFFER BE MADE?

[20.4]

A Part 36 offer may be made before proceedings. Indeed in terms of a defendant seeking to maximise his costs protection and a claimant seeking to make the most of the possible sanctions if he receives an outcome at least as advantageous as his offer, the earlier that the offer is made the better. However, although a Part 36 offer may be made before proceedings, if it is accepted in the same period the claimant cannot claim costs under CPR 36.10 because there are no proceedings, unless the offer is worded 'the defendant will be liable for the claimant's costs, including the costs pre-issue of proceedings in accordance with CPR Part 36.10' (*Udogaranya v Nwagw* [2010] EWHC 90186 (Costs)). This creates no practical difficulties because if the costs cannot be claimed under CPR 36.10, then they certainly may under the costs only proceedings provisions of CPR 46.14.

CPR 36.3(2)(b) also extends the scope of Part 36 to appeal proceedings. However, there is a trap for the unwary. In *East West Corpn v Dampskibs-selskabet AF, 1912, Aktieselskab (a body corporate)* [2003] EWCA Civ 174, [2003] 1 Lloyd's Rep 265n, [2003] 12 LS Gaz R 31 and *KR v Bryn Alyn Community (Holdings) Ltd (in liq)* [2003] EWCA Civ 383, [2003] PIQR P562, 147 Sol Jo LB 387, the claimants had all made offers to settle before the trial under the previous Part 36 which were not accepted by the defendants. In each case the defendants were unsuccessful at the trial and the trial judge ordered that they should pay the claimants' costs on the indemnity basis. After the defendants' unsuccessful appeals, the claimants sought a similar order in respect of their costs of the appeal. However, they had made no further Part 36 offer in respect of the appeal, perhaps thinking that the offer in the original proceedings provided sufficient protection. They were unsuccessful. The court concluded that they ought to have made a specific offer in the appeal

Strike out for non-payment of fees

[22.8]

If the claimant party fails to pay or obtain fee exemption from a fee payable for either the allocation of the claim or on the filing of the pre-trial checklist, then pursuant to CPR 3.7(6)(b) there is a deemed order that claimant pays the defendant's costs unless the court orders otherwise

The basis of assessment under deemed orders.

[22.9]

CPR 44.9(1) makes it clear that assessments under the deemed orders set out above are conducted on the standard basis. However, where the court has a residual discretion that does extend to making an order for indemnity costs in place of standard basis costs on the application of the party against whom the claim has been discontinued, if it is appropriate to do so. It did just this in *Shahrokh Mireskandari v Law Society* [2009] EWHC 2224 (Ch), 153 Sol Jo (no 34) 29, where the discontinued claim had always been utterly speculative.

Interest on the costs assessed under a deemed order

[22.10]

CPR 44.9(4) is clear that any interest on costs runs from the date when the deemed costs order is made.

COSTS ORDERS BY CONSENT

[22.11]

The parties may agree where the liability for costs rests between themselves, whether in respect of interim of final orders. This can be done by way of consent order, consent judgment or Tomlin order. However, the court retains the discretion whether or not to approve these orders and there a number of potential pitfalls to avoid.

Tomlin orders

[22.12]

A Tomlin order stays a claim on terms. The terms are usually contained in a schedule to the order. All too often parties still include the agreement in respect of costs in the schedule. This is acceptable if it is an agreement to pay a specified sum for costs. However, if the agreement is that the costs will be assessed if not agreed then the order must be in the body of the order. If it is not then there is no order giving a right to assessment proceedings and a failure to agree costs can present a major problem in recovering them.

Agreement in interim orders for costs to be assessed if not agreed

[22.13]

As we have considered earlier, an order for a detailed assessment is a case management decision. It must be made by the court in accordance with the overriding objective. This requires the court to consider proportionality. In most cases ordering a detailed assessment of the costs relating to an interim hearing is not proportionate. Whilst this may have been included to avoid an argument at this stage on the amount of the costs, the likelihood is that the court will be increasingly reluctant to approve such an order insisting that either the amount of costs is agreed or that there is a summary assessment of them there and then.

Uncertain and unclear terms

[22.14]

It may sound obvious, but it is important that the parties consider carefully the costs order that is drafted before consenting to it. This is not only to ensure that it contains enforceable costs provisions, but also to be satisfied that the order states precisely what has been agreed after consideration of all potential consequences.

In *Richardson Roofing Co Ltd v Colman Partnership Ltd* [2009] EWCA Civ 839, [2009] 4 Costs LR 521 under a consent order the claimant was to pay a fourth party's costs incurred and thrown away by the adjournment of the trial. Three years later, the fourth party served a draft bill of cost for its entire costs until the hearing ordering a preliminary issue. The fourth party issued proceedings seeking an order that the costs judge dealing with the assessment should be directed that the costs included the fourth party's preparation for trial because there was no prospect that the claim would be revived. The judge made an order directing the costs judge to carry out the assessment using the guidance set out in six specified paragraphs of his judgment.

The Court of Appeal thought it highly debatable whether the judge had had any jurisdiction to hear the application. The order in dispute was a consent order with no application to vary it. As the jurisdiction point had not been fully argued before the Court of Appeal, the point could not be decided and the court therefore assumed jurisdiction, despite its serious reservations. Even if the judge had jurisdiction, he should not have exercised it because the matter would ordinarily go before a costs judge for a detailed assessment. It was undesirable for judges to make this sort of order referring to guidance set out in their judgment, which was extremely diffuse. Judgments provide the reasons for the subsequent orders and any order made at the end of a judgment should stand on its own. The judge had failed to answer the issue in relation to the construction of the consent order and his consequent order was of no assistance to a costs judge. Accordingly, his order could not stand.

In *Newall v Lewis* [2008] EWHC 910 (Ch), [2008] 4 Costs LR 626, the SCCO master decided that all that the parties had meant by 'incidental costs' in a consent order were the investigative costs pre-issue, which would be subject to detailed assessment and referral to a judge, and that all costs claimed post-issue, including incidental ones, were potentially recoverable and did not

are found to be disproportionate by reference to the overriding objective and the factors now found at CPR 44.4(3) with a new eighth factor (last approved or agreed budget), then the court will assess the costs against a test of necessarily incurred and reasonable and proportionate in amount.

The provision in respect of an indemnity basis assessment for these cases is what it remains now – unqualified by reference to proportionality.

So for these cases the proportionality distinction relating to proportionality is that the court may on the standard basis find the overall costs disproportionate at the outset of an assessment and undertake the assessment only allowing necessarily incurred costs. If it finds the overall costs proportionate then the court permits all reasonably incurred costs which are and reasonable and proportionate in amount. This, together with where the benefit of the doubt rests, inevitably makes a difference. Ask any costs judges and we suspect that they will tell you the difference is anything between 10%-15% on average.

Post-31 March 2013

[24.4]

In respect of those costs that are governed by the post-March 2013 provisions the difference between standard and indemnity basis may be significantly more marked. In these cases CPR 44.3(2) inserts this pithy provision:

> 'Where the amount of costs is to assessed on the standard basis, the court will-
>
> (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred . . . '

Pithy it may be, but of quite extraordinary potency. This means that on a standard basis assessment a costs judge can undertake the assessment allowing what is reasonably incurred and reasonable in amount, add up the total allowed and then determine by reference to the new proportionality test at CPR 44.3(5) that this still leaves a figure that is disproportionate and reduce still further until satisfied that the figure is proportionate. (See Chapter 14 Prospective Costs Control – Proportionality, above)

In contrast there is no test of proportionality on the indemnity basis. As the new approach to proportionality is commonly accepted as likely to see costs reduced on the standard basis to lower levels than under the previous provisions, then the benefit of an indemnity basis assessment increases.

Costs bases and budgets

[24.5]

In those case in which a costs management order has been made by the court then on a standard basis assessment CPR 3.18 requires the court to have regard to the last approved or agreed budget and not to depart from it unless there is good reason to do so. There is no such constraint on an indemnity basis assessment. The case management order does not impact on the assessment of the costs. Whilst we are aware that the court in *Elvantine Full Circle Limited v AMEC Earth & Environment (UK) Ltd* (see above) suggested that the budget would still be the starting point, for the reasons we have already set out

above in Chapter 15 Prospective Costs Control – Costs and Case Management we disagree. The budget has been set by an analysis of what costs are reasonable and proportionate per phase of the budget going forward. An indemnity basis assessment cannot be constrained by figures that have been subjected to a proportionality scrutiny when this has no place on such an assessment and where the budget submitted was one of, amongst other matters, an estimate of future proportionate costs.

Conclusion

[24.6]

For the reasons we have set out above the difference between the amount assessed on a standard and indemnity basis assessment for those costs subject to the post-31 March 2013 regime, may now be sizeable. Proportionality lies at the heart of the recent reforms. An indemnity costs order bypasses the assessment of costs by reference to this. Suddenly there may be more than a few percentage points difference in outcome. We certainly expect there to be an increase in the number of applications for such orders.

THE INDEMNITY BASIS – WHEN IS IT APPROPRIATE?

Introduction

[24.7]

With the exception of CPR Part 36, which specifically provides for an order for costs on the indemnity basis in a defined situation (CPR 36.10 – see below) and costs under a contract where that contract specifically provides for costs on an indemnity basis, indemnity costs can only be awarded by the court exercising its discretion under CPR 44.2. It does so by reference to the overriding objective and the factors that it is obliged to consider when deciding what order to make about costs (CPR 44.2(4) and CPR 44.2(5)).

How does the court exercise its discretion?

[24.8]

The discretion to make such an order is wide, indeed so wide that the Court of Appeal has shied away from setting a prescriptive list of circumstances where such an order would be appropriate. In *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnston (Costs)* [2002] EWCA Civ 879 Lord Woolf explained why guidance was of limited assistance:

> 'In my judgment it is dangerous for the court to try and add to the requirements of the CPR which are not spelt out in the relevant parts of the CPR. This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm.'

or at a hearing if either party wants to take that latter step. Sealed offers are provided to the court as part of the court pack and so the judge is in a position to determine damages and costs on paper or at a hearing. In the first year of the RTA Protocol (as it then was) existing, hardly any cases reached Stage 3.

A word should be said here about claims needing approvals. More is said below because the options are varied. But for the moment, it is worth noting that an approval hearing could come at Stage 2 in order to approve a settlement between the parties or at Stage 3 where it is more akin to an assessment of damages hearing.

The fixed costs

[26.17]

In the Portal, the only recoverable costs allowed are the fixed costs and disbursements set out in this section. There is no opportunity to obtain assessed costs and therefore issues of seeking indemnity costs for the opponent's conduct do not arise. The same is true in relation to Part 36 offers in the Portal and which we deal with in Chapter 20. The recoverable costs are contained in Tables 6 and 6A in the Practice Direction. There are rather more options than might be expected for a three stage procedure. The tables distinguish between RTA on the one hand and EL /PL on the other. They also break at £10,000, which was the original limit for the RTA protocol. These distinctions are predicated on the basis that EL/PL claims are perceived to be more difficult than RTA claims and that added value brings added complexity. There are further complications because the fees for stage 3 are broken down into the uninformative Type A, B and C costs. Type A fixed costs refer to the 'legal representative's costs' for running the third stage. Type B refers to the 'advocate's costs' where a hearing in person takes place and Type C refers to the written advice required for an approval hearing. The tables are set out at the end of the book but they are condensed as follows:

	Stage 1	Stage 2	Stage 3		
			A	B	C
RTA up to £10,000	£200	£300	£250	£250	£150
RTA above £10,000	£200	£600	£250	£250	£150
EL/PL up to £10,000	£300	£600	£250	£250	£150
EL/PL above £10,000	£300	£1300	£250	£250	£150

Where the parties reach agreement after the Part 8 proceedings have been sent to the court, but before they have been issued, the claimant will be entitled to a Type A payment so long as the agreed figure is more than the defendant's formal protocol offer.

'London weighting' applies here as it does in Section II. If the claimant lives or works in London and the legal representative also practises in London, the recoverable costs are increased by 12.5%. This provision does not apply to Type B or C costs in Stage 3. The definition of London is set out in Practice Direction 45.

'Counsel's' advice

[26.18]

Before the Portal was expanded vertically (by increasing the damages to £25,000) and horizontally (to include EL and PL claims), the only use of counsel which could be recovered was for the provision of a written advice and / or representation at an approval hearing or as an advocate at the Stage 3 hearing. The increased value of claims persuaded the rule makers that seeking advice on quantum was appropriate for the larger cases. Consequently CPR 45.23B allows for a Type C costs claim to be made where the damages are over £10,000. This provision looks fraught with difficulty. What happens if the solicitor thinks it is worth more than £10,000 but counsel disagrees? Which is the 'value' of the claim? It would seem fairly clear that the Advice would generally be taken as representing the correct figure, but what if a Stage 3 hearing decides damages are indeed more than £10,000? CPR 45.23B requires the advice to be 'reasonably required' and that will undoubtedly be viewed differently in different quarters. Finally, the advice can be obtained by 'a specialist solicitor or counsel.' Will defendants seek to argue that the solicitor was not a specialist and so the fee is not payable? (Why is it not specialist counsel anyway?) Will local arrangements between solicitors come to pass to earn further income by providing opinions on a reciprocal basis? This provision looks to be something of a sop to the junior Bar but it may simply lead to a lot of work being done and billed but never recovered.

The disbursements

[26.19]

The disbursements which may be recovered are set out at CPR 45.19. They are in very similar terms to those in Section II ([**26.11**]). As with that Section, the rule says that the court may allow certain prescribed disbursements but will not allow any other type. It then finishes with the catch-all phrase that it may allow 'any other disbursement that has arisen due to a particular feature of the dispute' which rather destroys the strength of the earlier wording.

The disbursements which are recoverable are the costs of obtaining medical records and a medical report. As mentioned above, in most cases the defendant has paid for the medical report and associated records directly. This is likely to change, at least for the time being, as EL and PL practitioners can be expected to take a less collaborative approach than some RTA lawyers whose clients have very largely needed standard medical evidence to support soft tissue claims.

Engineer's report fees and those for searching the DVLA and MID databases can be claimed. So too can court fees where an approval is needed, a Part 8 claim has to be issued for Stage 3 or where protective proceedings have

No filing

[28.18]

It is well worth noting that the first part of the detailed assessment procedure is entirely a matter between the parties; there is no involvement of the court at this stage and if, as often happens, agreement is reached between the parties, the court will not have been troubled by the detailed assessment proceedings at all.

Delay in commencing proceedings

[28.19]

The period for commencing detailed assessment proceedings is three months after the event giving rise to the right of assessment (CPR 47.7). The most common event is a court order for costs but it could also be, for example, an acceptance of a Part 36 offer or a notice of discontinuance.

If the receiving party does not commence detailed assessment proceedings within the time prescribed by the rules (or by any direction of the court), the paying party's remedy is to make an application under Part 23 for an 'unless' order. CPR 47.8 empowers the court to order that unless the receiving party commences proceedings within a specified period all or part of the costs will be disallowed. Such applications are in fact rarely made, perhaps because the paying party does not wish to bring forward the day when he will have to hand over money to the receiving party. But where the application is made, the receiving party invariably ends up serving a notice of commencement and bill of costs to begin the detailed assessment proceedings before the application is heard so the application has a galvanising effect. Furthermore, the receiving party almost always ends up paying the costs of the application since there are few cases where the receiving party could not feasibly have a bill drawn and served a notice within three months of the right to do so having arisen. Moreover, the application is the gateway to seeking any sanction greater than interest being disallowed.

Where the paying party has not made an application under CPR 47.8, there is nothing to prevent the receiving party from commencing the assessment proceedings at any time, the only sanction being the court's power to disallow interest for the delayed period (CPR 47.8(3)(b)). Whilst the court's power is entirely discretionary as to the period of interest to be disallowed, conventionally it is for the period from three months after the order for assessment until the notice of commencement is served, which can be several years later.

'Misconduct' in the form of delay

[28.20]

Where a paying party makes an application under CPR 47.8, it is sometimes accompanied by an application under CPR 44.11 which empowers the court to disallow all or part of the costs where there has been misconduct. If the application is only made as part of the points of dispute to be heard at the final detailed assessment hearing, rather than at the beginning of the proceedings, the case law does not hold out much hope for applications under CPR 44.11 based on costs delays.

In *Botham v Khan* and *Lamb v Khan* [2004] EWHC 2602 (QB) the court held that disallowance of costs pursuant to CPR 44.11 (then CPR 44.14) on the ground of misconduct would be a disproportionate sanction. Although there was culpable delay by the defendant, the claimants had not availed themselves of the right to apply under CPR 47.8(1) for an order requiring the defendant to commence detailed assessment within a specified period. The delay had not prevented a fair assessment of the defendant's costs although the process would be more difficult than if it had been carried out on a timely basis.

The paying party was equally unsuccessful under CPR 44.11 in *Haji-Ioannou v Frangos* [2006] EWCA Civ 1663, even though the delay was for more than five years. The court decided that CPR 47.8 and CPR 44.14 (now CPR 44.11) were not inconsistent and there was no case for imposing upon the defendants the further sanction of disallowing any part of their costs under CPR 44.14 in addition to loss of interest under CPR 47.8. Their delay was not deliberate or wilful and the claimant had not himself been a model of expedition. Where the relevant rule not only gave the paying party the option of preventing further delay by himself taking the initiative but also spelled out the normal sanction for such delay, the court should be hesitant to impose further penalties by way of reducing otherwise allowable costs.

Delay no breach of Article 6

[28.21]

The fact that the remedy for delay is in the hands of the paying party was clearly demonstrated in *Less v Benedict* [2005] EWHC 1643 (Ch). The claimants had been ordered to pay the defendant's costs and the defendant served notices of commencement within the time limit specified in CPR 47.7. But, as a result of confusion and oversight it was not until three and half years later that the defendant re-served the notices on the claimants at their last known addresses. The claimants submitted their right to a hearing within a reasonable time under Article 6 of the European Convention on Human Rights would be breached if the costs assessment was allowed to continue; the excessive and unreasonable delay without explanation was an abuse of process; the claimants could not have a fair hearing as they no longer had access to the relevant files. The court held there had been no violation of the claimant's rights under Article 6 because CPR 47.8 provided a mechanism for the claimants to bring the matter to the attention of the court to obtain a hearing within a reasonable time. If a party failed to take advantage of that mechanism it could not be said that he had thereby been deprived of his rights under Article 6. The court would not, by proceeding to a hearing, be sanctioning a continuance of a breach of any rights, but would be taking remedial action to correct the consequences of such a breach.

client to co-operate in the production of the bill with the later firm of solicitors. Where the conducting solicitor has moved from one firm to another he may be able to sign all the certificates on behalf of both firms by amending the certificates appropriately.

Bear in mind that the client could always sign the certificate which would be a lot easier logistically in many cases. Where the earlier solicitor's fees are based on an agreement contingent on the outcome (CFA or DBA) it would be wise to think twice before taking this approach. If there is anything wrong with the enforceability of the agreement, the client would not want to have affirmed anything in the bill which would prevent him otherwise being the beneficiary of an unenforceable agreement. But, in this situation, any solicitor who does not co-operate in the recovery of fees from the opponent is risking leaving himself without any payment whatsoever.

The risk is not all on the earlier solicitor's side however. Parties who, having instructed two firms of solicitors, commenced detailed assessment proceedings with the bill of one firm alone, were given a bitter pill to swallow by the court in *Harris v Moat Housing Group South Ltd* [2007] EWHC 3092 (QB). The appellants ('either oblivious or heedless of the provisions of the practice direction,' said Christopher Clarke J) failed to include the costs of their previous solicitors in their bill of costs, and the costs of their second solicitors were compromised by agreement with the paying party. If the appellants had, either in their notice of commencement or in the bills or otherwise, made clear that the amount claimed was only part of their claim to costs and that they would be claiming later in respect of the work of their first solicitors; and the agreement was that the respondents would pay a sum in respect of the costs claimed, recognising that the costs in respect of the first solicitors were still to be dealt with, the appellants would not have been prevented from making a claim in respect of those costs. There would have been a failure to comply with the Practice Direction, but subject to any sanction that the court thought fit to impose there would be no reason in principle why the court should not assess the remaining costs in dispute. However, the position here was different, because what had been settled was the amount of the receiving party's costs pursuant to particular orders. If they had left out of their bill part of what they should have claimed and there had been a settlement of the bill, they could not recover more than the amount agreed. The omission was their misfortune.

The Certificates cover the following issues:

A. *Mandatory Certificates*

[29.22]

(1) *Accuracy*: This certificate starts with the overarching confirmation that 'this bill is both accurate and complete'. It then confirms that the indemnity principle has not been breached. In other words that 'the costs claimed herein do not exceed the costs which the receiving party is required to pay me/my firm'.

Additionally, this certificate confirms that any employed legal representative who carried out work for which costs are claimed is employed by the receiving party. This certificate supported the rule that an employed solicitor could not

carry out litigation for anyone other than his employer. That restriction, to the extent that it still applies, is likely to be removed with the arrival of Alternative Business Structures etc.

Finally this certificate confirms that any work done for a legally aided client was carried out pursuant to a certificate from the Legal Aid Agency (or earlier equivalent.)

(2) *Interest and interim payments*: This certificate deals with activities that have happened during the case and since the case has ended but before it has come back to court to be assessed.

Both certificates are written in the alternative. Either there has been a ruling affecting the receiving party (or his solicitor)'s entitlement to interest (and in which case details need to be given of the date and text of the ruling together with the identity of the judge); or there has been no such ruling.

Similarly, there has either been one or more interim payments (and in which case the date, amount and the identity of the person making the payment are needed for each payment); or there have been no such payments.

The presumption in the rules at CPR 44.2(8) that an interim payment will be awarded will mean that this certificate will be answered more often in the positive than has previously been the case.

B. *Legal Aid cases*

[29.23]

(3) *Position of a Legally Aided client*: This certificate is made pursuant to regulation 119 of the Civil Legal Aid (General) Regulations 1989. It deals with the issue of whether the client has an interest in the detailed assessment proceedings. For example, if the client may have to meet any shortfall in costs received from the opponent through the operation of the statutory charge.

Where the client does have an interest, the certificate confirms that a copy of the bill has been sent to the client with an explanation of the nature of his interest and the steps that can be taken to safeguard his interest in the assessment. Furthermore, the client has not requested that the costs officer be informed of his interest and has not requested a copy of the notice of hearing to be sent to him. If the client has no interest, then the certificate will record this and of course there is no need to send the bill to the client with the explanation.

The purpose of this certificate therefore is to deal in a simple way with clients who do not need or wish to attend the hearing being left in peace. Otherwise, they would need to be sent a Notice of Hearing on the basis that they might have an interest and would turn up at the hearing, more often than not, for little or no purpose. Where a client has an interest and does wish to receive notice of the hearing, this certificate cannot be completed and the client's details should appear on the statement of parties lodged with the Request for a Detailed Assessment Hearing.

(4) *Notification re counsel's fees and consent to FCC*: This certificate is made pursuant to regulations 112 and 121 of the Civil Legal Aid (General) Regulations 1989. It gives consent to the signing of the final costs certificate within 21 days of detailed assessment.

not considered the companies' interests but only his own; there was ample evidence to justify the costs order despite the absence of an early warning concerning costs.

In *Bournemouth and Boscombe Athletic Football Club Ltd v Lloyds TSB Bank plc* [2004] EWCA Civ 935, the claimant football club was in severe financial trouble and was unable to meet its obligations to its bankers, the defendant, who appointed administrative receivers. The club entered into a company voluntary arrangement and its business was sold to a new company. One of the directors initiated proceedings against the bank in the name of the company which were struck out. He then initiated further proceedings making the same allegations. That action too was struck out and an appeal against the striking out also failed. The director was ordered to be added as a defendant to enable an application to be made for a non-party costs order against him. The court concluded that the director had sought to play fast and loose with the civil justice system by commencing and presenting hopeless claims and by presenting a hopeless appeal on behalf of an insolvent company. The circumstances were sufficiently exceptional to justify the court making him face the financial consequences of his conduct by ordering him personally to pay the costs of the company's unsuccessful appeal.

In *Goodwood Recoveries Ltd v Breen: Breen v Slater* [2005] EWCA Civ 414, a Michael Slater controlled the claimant debt recovery company and was also a consultant solicitor in a firm which funded proceedings brought by the company under a conditional fee agreement. The costs of the litigation brought by the claimant company would not have been incurred without Mr Slater's involvement. He formulated the claim and brought it, albeit in the name of the company. He was the real party for whose benefit the litigation was brought. He did not fund it, but only because it was funded under a CFA by the firm of solicitors for whom he acted as a consultant and in whose name he undertook the conduct of the litigation. A lack of *bona fides* is not necessarily a condition of claiming against a non-party, if that non-party was really the party for whose benefit the case was conducted. In any event the whole of the costs of the litigation were caused by Mr Slater's dishonesty or impropriety, irrespective of whether he had any *bona fide* belief in the claim. Therefore it was not necessary to decide whether there had to be a causal link between all the costs and the alleged impropriety: it was appropriate to order Mr Slater to pay the whole of the costs and not merely the additional costs which could be attributed directly to improper conduct on his part.

Liquidators and receivers

[40.13]

Although the court has jurisdiction to order a liquidator, as a non-party to proceedings brought by an insolvent company, to pay costs personally, it will only exercise that jurisdiction in exceptional circumstances where there has been impropriety on the part of the liquidator, particularly in view of the fact that the prospective remedy of obtaining an order for security for costs is available to the defendant (see Chapter 19 – Prospective Costs Control – Security for Costs, above). The caution necessary in all cases when an attempt is made to render a non-party liable for costs is all the greater in the case of a liquidator having regard to public policy considerations (*Metalloy Supplies Ltd (in liquidation) v MA (UK) Ltd* [1997] 1 All ER 418, CA). Once again an examination of relevant case law offers pointers to the key components necessary to establish a personal liability on the part of the receivers or liquidators.

The court has been clear that the decision in *Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira (No 2)* (1986) AC 965, H, [1986] 2 All ER 409, HL does not justify the judicial creation of a substantive rule that receivers should be personally responsible for the costs of a successful party: indeed quite the contrary. However, each case will be determined on its own facts.

In *Dolphin Quays Developments Ltd (In Administrative and Fixed Charge Receivership) v Mills* [2007] EWHC 1180 (Ch), the court set out the importance of drawing a distinction between the inevitable functions of receivers and liquidators and the type of conduct necessary to trigger a non-party costs order. Here the applicant applied for an order that the receivers should pay the costs of unsuccessful litigation that had been brought by the claimant company against him. He was a substantial creditor of the claimant company's parent company, and contended that the receivers were the real parties to the unsuccessful litigation and had conducted the litigation for their own benefit and the benefit of the Royal Bank of Scotland which had appointed them. The application was refused with a reminder that non-party costs orders are only to be made in exceptional circumstances and this was an entirely normal case of receivers seeking to enforce a contractual right forming part of the security. The fact that the claim failed might be unusual did not mean it was exceptional. This claim could hardly be classified as 'exceptional'. If an order were made in this case then it would have to be made in all such cases. There was no impropriety or unreasonableness in pursuing the litigation on which a non-party costs order could be founded. Neither the receivers nor the bank could be viewed as the real parties to the litigation. Again the court made the point that the applicant could have applied for security for costs from the company when the litigation was first instigated.

However, that such orders can be made is confirmed by the decision in *Apex Frozen Foods Ltd (in liquidation) v Abdul Ali* [2007] EWHC 469 (Ch). A freezing order was granted subject to the liquidator giving a personal undertaking to the effect that he would be liable for any loss to the claimant if the court found that the order had occasioned such loss and that the claimant should be compensated for it.

The freezing order was subsequently discharged on the basis that there had been improper disclosure of the material facts at the time that the freezing order was granted. The purpose of the undertaking was to ensure that a mechanism was available to make good any detriment suffered by the claimant through the grant of the freezing order if it was subsequently established that there should not have been an injunction. The claimant had incurred costs in relation to the injunction proceedings as a result of the freezing order being obtained in the absence of proper disclosure of material facts. The fact that the liquidator was innocent of any personal conscious failure was insufficient to absolve him from liability when such absolution would produce precisely the injustice which the undertaking was designed to guard against. Accordingly, the claimant was entitled to recover its costs as recoverable damages on the standard basis. The undertaking here was the key element, making out the required 'exceptionality'.

(b) on an assessment under paragraph (a), the court must also assess any costs payable to that party in the proceedings, unless—

(i) the court has issued a default costs certificate in relation to those costs under rule 47.11; or

(ii) the costs are payable in proceedings to which Section II or Section III of Part 45 applies.

(3) The court need not order detailed assessment of costs in the circumstances set out in Practice Direction 46.

(4) Where—

(a) a claimant is a child or protected party; and

(b) a detailed assessment has taken place under paragraph (2)(a),

the only amount payable by the child or protected party is the amount which the court certifies as payable.

(This rule applies to a counterclaim by or on behalf of a child or protected party by virtue of rule 20.3.)

[CPR 46.5]

46.5 Litigants in person

(1) This rule applies where the court orders (whether by summary assessment or detailed assessment) that the costs of a litigant in person are to be paid by any other person.

(2) The costs allowed under this rule will not exceed, except in the case of a disbursement, two-thirds of the amount which would have been allowed if the litigant in person had been represented by a legal representative.

(3) The litigant in person shall be allowed—

(a) costs for the same categories of—

(i) work; and

(ii) disbursements,

which would have been allowed if the work had been done or the disbursements had been made by a legal representative on the litigant in person's behalf;

(b) the payments reasonably made by the litigant in person for legal services relating to the conduct of the proceedings; and

(c) the costs of obtaining expert assistance in assessing the costs claim.

(4) The amount of costs to be allowed to the litigant in person for any item of work claimed will be—

(a) where the litigant can prove financial loss, the amount that the litigant can prove to have been lost for time reasonably spent on doing the work; or

(b) where the litigant cannot prove financial loss, an amount for the time reasonably spent on doing the work at the rate set out in Practice Direction 46.

(5) A litigant who is allowed costs for attending at court to conduct the case is not entitled to a witness allowance in respect of such attendance in addition to those costs.

(6) For the purposes of this rule, a litigant in person includes—

(a) a company or other corporation which is acting without a legal representative; and

(b) any of the following who acts in person (except where any such person is represented by a firm in which that person is a partner)—

(i) a barrister;

(ii) a solicitor;

(iii) a solicitor's employee;

(iv) a manager of a body recognised under section 9 of the Administration of Justice Act 1985; or

(v) a person who, for the purposes of the 2007 Act, is an authorised person in relation to an activity which constitutes the conduct of litigation (within the meaning of that Act).

[CPR 46.6]

46.6 Costs where the court has made a group litigation order

(1) This rule applies where the court has made a Group Litigation Order ("GLO").

(2) In this rule—

"individual costs" means costs incurred in relation to an individual claim on the group register;

"common costs" means—

(i) costs incurred in relation to the GLO issues;

(ii) individual costs incurred in a claim while it is proceeding as a test claim, and

(iii) costs incurred by the lead legal representative in administering the group litigation; and

'group litigant' means a claimant or defendant, as the case may be, whose claim is entered on the group register.

(3) Unless the court orders otherwise, any order for common costs against group litigants imposes on each group litigant several liability for an equal proportion of those common costs.

(4) The general rule is that a group litigant who is the paying party will, in addition to any liability to pay the receiving party, be liable for—

(a) the individual costs of that group litigant's claim; and

(b) an equal proportion, together with all the other group litigants, of the common costs.

(5) Where the court makes an order about costs in relation to any application or hearing which involved—

(a) one or more GLO issues; and

(b) issues relevant only to individual claims,

the court will direct the proportion of the costs that is to relate to common costs and the proportion that is to relate to individual costs.

(6) Where common costs have been incurred before a claim is entered on the group register, the court may order the group litigant to be liable for a proportion of those costs.

(7) Where a claim is removed from the group register, the court may make an order for costs in that claim which includes a proportion of the common costs incurred up to the date on which the claim is removed from the group register.

(Part 19 sets out rules about group litigation.)

[CPR 46.7]

46.7 Orders in respect of pro bono representation

(1) Where the court makes an order under section 194(3) of the 2007 Act—

(a) the court may order the payment to the prescribed charity of a sum no greater than the costs specified in Part 45 to which the party with pro