

Guidance for case managers on the assessment of costs

The timetable

Preparation by the parties

- 1 Where an MPT has made an order for costs, it will follow that the receiving party has a period of 28 days to submit a schedule of their wasted costs together with written submissions supported by evidence. The paying party will have a period of 28 days from the receipt of the receiving party's schedule to prepare and serve their written submissions together with evidence relating to their ability to pay.
- 2 There may be circumstances in which one or both parties may need longer than 28 days. In such circumstances, the party should write to the Case Manager and to the other party without delay. It is within the Case Manager's discretion, if he or she feels it would be just and fair, to allow a party further time to prepare for the costs assessment.
- 3 The Case Manager will consider what efforts have been made by the party seeking more time to comply with the 28 day time frame and will take into account whether the request for more time was itself made in a timely fashion.
- 4 Once it was known that an application for costs was to be made, the MPT will have put parties on notice of the preparation which would need to be carried out in respect of the costs application and the Case Manager will have regard to the whole period of time which has been available to the parties in determining whether or not it would be just and fair to allow further time.
- 5 If the paying party does not respond to the receiving party's schedule, the receiving party may ask the Case Manager to proceed to a determination.
- 6 Where it has been necessary for a party to instruct a new legal team following the MPT's decision on costs, that party may wish to ask for more time. The Case Manager will review whether that legal team has had sufficient time to prepare. The doctor will be expected to have acted with due expedition in instructing a new team and should not delay in instructing new representatives. In all of the

circumstances of the case, the Case Manager will allow further time if it is just and fair to do so.

Where a party seeks to appeal a decision of the MPT

- 7** Where a party seeks to appeal a decision of the MPT, the Case Manager will usually go on to assess the sum of costs to be paid in accordance with the usual timetable. However, in exceptional circumstances, it may be that the Case Manager takes the view that it would be inappropriate to determine the sum of costs to be payable before the appeal is heard. In those circumstances, it would be within the Case Manager's discretion to postpone the costs decision until the outcome of the appeal is known. The Case Manager may postpone the costs decision in this way of his or her own volition, or on application from either party. If the Case Manager is considering a postponement he or she must invite written submissions from both parties. Having made a decision on postponement, he or she will provide both parties with written reasons within 7 days of the decision having been made.

Agreement between the parties

- 8** If the parties are able to reach an agreement as to the sum of costs to be paid to the receiving party, they should write to the Case Manager setting out the terms agreed. The Case Manager has a discretion whether or not to endorse that agreement and order the agreed sum to be paid. If the Case Manager believes the agreement to be unfair he or she will assess costs in the usual way.

The Assessment of Costs

- 9** The Case Manager will assess costs following the determination by the MPT that a paying party has failed to comply with a case management direction or rule, and has behaved unreasonably, resulting in the MPT making a costs order against the paying party. This assessment will be made on the papers.
- 10** The Case Manager should only allow claims in respect of costs which have been incurred as a result of the failure to comply. If a cost would have been incurred in any event, the claim for that particular cost should not be allowed.
- 11** In determining what has been reasonable in a given case, the Case Manager may be assisted by having sight of a copy of the paying party's own costs schedule, if the paying party wishes to provide a copy of the same.

- 12** In assessing costs, the Case Manager will make summary assessments relating to various heads of costs. It would not be appropriate or proportionate for the Case Manager to carry out a detailed assessment of costs.
- 13** The Case Manager will first need to assess whether each item claimed represents work or time which was wasted by reason of the paying party's failure to comply. If the item does not represent wasted time or work it will not be recoverable.
- 14** Having done so, the Case Manager will then assess whether each item was reasonably incurred and whether the sum claimed is reasonable based on the guideline rates (see Annex 1).

The cap

- 15** The Case Manager's assessment of the costs to be paid will be subject to an overall cap. The period for which the case was listed (not the actual length of the hearing) will determine the level of the cap (see Annex 1).

Preparation Costs

- 16** Only preparation which has actually been undertaken may be claimed, not preparation which may have been done at some future time.
- 17** In assessing the costs which are reasonably to be claimed in respect of work carried out by solicitors, trainee solicitors, legal executives, fee earners & paralegals, the Case Manager will have regard to the Guideline Hourly Rates (GHR).
- 18** The GHR will provide guidance for the Case Manager on what is reasonable, but any amount to be awarded remains a matter for the Case Manager's discretion.
- 19** The length of the period for which the case is listed is not always a reliable indicator of how much preparation has been required.

Disbursements including Advocacy Costs

- 20** With all costs, including disbursements, a party has a responsibility to ensure that costs are not unreasonably incurred. The Case Manager will consider all the circumstances in the case when reviewing the costs which have been incurred. Spending should be proportionate. Where, for example, a party has chosen to instruct Queen's Counsel in a straightforward case which could have been presented by suitably experienced junior counsel, the Case Manager may determine

that this was not reasonable and may decide that only a proportion of the cost claimed should be met by the paying party.

- 21** Advocacy costs may be claimed either in respect of hearing days which have occurred unnecessarily (i.e. where the advocate has actually appeared) or in respect of ineffective hearing days where the receiving party has instructed an advocate (i.e. where the advocate has not appeared). When considering whether a sum claimed in respect of advocacy costs is reasonable, the Case Manager will first consider the period for which the case was listed (not the actual duration of the case) and the level of experience of the advocate.
- 22** In the case of ineffective hearings where the advocate has not appeared, it will be for the receiving party to show that they were still required to pay the instructed advocate and have actually incurred costs in paying the advocate. The Case Manager must then assess what proportion of those costs should be awarded. The Case Manager may need to consider the proximity of the date the receiving party was notified that the listed hearing date would not be effective to the hearing date as in some cases, the fee payable to counsel will depend on how much notice was given of the vacated hearing.
- 23** Assessing the appropriate fee for the advocate in a specific case will be a matter for the discretion of the Case Manager, applying the appropriate guideline (see Annex 1), taking into account the features of the case. The Case Manager will consider what fee would be paid to a hypothetical Counsel, with the relevant experience, capable of conducting the case effectively but unwilling or unable to demand the fees charged by Counsel of pre-eminent reputation (*Simpsons Motor Sales (London) Ltd v Hendon Borough Council* [1965] 1 WLR 112).
- 24** Remuneration for solicitor advocates will be assessed in accordance with the normal principles for remuneration of solicitors. It is not appropriate to seek a brief fee and refreshers as if the advocate were a member of the Bar. If the cost of using a solicitor advocate is more than the cost of instructing Counsel, the higher cost is unlikely to be deemed recoverable.
- 25** There is no guideline for experts' fees, as the level of expertise required and the nature of the speciality opined upon will vary dramatically from case to case. In assessing whether or not an expert's fee should be allowed, the Case Manager will consider whether the sum charged is reasonable. Like in all other aspects of the assessment, the Case Manager will also have careful regard as to what proportion, if any, of the cost was wasted by reason of the paying party's failure to comply.
- 26** With all disbursements, the Case Manager will have careful regard as to whether the costs could have been avoided if the receiving party had acted with reasonable care in seeking to mitigate their losses (for example by notifying an expert witness

that the hearing would be ineffective, as soon as possible, rather than delaying unnecessarily).

Self-represented doctors

- 27** There is an absolute cap on the amount recoverable by a self-represented doctor, namely two-thirds of what would be payable to a hypothetical legal team carrying out the same work, plus the reasonable costs of disbursements. Where a doctor acts as his own advocate, he may claim a maximum of two-thirds of what would have been payable to a professional advocate.
- 28** The Case Manager will use the guidelines above to determine the figure which would have been paid to the hypothetical legal representative.
- 29** In respect of preparation costs, the GHR will not apply to work done by a self-representing doctor, as this is a rate for legal professionals. The rate awarded to the self-represented doctor may be either:
- a. an hourly rate to reflect actual financial loss; or
 - b. A fixed hourly charge (presently £18/hr) to represent the lost time.
- 30** For actual financial loss, it is for the self-represented doctor to establish by evidence and on balance of probabilities that a financial loss has been suffered. He must go on to show what the loss actually is, following a three stage test:
- a. he must show that he was liable to be working
 - b. he must then show that he would have been employed and
 - c. he must show how much he would have earned.

Each of the above must be supported by evidence. If he cannot meet the three stages of the test, the hourly rate will be awarded.

- 31** When making an award of costs in favour of a self-represented doctor, the Case Manager will:
- a) Identify a rate, being either the actual financial loss or the fixed hourly rate;
 - b) Assess the time reasonably spent (perhaps with an additional uplift for research and taking into account the fact that a doctor may need longer than a professional lawyer for some aspects of the case preparation, but less for others). When assessing what was reasonable in a given case, the Case Manager will not regard as unreasonable decisions made because of language barriers, cultural differences, or illness;
 - c) Assess the figure a hypothetical legal representative of the appropriate grade would have charged for the same work (as set out in paragraph 29);

- d) Allow the self-represented doctor's claim in full, or if necessary, discount the figure to two-thirds of the amount that would have been charged by the hypothetical legal representative;
- e) Assess & add any disbursements to reach a final figure.

Claims relating to a Mackenzie friend

- 32** Where a self-represented doctor is assisted by a Mackenzie friend, the doctor can make a claim for wasted costs arising out of work he has done himself, but no claim can be made for in respect of work done by the Mackenzie friend.

Claims relating to a "suitable person"

- 33** Where a doctor is formally represented by a "suitable person"¹, rather than by a solicitor or barrister, a claim may be made in respect of wasted costs arising out of work which was done by them after they were given permission to act for the doctor and not before. As with all costs, a party may only claim back that which he was actually liable to pay out, and so where a claim is made for work done by a "suitable person", it is for the doctor to show that there is a genuine written agreement between them that the doctor will pay (or has already paid) the sum claimed.

Costs arising out of the application for costs

- 34** The receiving party is entitled to claim reasonable costs relating to the preparation of the application for costs and the schedule of costs itself.

¹ This means where the doctor is represented by a person who has been permitted under Rule 33(1)(c) to act on his behalf.

Ability to pay

35 Having assessed the sum of costs which has been properly claimed, the Case Manager will turn to the question of the paying party's ability to pay. The presumption is that the paying party is able to pay, unless they can show otherwise. In considering the evidence provided by the paying party, the Case Manager will have regard to what would be just and fair in all the circumstances of the case.

Notification & Payment

36 The Case Manager will provide to both parties a copy of her decision as to the sum to be paid, within 7 days of the decision having been made².

² Challenge of a decision of a Case Manager would be by way of Judicial Review

Annex 1: Guideline rates for advocacy

Introduction

- 1 As is made plain in the guidance to which this document is annexed, it is intended that the costs scheme as a whole will benefit all parties by encouraging compliance with case directions and rules. The costs scheme is not a costs recovery scheme: for this reason, in many cases, there may not be a full recovery of the wasted costs incurred.
- 2 The Case Manager must balance the interests of the paying party and the receiving party, so as to achieve the fairest outcome. This means looking at whether a cost is reasonable in the context of market rates, and also whether it was reasonable for a cost to be paid, taking into account the circumstances of the party who incurred the costs. The purpose of this document is to assist the Case Manager in that task.

Reasonable preparation and advocacy costs

Background

- 3 The purpose of this document is to assist the Case Manager in assessing whether a sum claimed is reasonable.
- 4 The figures below for reasonable advocacy costs take into consideration the rates charged by barristers working out of chambers in Manchester, when instructed to appear in Fitness to Practice hearings at the GMC, for a single case. Rates charged by chambers in Manchester were used in the production of this guideline because hearings are heard in Manchester.
- 5 In all cases, the indemnity principle applies and the Case Manager will not allow a claim for more than the costs actually incurred although this may include the costs of the costs application itself. Accordingly, the Case Manager will have regard to the actual agreement in place as to the solicitor's or advocate's fee, even if this is less than the lower end of the relevant bracket. The figures below are intended to act as a guideline only.

Guideline Figures

- 6 In all cases, the Case Manager will have regard to the figures below. The Case Manager will exercise his or her judgment as to whether there are any features of the case which justify a departure from these guidelines. In so considering the guidelines, the Case Manager will always seek to ensure that the outcome is fair and just.

<i>Duration of Listing</i>	<i>Brief Fee</i>	<i>"Refresher" (Daily Rate for second and subsequent days of the hearing)</i>
<i>1-2 days</i>	<i>£1, 200-£2, 400</i>	<i>£900- £1, 500</i>
<i>2-5</i>	<i>£2, 400-£4, 800</i>	<i>£900- £1, 500</i>
<i>5-7</i>	<i>£4, 800-£6, 000</i>	<i>£900- £1, 500</i>
<i>7-10</i>	<i>£6,000 - £8, 400</i>	<i>£900- £1, 500</i>
<i>10 days+</i>	<i>£8, 400- £12, 000</i>	<i>£900- £1, 500</i>

Where an otherwise unnecessary conference or written advice has been necessary, the appropriate guideline for reasonable costs would be £180/hour. In a particularly complex case this figure could be raised to something in the region of £250. However, regard will be had to the actual costs incurred by the party to the extent that they do not exceed this Guideline rate.

Using the Guideline Figures

- 7** The brackets above only provide a guideline, which must be considered in the context of the facts of the particular case. The Case Manager will consider features such as: the volume of papers, the number and nature of the expert reports, any particular complexities of the case and whether the parties were required to deal with novel points of law. Where the application includes a claim for wasted costs arising out of an adjourned hearing, the proximity of the hearing date and the notice of an adjournment is a relevant factor. It may be appropriate to apply a sliding scale with a higher proportion of the total costs actually incurred being awarded in cases where there is shorter notice.
- 8** There may be circumstances where there is a genuine reason as to why a party felt it necessary to secure the services of an advocate from out of the area, whose fees are higher than those set out in the guideline brackets above. The Case Manager will assess each case on its merits but it will be for the claiming party to provide evidence as to why it was necessary to secure that advocate and whether the costs claimed are in fact reasonable in the circumstances.
- 9** Guidance is given as to what will, in the vast majority of cases, be deemed to be a reasonable “brief fee”. This fee usually remunerates the advocate for reading the papers, preparing the case, attending one case conference (i.e. a meeting between the client and the advocate) and the first day of the main hearing. However, the brief fee will rarely (if ever) be recoverable, as usually the work done in return for the brief fee will be necessary regardless of the failure to comply/unreasonable behaviour and so will not fall to be considered as “wasted” costs. In cases where an additional brief fee (or rereading fee) has been paid, the Case Manager will consider what proportion, if any, of the sums claimed should be allowed.

The overall Cap

- 10** In order to ensure certainty for the parties and to ensure that no party is required to pay a disproportionate amount, an overall cap will apply to sums which can be awarded against a party. This cap does not include costs arising out of the instruction of an expert witness but it does include all other costs and disbursements.

37 The costs awarded will usually be payable within 14 days of the notification of the Case Manager's decision, unless the Case Manager specifies a different period.

<i>Duration of hearing</i>	<i>Total Cap inclusive of VAT</i>
<i>1-2 days</i>	<i>£3, 000</i>
<i>3-5 days</i>	<i>£7, 500</i>
<i>5-7 days</i>	<i>£9, 500</i>
<i>7-10 days</i>	<i>£13, 500</i>
<i>10 days +</i>	<i>£15, 000</i>

N.B. All sums in this guidance are inclusive of VAT.