THE NEW ROLE OF COSTS AND THE INCREASED EXPOSURE OF LAWYERS UNDER THE CIVIL PROCEDURE RULES, 2002

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1. The Civil Procedure Rules, 2002, ("the CPR") will come into effect on January 1, 2003. Rule 1.1 states that the "overriding objective of the CPR is to "deal with cases justly", and it seeks to do this by, among other things, ensuring that cases are dealt with "expeditiously and fairly".

2. This "over riding objective" is taken from the new English Civil Procedure Rules (the "UK CPR")[1] which came into force on April 26, 1999. In what appears to be the first Court of Appeal decision on the UK CPR, ***Ricardo Biguzzi v Rank Leisure Plc***[2] Lord Woolf MR commented on the UK CPR and its effect on previous authorities. He observed:

> ***"Under the CPR the keeping of time limits laid down by the CPR, or by the court itself, is in fact more important than it was. Perhaps the clearest reflection of that is to be found in the overriding objectives contained in Part 1.***
>
> ***Under the court's duty to manage cases, delays such as has occurred in this case, should, it is hoped, no longer happen. The court's management powers should ensure that this does not occur. But if the court exercises those powers with circumspection, it is also essential that parties do not disregard timetables laid down. If they do so, then the court must make sure that the default does not go unmarked. If the courts were to ignore delays***

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[1] It should be noted that while the CPR is based on the same principles and approach as the UK CPR, the details are, in many respects, very different

[2] [1999] 1 WLR, 1926 (26th July, 1999)

which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant.

There are alternative powers which the courts have which they can exercise to make it clear that the courts will not tolerate delays other than striking out cases. In a great many situations those other powers will be the appropriate ones to adopt because they produce a more just result. In considering whether a result is just, the courts are not confined to considering the relative positions of the parties. They have to take into account the effect of what has happened the administration of justice generally. That involves taking into account the effect of the court's ability to hear other cases if such defaults are allowed to occur. It will also involve taking into account the need for the courts to show by their conduct that they will not tolerate the parties not complying with dates for the reasons I have indicated."

3. In the Court below, the trial Judge had stated[3]:

"It is my firm belief that authorities decided under the old procedure should not be taken as binding or probably even persuasive upon this court, any more than looking back to the old rules to interpret the new should be so. This is a new regime."

4. He added[4]:

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[3] at 1930G
[4] at 1930H

> ***"I very much doubt whether any of the authorities can assist, although it is perfectly true, as counsel both pointed out to me, that in some of the later striking out cases, and I do not propose going through them for the reason I have just expressed, there were foreshadowings and expressions of view as to how things might be under the new order.***
>
> ***I have to say that this court's view, after extensive training and a good deal of discussion and thought, is that the new order will look after itself and develop its own ethos and that references to old decisions and old rules are a distraction."***

5. A unanimous Court of Appeal approved that approach. Lord Woolf said[5]:

> ***"I do not accept the criticisms of the judge with regard to his approach to the previous authorities. Indeed far from criticising the judge, I would commend his approach."***

6. In ***Biguzzi***, the Court also pointed out that an important tool in this process will be the Court's powers in relation to costs. Costs will still be in the Court's discretion, but the CPR encourages Judges to use their discretion more creatively and aggressively. In particular:

   a) The CPR sets out circumstances in which costs will not follow the event;

   b) Costs can be ordered against a person not a party;

   c) There is specific provision for "wasted costs orders".

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[5] at 1932B

7. The other important change is that the taxation process has been completely revamped. Bills of Costs should now be simpler, and taxation hearings shorter, but the process itself will be more involved.

Following the Event (64.6)

8. The "general rule" is still that costs will follow the event, but the CPR sets out a number of factors which may persuade the Court to order the successful party to pay some or all of the costs. These include:

(a) the conduct of the parties both before and during the proceedings;

(b) whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;

(c) any payment into court or offer to settle;

(d) whether it was reasonable for a party –

(iii) to pursue a particular allegation; and/or;

(iv) to raise a particular issue;

(e) the manner in which a party has pursued –

(i) that party's case;

(ii) a particular allegation; or

(iii) a particular issue;

(f) whether a claimant who has succeeded in his claim, in whole or in part exaggerated his or her claim.

9. The Court can order a party to pay:

a) a proportion of another party's costs;

b) a stated amount in respect of another party's costs;

c) costs incurred before proceedings had begun;

d) costs relating to particular steps taken in the proceedings.

10. In applying the equivalent rule in the UK CPR, the Courts in the UK have ordered successful parties to pay all or part of the costs of the proceedings, or have made no order to costs. An example is ***Daniels v Walker***,[6] in which the Court of Appeal allowed an appeal by the defendants, but ordered them to pay the costs because of the way in which the matter had been conducted in the Court below. The decision of the House of Lords in ***Christopher Moran Holdings Ltd v. Bairstow and Another***[7] should also be noted. In delivering the judgment of the House, Lord Millett said:

> ***"The respondent lodged a proof for £5.3 million. The appellants rejected the proof, as they were entitled to do, in toto without admitting it in part. At the hearing, and on the basis of its own expert evidence, the respondent reduced the amount of its claim to £3.5 million. The appellants contended for a sum of £200,000. The respondent recovered £1.053 million. This was far less than it claimed, and far more than the smallest sum for which the appellants contended. The judge recognised that this was hostile litigation, and that accordingly it would not be right to order the costs of both parties to be paid out of the assets of the company. At the same time he did not consider it appropriate to award the respondent its costs on the footing that costs should follow the event. Indeed he***

[6] unreported, May 3, 2000 (see the White Book, Spring 2001 vol.1, par. 44.3.1)

[7] [1999] UKHL 2 (4th February, 1999)

said that he could not tell what the event really was. The truth was that the issue had to be determined by the court; and that he had accepted the arguments and evidence of one party on some aspects and those of the other on others. In those circumstances he made no order for costs.

The respondent accepts the judge's ruling that this was hostile litigation, but submits that the ordinary rule should follow. The judge was wrong to say that he could not tell what the event was. The respondent was the successful party, in that it obtained an award higher than it could have obtained without coming to court.

I do not think that this is right, even at the most technical level. The respondent submitted an excessive proof. The appellants were entitled to reject it. The respondent appealed from their rejection of its proof. It was unsuccessful. It did not obtain an order that its proof be admitted. On this footing the respondent was the unsuccessful party. But the judge's order reflected the realities of the situation. Neither party was wholly successful or wholly unsuccessful. In my view the judge's order for costs was well within the exercise of his discretion and should be affirmed".

11. The Courts in Canada have taken a somewhat similar approach. An example is the recent decision in ***Fotheringham v. Fotheringham***[8]. This was a matrimonial matter with numerous disputes. While the plaintiff wife succeeded on the primary issue

[8] [2001] BCSC 1321

(custody of the relevant child) and other issues, the defendant husband succeeded on many others. Mr. Justice Bouck held:

1. A party who substantially succeeds on the matters in dispute at trial is entitled to his or her costs unless otherwise ordered.

2. Substantial success is measured objectively taking into account all the matters in dispute, their weight or importance to the parties and the parties' relative success or failure with respect to those matters.

3. As a rule of thumb, substantial success occurs when the prevailing party succeeds on 75% of the matters in dispute looked at globally.

4. This case is not an instance where costs should be awarded based upon the parties' success or failure on particular issues. The claims and defences are not unique. They would probably involve an undesirable, costly and prolonged dissection of "issues and subissues." Any result would present a difficult task for the registrar on the taxation.

5. Mrs. Fotheringham did not substantially succeed on the matters in dispute. Therefore, each party will bear their own costs.

Pre-emptive costs orders

12. These provisions in the UK CPR have led to applications for "pre-emptive costs orders", that is, applications at the start or at an early stage of proceedings for an order that regardless of the outcome, the applicant should not be ordered to pay costs. In

McDonald v Horn[9], Hoffmann LJ said that the general rule that costs follow the event, presents:

> ***"a formidable obstacle to any pre-emptive costs order as between adverse parties in ordinary litigation. It is difficult to imagine a case falling within the general principle in which it would be possible for a court properly to exercise its discretion in advance of the substantive decision".*** [10]

13. It seems however, that the position may well be different in "public interest" cases. In ***New Zealand Maori Council v AG of New Zealand***[11], Lord Woolf, delivering the judgment of the Privy Council, said:

> ***"There remains the question of costs. Although the appeal is to be dismissed, the applicants were not bringing the proceedings out of any motive of personal gain. They were pursuing proceedings in the interest of taonga which is an important part of the heritage of New Zealand. Because of the different views expressed by the members of the Court of Appeal on the issues raised on this appeal, an undesirable lack of clarity inevitably existed in an important area of the law which it was important that their Lordships examine and in the circumstances their Lordships regard it as just that there should be no order as to the costs on this appeal".***

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[9] [1995] ICR 685
[10] at 694E
[11] [1994]1 AC 466

14. In ***New Zealand Maori***, there had been no application for a pre-emptive costs order, but such an application was made in ***R v Lord Chancellor's Department, ex parte Child Poverty Action Group*** [12]. The applicants relied on the above passage from ***New Zealand Maori***. Mr. Justice Dyson declined, however, to make the order and seemed to doubt whether such an order should be allowed even in public interest cases. He said:

> ***"I should start by explaining what I understand to be meant by a public interest challenge. The essential characteristics of a public law challenge are that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case. It is obvious that many, indeed most judicial review challenges, do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interest of his or her own.***
>
> ***The basic rule that costs follow the event ensures that the assets of the successful party are not depleted by reason of having to go to court to meet a claim by an unsuccessful party. This is as desirable in public law cases as it is in private law cases. As Mr Sales points out, where an unsuccessful claim is brought against a public body, it imposes costs on that body which have to be met out of public funds diverted from the funds available to fulfill its primary public functions."***

[12] [1997] 1 WLR, 347 (6th February, 1998)

15. On the other hand, in another first instance decision, the Irish High Court, while declining to make a pre-emptive costs order, seemed to accept that it might be appropriate to make one in a public interest case. In ***The Village Residents Association Ltd. v. An Bord Pleanala***[13] some residents of an area formed the claimant company for the purpose of seeking an order to prevent the McDonald chain from opening restaurants in their area. Ms. Justice Laffoy had two applications before her and set out her findings as follows:

> ***"The first is the application of McDonalds... seeking an order... that the Applicant should provide security for McDonald's costs in opposing these proceedings.***
>
> ***The second is the Applicant's application ... seeking a pre-emptive costs order.***
>
> ***I am of the view that the criteria for determining whether a question of law of public importance exists which can be extrapolated from the judgment of Morris J. in the Lancefort case - whether the point is of such gravity and importance as to transcend the interests of the parties actually before the court and whether it is in the interests of the common good that the law be clarified so as to enable it to be administered not only in the instant case but in future cases also - are not met."***

16. I have found one case in which a "pre-emptive" costs order was successfully made. In ***Re AXA Equity & Law Life Assurance Society Plc***[14] , an unreported first instance decision from the UK, a party who represented all policyholders opposed a scheme put

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[13] [2000] IEHC 34; [2000] 2 IR 321; [2001] 2 ILRM 22 (23rd March, 2000)
[14] White Book, 44.3.8

forward by the insurance company to reorganize its business. The Court made a pre-emptive costs order, holding that the applicant was performing a public service by enabling the claimant's scheme to be fully tested in Court, and so should not be liable to pay costs regardless of the outcome.

Costs against a Person not a Party (64.9)

17. These costs orders can be made on the Court's own motion or on the application of a party. 14 days notice must be given of the hearing, and the notice must set out the grounds on which the order is sought or proposed.

18. In most cases, "the non party" will either be an Attorney for one of the parties or a non party who has failed to comply with an order of the Court, for example a bank which does not comply with a garnishee order, or someone who does not comply with a disclosure order. There have been a number of cases however, in which it has been argued that a non party who was "behind" the litigation should be liable to pay the costs if the claim fails[15]. In ***Symphony Group plc v Hodgson***[16], Balcombe LJ felt that those arguments should be considered with considerable caution.

19. Balcombe LJ went on to observe however, that such an order might be appropriate in a case:

> **"Where a person has maintained or financed the action. This was undoubtedly considered to be a proper case for the exercise of the discretion by Macpherson of Cluny J in *Singh -v- Observer Limited***

[15] Note that in the UK, the relevant provision was enacted before the UK CPR.
[16] [1994] QB 179, at page 192/3

[1989] 2 All ER 751, where it was alleged that a non-party was maintaining the plaintiff's libel action. However, on appeal the evidence showed that the non-party had not been maintaining the action and the appeal was allowed without going into the legal issues raised by the judge's decision: see *Singh -v- Observer Limited* [1989] 3 All ER 777n."[17]

20. In later cases, the Court of Appeal has commented further on this provision. In ***Metalloy Supplies Ltd v MA (UK) Ltd*** [18] another decision of the Court of Appeal, Millett LJ observed [19]:

> ***"It is not an abuse of the process of the court or in any way improper or unreasonable for an impecunious plaintiff to bring proceedings which are otherwise proper and bona fide while lacking the means to pay the defendant's costs if they should fail. Litigants do it every day, with or without legal aid.***
>
> ***The court has a discretion to make a costs order against a non-party. Such an order is, however, exceptional, since it is rarely appropriate. It may be made in a wide variety of circumstances where the third party is considered to be the real party interested in the outcome of the suit. It may also be made where the third party has been responsible for bringing the proceedings and they have been brought in bad faith or for an ulterior purpose or there is some other conduct on his part which makes it just and reasonable to make the order against him."***

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[17] at page 192A
[18] [1997] 1 WLR 1613
[19] at pp 1619-1620

21. More recently, the Court of Appeal held in ***Fulton Motors Limited v Toyota (GB) Limited***[20] , that where an individual funds litigation by an insolvent litigant, that individual could be liable for the costs, especially where he had a personal interest in the outcome and was aware of the risks involved.

22. Interestingly, it has been argued that orders for costs should be made against lawyers who act for claimants on a *pro bono* basis, on the grounds that the lawyers are in effect, funding the litigation. In ***Tolstoy-Miloslavsky v Aldington***[21], however, Lord Justice Rose rejected such an application, saying [22]:

> ***"It is in the public interest ... for counsel and solicitors to act without fee. The access to justice which this can provide, for example in cases outside the scope of legal aid, confers a benefit on the public."***

23. That protection has been extended to attorneys who act under a conditional fee arrangement. In giving the judgment of the Court of Appeal in ***Hodgson and others v Imperial Tobacco Ltd and others*** [23], Lord Woolf MR, said [24]:

> ***"Just as in the Tolstoy-Miloslavsky case it was made clear that it is in the public interest ... for counsel and solicitors to act without fee, so it must now be taken to be in the public interest ... for counsel and solicitors to act under a C.F.A."***

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[20] unreported (July 23, 1999) White Book, 48.2.1
[21] [1996] 1 WLR 736
[22] at page 746B
[23] [1998] 1 WLR 1056
[24] at page 1067F

Wasted Costs Orders (64.13)

24. Rule 64.13 provides that the Court can order an attorney to pay any "wasted costs", which are defined as any costs incurred by a party:

    a) As a result of any improper, unreasonable or negligent act or omission on the part of any attorney-at-law or any employee of such attorney-at-law; or

    b) Which, in the light of any act or omission occurring after they were incurred, the court considers it unreasonable to expect that party to pay.

25. There must be a separate hearing, for which 7 days notice is given to the attorney, and the notice must set out the grounds on which the order is sought or proposed. These provisions will, to some extent, put attorneys in a better position, since they require that an attorney must get notice and an opportunity to respond before an order for costs is made against him. In the past, such orders have been made without notice or an opportunity to make submissions.

26. It is important to note that the acts or omissions referred to in "(a)" are not limited to failing to turn up in Court or filing documents late, although those are perhaps the most obvious examples. The English Courts have interpreted these provisions broadly, and some may say, enthusiastically. The equivalent provisions were enacted in the UK prior to the UK CPR and have been applied in hundreds of cases[25]. The principles upon which these provisions

[25] A recent review of the relevant decisions can be found in Hamilton v Al Fayed [2002] EWCA Civ 665 (17th May, 2002)

are to be applied have been established by a trilogy of Court of Appeal decisons: **Ridehalgh v Horsefield** [26], **Tolstoy-Miloslavsky v Aldington** [27], and **Wall v Lefever** [28]. They include:

> 26.1. Improper conduct is that which would be so regarded ***"according to the consensus of professional (including judicial) opinion."*** Unreasonable conduct ***"aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. ... The acid test is whether the conduct permits of a reasonable explanation."*** Negligent conduct is to be understood ***"in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession."*** (all from ***Ridehalgh***)
>
> 26.2. ***"Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject their advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. ... It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court. ... It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not***

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[26] [1994] Ch 205
[27] [1996] 1 WLR 736
[28] (unreported, transcript dated 14th July 1997)

hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it." (all from ***Ridehalgh***)

26.3. ***"A solicitor does not abdicate his professional responsibility when he seeks the advice of counsel." (Ridehalgh)***. But the fact that both leading and junior counsel in ***Tolstoy*** settled the statement of claim ***"did not exonerate the solicitors from their obligation to exercise their own independent judgment to consider whether the claim could properly be pursued; they were not entitled to follow counsel blindly."***

26.4. However, ***"the jurisdiction to make a wasted costs order must be exercised with care and only in a clear case." (Tolstoy). "It should not be used to create subordinate or satellite litigation, which is as expensive and as complicated as the original litigation. It must be used as a remedy in cases where the need for a wasted costs order is reasonably obvious. It is a summary remedy which is to be used in circumstances where there is a clear picture which indicates that a professional adviser has been negligent etc." (Wall v Lefever)***

27. In ***Arthur J.S Hall and Co. v. Simons and Barratt v. Ansell and Others v. Scholfield Roberts and Hill*** [29], Lord Steyn, who wrote the leading judgment is the House of Lords, quoted with approval, Sir Thomas Bingham M.R. in ***Ridehalgh***:[30]

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[29] [2000] 3 All ER 673 (20th July, 2000)
[30] at page 683 d-f

"Any judge who is invited to make or contemplates making an order arising out of an advocate's conduct of court proceedings must make full allowance for the fact that an advocate in court, like a commander in battle, often has to make decisions quickly and under pressure, in the fog of war and ignorant of developments on the other side of the hill. Mistakes will inevitably be made, things done which the outcome shows to have been unwise. But advocacy is more an art than a science. It cannot be conducted according to formulae. Individuals differ in their style and approach. It is only when, with all allowances made, an advocate's conduct of court proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order against him."

28. In the same case Lord Hoffmann went on to recognize, however that there are many cases in which wasted costs orders have been properly made. He said:[31]

"There is no doubt that the jurisdiction has given rise to problems, particularly in exercising it with both fairness and economy. But I have found no suggestion that it has changed standards of advocacy for the worse. On the contrary. In Fletamentos Maritimos S.A. v. Effjohn International BV (unreported) 10 December 1997; Court of Appeal (Civil Division) Transcript No. 2115 of 1997 the Court of Appeal made a wasted costs order against a firm of solicitors who had instructed counsel to made a hopeless application for leave to appeal. Simon Brown L.J. ended his judgment by saying:

"Nothing in this judgment should, or I believe will, deflect legal representatives, on instructions, from

[31] at page 695 c-d

> ***vigorously pursuing and arguing the most difficult cases. An argument, however unpromising, is perfectly properly advanced (not least on an application for leave to appeal) provided only and always that it is respectable and is not being pursued for reasons other than a genuine belief in the possibility of its success. If our order today were to discourage some of the more absurd arguments with which this court is sometimes plagued, I for one would not be regretful."***

29. Lord Hope of Craighead added: [32]

> ***"It may be said that recent reforms to the system of civil justice in England and Wales have greatly reduced the risk of disruption to the administration of justice by the taking of unnecessary points and the development of unhelpful and time-wasting arguments by advocates. As my noble and learned friend Lord Hoffmann has pointed out, the new Civil Procedure Rules have given the judges a battery of powers to keep the resources which the court expends on a case proportionate to its value and importance".***

30. The Court of Appeal upheld a wasted costs order in ***Fletamentos Maritimos sa v. Effjohn International bv*** [33]. The Court held:

> ***"To my mind "a clear picture" does emerge in this case of solicitors lending themselves inventively and enthusiastically to litigation in which they should have been reluctant to be involved at all. I do not say, against the background of a whole series of adverse decisions and High Court orders for costs made against Marflet whilst Herbert Smith were still instructed, that Marflet***

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[32] at page 717 a-b
[33] [1997] EWCA Civ 2947 (10th December, 1997)

themselves were not perfectly happy to litigate every stage of this dispute to its uttermost limits. In that sense, therefore, this application was no more solicitor-led than client-led. But I have the clearest impression that Zaiwallas saw their role essentially as one of assisting their clients at all costs to stave off the evil day of judgment, meanwhile taking all possible points in an attempt to disrupt the arbitral process and achieve, if possible, a more compliant Tribunal. I have no doubt too that they were intent on trying to build up a plausible basis upon which Marflet could ultimately seek to challenge the several awards in enforcement proceedings in Spain. These, in short, were wrecking tactics, designed rather to obstruct than to further the fair disposal of this arbitration. This litigation permitted of no reasonable explanation. It failed "the acid test." It amounted to an abuse of process."

31. The Privy Council (in an appeal from New Zealand) had to consider the issue in ***Harley v. Robert McDonald Glasgow Harley v. Robert McDonald*** [34]. Lord Hope of Craighead delivered the judgment of the Committee and observed in the course of it that:

"As a general rule allegations of breach of duty relating to the conduct of the case by a barrister or solicitor with a view to the making of a costs order should be confined strictly to questions which are apt for summary disposal by the court. Failures to appear, conduct which leads to an otherwise avoidable step in the proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples".

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[34] [2001] UKPC 20 (10th April, 2001)

32. Like orders against a non-party, wasted costs orders can be made on the Court's own motion or on the application of a party. The Courts in the UK have held, however, that such orders are best left until after the end of the trial.[35]

Quantification of Costs

33. The CPR uses a number of new terms and concepts in relation to costs, the more important of which are set out in Appendix 2. Apart from agreement, there are three ways in which the amount payable can be determined. These are:

(a) If **Fixed Costs** are payable;

(b) **Summary Assessments** by the Court;

(c) If the Receiving Party elects to receive **Basic Costs**;

(d) **Taxation**.

34. There are three types of **Fixed Costs,** and all are set out in Appendix A of the CPR. They will be payable either on the commencement of a claim, on the entry of judgment or on the enforcement of a judgment. In those cases, there is no need for a separate order, or a taxation or even a Certificate by the Registrar. One can simply include the relevant sum from Appendix A in a default judgment or in a writ of possession, for example.

35. Rule 65.9 (**Summary Assessment** of Costs) codifies an inherent power which the Court always had but rarely used. When making an order for costs, the Court can itself quantify the amount of

[35] Film Lab Systems International Limited v Pennington [1994] 4 ALL ER, 673

costs to be paid. It should be noted that given the wording of 65.9 (2), this can now only be done on an application by the Receiving Party. Therefore if the Receiving Party does not choose to make such an application, it is submitted that the Court cannot do so on its own motion or on the application of the Paying Party.

36. As is the case under the old rules, a Receiving Party can always choose to accept **Basic Costs** instead of going to a taxation. The procedure is similar to that which applied to "Table A" under the old rules except that Rule 65.10 does not envisage the Receiving Party simply including the sum for costs in the Court's order. The receiving party must file a "**Basic Costs** Certificate" (Form 25). Upon being signed by the Registrar, like all other costs certificates, it may be enforced in the same way as a judgment of the Court.

37. If the Registrar is not satisfied that the Certificate is in order, she can require that the Receiving Party attend before her or direct a taxation. Presumably, the Registrar will only take the latter course when the former has been attempted without success.

38. If the Registrar does sign the Certificate, a Paying Party who disputes its accuracy can apply to the Registrar for its amendment.

39. As indicated earlier, there is a very significant change in the procedure for **Taxation**. Paying parties are required to file "points of dispute", in effect, a "defence" to a bill of costs. If one is not filed, the Receiving Party will be entitled to a default taxation of the bill as laid, and if one is filed, the taxation will be limited to the issues raised in the Paying Party's "points of dispute". The Taxation timetable is set out in Appendix 1 of this paper.

Number of Attorneys (65.11)

40. The Rules in relation to the number of attorneys for whom costs will be allowed can be summarized as follows:

    a. A party can never recover costs for more attorneys than actually attended court.

    b. The Rules speak of "attendance" in Court and not "appearance" and therefore make no distinction between an attorney who "appears" robed as Counsel and one who does not.

    c. The presumption is that the appropriate number of attorneys for each party at a trial is 2 and in chambers, 1.

    d. The trial Judge or the taxing Registrar can allow fees for more attorneys for either a trial or a matter in chambers.

    e. If the Judge makes no order, the taxing Registrar can allow one attorney only for a trial if she is satisfied that the presumption is rebutted.

41. The Registrar's decision as to the amount to be allowed in a taxation will usually be based on three things: the number of attorneys, the hourly rate allowed to each, and the number of hours approved for each. In resolving these issues, the Registrar will consider the factors set out in 65.17 (3), but the Registrar cannot allow less than Basic Costs.

Appeals Against Taxation (65.28)

42. Only a Paying Party or a Receiving Party who has filed points of dispute can appeal against the Registrar's decision at a taxation. Appeals will be to a Judge in Chambers and must be filed within 14 days. Like points of dispute, an appeal notice must specify each item which is being contested and the grounds of the objection.

Form and Content of Bills of Costs (65.18)

43. Bills of costs need not be in any particular form, and in particular, need not list every document prepared, every meeting attended, etc. They need only contain "sufficient detail and information to justify the amount being claimed by the receiving party". Indeed, the CPR specifically provides that if a bill contains more detail than necessary, the Registrar may disallow all or part of the costs of taxation.

Offers to Settle

44. Part 34 of the CPR deals with offers to settle, and provides that the Court may make an order for costs against a successful party who refused an offer to settle. It is important to note the following:

45.1 A payment into court is not necessary.

45.2 The offer can be made by any party to the litigation.

45.3 Offers made before the litigation commenced will also be relevant.

Conclusion

45. Issues relating to costs have traditionally been the poor cousins in the civil procedure family. Most lawyers know little about the process, and care less. The CPR creates a new regime, in which costs will play an integral role. Lawyers will be well advised to familiarize themselves with these provisions.

B. St. Michael Hylton
November 16, 2002

Appendix 1

Taxation Timeline

	Steps to be taken	Date
1	File & Serve Bill of Costs	Within 3 months of judgment
2	Points of Dispute	28 days after 1
3	Notice of Taxation	Within 3 months of 2
3A	Default Costs Certificate (if no points of dispute)	28 days after 1
4	Interim Costs Certificate	Anytime after 3
5	Taxation	After 14 days notice
6	Final Costs Certificate	At or within 14 days of taxation
7	Notice of Appeal	14 days after decision
8	Hearing of appeal by a Judge in Chambers	After 14 days notice
9	Payment of Costs	14 days after 3A, 4 or 6

N.B.

1. In the CPR, all days are "clear days" (3.2(2))

2. When calculating 7 days or less, weekends and holidays are not counted. (3.2 (4))

3. An Attorney must notify the client in writing about an order for costs within 7 days of the order being made, if the client was not present (64.8).

Appendix 2

Glossary of Terms

Basic Costs (65.10 /Appendix B/ Form 25).

Minimum costs, which a Receiving Party may elect to receive (Equivalent of old Table A).

Default Costs (65.20 /Form 26).

Automatically applicable when Points of Dispute not filed.

Paying/Receiving Party

The real winner and loser!

Points of Dispute (65.20)

In effect, a "defence" to the bill of costs.

Wasted Costs (64.13)

When the attorney pays.

Fixed Costs (65.4-65.6 / Appendix A)

Fixed sums on commencement of proceedings, default judgment or enforcement of judgment.

Final Costs (65.25/ Form 28)

The Certificate signed by the Registrar after Taxation.

Interim Costs (65.24/ Form 27)

Sum ordered to be paid while taxation pending.

Special Costs (64.12)

Actually part of the Judge's order and not a separate document (equivalent of the old certificate for counsel).

Summary Costs (65.9)

The Judge can fix the amount of costs payable.