

# **PRACTICE DIRECTION (COSTS IN CRIMINAL PROCEEDINGS)**

## **CONTENTS**



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### **PART 1: GENERAL**

- 1.1 Scope
- 1.2 The Power to Award Costs
- 1.3 Extent of Orders for Costs from Central Funds
- 1.4 Amount of Costs to be Paid
- 1.5 Criminal Procedure Rules

### **PART 2: COSTS OUT OF CENTRAL FUNDS**

- 2.1 In a Magistrates' Court
- 2.2 In the Crown Court
- 2.3 In the High Court
- 2.4 In the Court of Appeal (Criminal Division)
- 2.5 Costs of Witness, Interpreter or Medical Evidence
- 2.6 Private Prosecutor's costs from Central Funds
- 2.7 Procedure

### **PART 3: AWARDS OF COSTS AGAINST DEFENDANTS**

### **PART 4: OTHER COSTS ORDERS**

- 4.1 Costs Incurred as a Result of Unnecessary or Improper Acts or Omissions
- 4.2 Costs Against Legal Representatives-Wasted Costs
- 4.3 Disallowance of Criminal Legal Aid Costs
- 4.4 Very High Cost Cases
- 4.5 Wasted costs orders in the High Court
- 4.6 Awards of Costs against Solicitors under the Court's Inherent Jurisdiction
- 4.7 Awards of costs against Third Parties

### **PART 5: ASSESSMENT OF COSTS**

- 5.1 Assessment of defence costs out of central funds
- 5.2 Appeals to a Costs Judge
- 5.3 Supporting Papers
- 5.4 Time Limits
- 5.5 Appeals to the High Court

**PART 6: CONTRIBUTION ORDERS AND RECOVERY OF DEFENCE COSTS ORDERS**

- 6.1 Contribution Orders in the Crown Court
- 6.2 Recovery of Defence Costs Orders on appeal

**PART 7: COSTS IN RESTRAINT, CONFISCATION OR RECEIVERSHIP PROCEEDINGS**

- 7.1 The Order for Costs
- 7.2 Assessment of Costs
- 7.3 Remuneration of a Receiver
- 7.4 Procedure on Appeal to the Court of Appeal

**PART 8: ADVICE ON APPEAL TO THE COURT OF APPEAL (CRIMINAL DIVISION)**

**PART 9: VAT**

- 9.2 VAT Registration Number
- 9.3 Action Before Assessment
- 9.4 Costs Where VAT Rate Changes
- 9.5 Apportionment
- 9.6 Disbursements
- 9.7 Legal Aid
- 9.8 Tax Invoice
- 9.9 Appeal
- 9.10 Vouchers
- 9.11 Solicitors and other litigants acting in person
- 9.12 Government departments

**PART 10: REVOCATIONS**

- Schedule 1** Relevant Regulations Relating to Costs in Criminal Proceedings
- Schedule 2** Costs from Central Funds and Relevant Statutory Authorities
- Schedule 3** Form of Notice of Appeal to a Costs Judge
- Schedule 4** Form of Certificate (VAT)
- Schedule 5** Form of application for a Costs Order

## **PART 1: GENERAL**

### **1.1 Scope**

- 1.1.1 This direction shall have effect in Magistrates' Courts, the Crown Court, the High Court and the Court of Appeal (Criminal Division) where the court, in the exercise of its discretion, considers an award of costs in criminal proceedings<sup>1</sup> or deals with criminal legal aid and recovery of defence costs orders. The provisions in this practice direction come into force immediately.

### **1.2 The Power to Award Costs**

- 1.2.1 The powers enabling the court to award costs in criminal proceedings are primarily contained in Part II of the Prosecution of Offences Act 1985 ("the Act") (sections 16 to 19B), the Access to Justice Act 1999 and the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (in relation to funded clients) and in regulations made under those Acts including the Costs in Criminal Cases (General) Regulations 1986, as amended ("the General Regulations"). References in this direction to sections and regulations by number alone are to the sections and regulations so numbered in the Act and the General Regulations unless otherwise stated. Schedule 1 below sets out details of the relevant regulations.
- 1.2.2 Sections 16 and 16A of the Act make provision for the award of defence costs out of Central Funds (a defendant's costs order). Section 17 provides for an award of costs to a private prosecutor out of Central Funds. Section 18 gives power to order a convicted defendant or an unsuccessful appellant to pay costs to the prosecutor. Section 19(1) of the Act and Regulation 3 of the General Regulations provide for awards of costs between parties in respect of unnecessary or improper acts and omissions. Section 19A provides for the court to disallow or order a legal or other representative of a party to the

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<sup>1</sup> As defined by the Access to Justice Act 1999 Section 12(2) and Regulation 3 of the Criminal Defence Service (General) (No.2) Regulations 2001.

proceedings to meet wasted costs. Regulations 3A to 3D of the General Regulations govern the making of wasted costs orders. Section 19B provides for the award of costs against third parties. Regulations 3E to 3I of the General Regulations apply to third party costs orders.

1.2.3 The Senior Courts also have the power under their inherent jurisdiction over officers of the court to order a solicitor personally to pay costs thrown away. The inherent jurisdiction of the court should be invoked only to avoid a clear injustice.<sup>2</sup> Where the legislature has stepped in with particular legislation in a particular area (eg, the wasted costs provisions) then, within that particular area, the existing inherent jurisdiction will be ousted or curtailed, at any rate in so far as the particular legislation is negative in character.<sup>3</sup> Given the present provisions relating to costs, the exercise of the inherent jurisdiction will occur only in the rarest of circumstances.

1.2.4 Where the court orders a defendant to pay costs to the prosecutor; orders one party to pay costs to another party or a third party to pay costs; disallows or orders a legal or other representative to meet any wasted costs; or makes a defendant's costs order other than for the full amount; the order for costs must specify the sum to be paid or disallowed. Where the court is required to specify the amount of costs to be paid it cannot delegate the decision, but may require the appropriate officer of the court to make enquires to inform the court as to the costs incurred, and may adjourn the proceedings for enquiries to be made if necessary. The rules provide that a party who has incurred wasted costs should provide assistance to the court as to the amount involved: Criminal Procedure Rules, rule 76.8(5), 76.9(5).

### **1.3 Extent of Orders for Costs from Central Funds**

1.3.1 Where a court orders that the costs of a defendant, appellant or private prosecutor should be paid from Central Funds, the order will be for such amount as the court considers sufficient reasonably to compensate the party

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<sup>2</sup> *Symbol Park Lane Ltd v Steggle Palmer* [1985] 1 WLR 668 CA

<sup>3</sup> *Shiloh Spinners Ltd v Harding* [1973] AC 691; *Harrison v Tew* [1989] QB 307 HL

for expenses incurred by him in the proceedings; unless the court considers that there are circumstances that make it inappropriate to allow the full amount in which event it will allow such lesser sum as it considers just and reasonable. This will include the costs incurred in the proceedings in the lower courts unless for good reason the court directs that such costs are not included in the order, but it cannot include expenses incurred which do not directly relate to the proceedings themselves, such as loss of earnings. Where the party in whose favour the costs order is made is legally aided, he will only recover his personal costs: see section 21(4A)(a) of the Act. Schedule 2 below sets out the extent of availability of costs from Central Funds and the relevant statutory authority.

- 1.3.2 If a defendant's costs order includes legal costs (sums paid for advocacy, litigation services or experts' fees) the order must include a statement to that effect.

#### **1.4 Amount of Costs to be Paid**

- 1.4.1 If the court does not fix the amount of costs to be paid out of central funds, the costs will be determined in accordance with the General Regulations by the appropriate authority. The appropriate authority will calculate the amount payable in respect of legal costs at such rates and scales as are prescribed by the Lord Chancellor. Where the court makes a defendant's costs order, or an order in favour of a private prosecutor, but is of the opinion there are circumstances which make it inappropriate that the person in whose favour the order is made should recover the full amount of the costs, the court may assess the lesser amount that would in its opinion be just and reasonable, and specify that amount in the order. If the court is not in a position to specify the amount payable, the Judge may make remarks which the appropriate authority will take into account as a relevant circumstance when determining the costs payable.
- 1.4.2 In respect of proceedings commenced on or after 1 October 2012 legal costs (sums paid for advocacy, litigation services or experts' fees) may only be

included in a defendant's costs order to a defendant who is an individual and only in proceedings in a magistrates' court, appeals against conviction or sentence from a magistrates' court to the Crown Court and appeals to the Court of Appeal (i) against a verdict of not guilty by reason of insanity (ii) against a finding under the Criminal Procedure (Insanity) Act 1964 that the appellant is under a disability or that he did the act or made the omission charged or (iii) under section 16A of the Criminal Appeal Act 1968 (appeals against order made in cases of insanity or unfitness to plead).

1.4.3 Where legal costs may be allowed, if the court fixes the amount to be paid to a defendant under section 16(6C) of the Act or under sections 62A(4) or 135A(4) of the Extradition Act 2003 it must calculate any amounts to be allowed in respect of legal costs in accordance with rates and scales prescribed by the Lord Chancellor.

1.4.4 Rules 76.2(6) and (7) of the Criminal Procedure Rules contain general rules about the amount of an award of costs that apply subject to any statutory limitation.

## **1.5 Criminal Procedure Rules**

1.5.1 Part 76 of the Criminal Procedure Rules contains rules governing the procedure on the exercise of any of the powers to award costs listed in rule 76.1. They include the powers contained in the Act and in the General Regulations. Part 61 of the Criminal Procedure Rules contains rules about the award of costs in restraint or receivership proceedings under the Proceeds of Crime Act 2002.

1.5.2 The procedure for the assessment of costs under rule 76.11 of the Criminal Procedure Rules applies where the court makes an award between parties in one of the cases listed in rule 76.11(1). The assessment of an award of costs out of central funds is governed by substantially similar procedures under (i) the General Regulations or (ii) the Serious Crime Act 2007 (Appeals under Section 24) Order 2008.

## **PART 2: COSTS OUT OF CENTRAL FUNDS**

### **2.1 In a Magistrates' Court**

2.1.1 Where an information laid before a justice of the peace charging a person with an offence is not proceeded with; a Magistrates' Court enquiring into an indictable offence as examining justices determines not to commit the accused for trial; or a Magistrates' Court dealing summarily with an offence dismisses the information; the court may make a defendant's costs order. An order under section 16 of the Act may also be made in relation to breach of bind-over proceedings in a Magistrates' Court or the Crown Court: regulation 14(4) of the General Regulations. Whether to make such an order is a matter in the discretion of the court in the light of the circumstances of each particular case. A defendant's costs order should normally be made unless there are positive reasons for not doing so, for example, where the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him was stronger than it was. Where the defendant has been acquitted on some counts but convicted on others the court may make an order that only part of the costs be paid: see paras 2.2.1 and 2.2.2 below. The court when declining to make a costs order should explain, in open court, that the reason for not making an order does not involve any suggestion that the defendant is guilty of any criminal conduct but the order is refused because of the positive reason that should be identified.<sup>4</sup> Where the court considers that it would be inappropriate that the defendant should recover all of the costs properly incurred, either the amount allowed must be specified in the order or the court may describe to the appropriate authority the reduction required.

2.1.2 In respect of proceedings in a magistrates' court commenced on or after 1 October 2012 legal costs (sums paid for advocacy, litigation services or

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<sup>4</sup> Hussain v UK (2006) 43 EHRR 22 (ECtHR)

experts' fees) may only be allowed to a defendant who is an individual. Where legal costs may be allowed, if the court fixes the amount to be paid under section 16(6C) of the Act or under sections 62A(4) or 135A(4) of the Extradition Act 2003 it must calculate any amounts allowed in respect of legal costs in accordance with the rates and scales prescribed by the Lord Chancellor. If the court does not fix the amount of costs to be paid out of central funds, the costs will be determined by the appropriate authority in accordance with the General Regulations and any legal costs allowed will be calculated at the prescribed rates and scales.

## **2.2 In the Crown Court**

2.2.1 Where a person is not tried for an offence for which he has been indicted, or in respect of which proceedings against him have been sent for trial or transferred for trial, or has been acquitted on any count in the indictment, the court may make a defendant's costs order in his favour. Whether to make such an order is a matter for the discretion of the court in the light of the circumstances of the particular case. A defendant's costs order should normally be made whether or not an order for costs between the parties is made, unless there are positive reasons for not doing so, for example, where the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him was stronger than it was. The court when declining to make a costs order should explain, in open court, that the reason for not making an order does not involve any suggestion that the defendant is guilty of any criminal conduct but the order is refused because of the positive reason that should be identified.<sup>5</sup> Where the court considers that it would be inappropriate that the defendant should recover all of the costs properly incurred, either the lesser amount must be specified in the order, or the court must describe to the appropriate authority the reduction required.

2.2.2 Where a person is convicted of some count(s) in the indictment and

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<sup>5</sup> Hussain v UK (2006) 43 EHRR 22 (ECtHR)



acquitted on other(s) the court may exercise its discretion to make a defendant's costs order but may order that only a proportion of the costs incurred be paid. The court should make whatever order seems just having regard to the relative importance of the charges and the conduct of the parties generally. The proportion of costs allowed must be specified in the order.

2.2.3 The Crown Court may make a defendant's costs order in favour of a successful appellant: see section 16(3) of the Act.

2.2.4 In respect of proceedings in the Crown Court commenced on or after 1 October 2012 legal costs (sums paid for advocacy, litigation services or experts' fees) may only be allowed under a defendant's costs order to a defendant who is an individual and only in respect of appeals against conviction or sentence from a magistrates' court. Legal costs may not be allowed in respect of proceedings on indictment. Where legal costs may be allowed, if the court fixes the amount to be paid under section 16(6C) of the Act it must calculate any amounts allowed in respect of legal costs in accordance with the rates and scales prescribed by the Lord Chancellor. If the court does not fix the amount of costs to be paid out of central funds, the costs will be determined by the appropriate authority in accordance with the General Regulations and any legal costs allowed will be calculated at the prescribed rates and scales.

### **2.3 In the High Court**

2.3.1 The Divisional Court of the Queen's Bench Division may make a defendant's costs order on determining proceedings in a criminal cause or matter: see section 16(5)(a) of the Act.

### **2.4 In the Court of Appeal (Criminal Division)**

2.4.1 A successful appellant under Part I of the Criminal Appeal Act 1968 may be

awarded a defendant's costs order. Orders may also be made on an appeal against an order or ruling at a preparatory hearing (section 16(4A) of the 1985 Act), to cover the costs of representing an acquitted defendant in respect of whom there is an Attorney Generals' reference under section 36 of the Criminal Justice Act 1972 (see section 36(5)(5A) of the 1972 Act) and in the case of a person whose sentence is reviewed under section 36 of the Criminal Justice Act 1988 : see section 36 of, and paragraph 11 of Schedule 3 to, the 1988 Act.

2.4.2 On determining an application for leave to appeal to the Supreme Court under Part II of the Criminal Appeal Act 1968, whether by prosecutor or by defendant, the court may make a defendant's costs order.

2.4.3 In considering whether to make such an order the court will have in mind the principles applied by the Crown Court in relation to acquitted defendants: see paras.2.2.1 and.2.2.2 above.

2.4.4 In respect of appeals where the application for leave to appeal is made or notice of appeal given on or after 1 October 2012 legal costs (sums paid for advocacy or litigation services or experts' fees) may only be allowed under a defendant's costs order to a defendant who is an individual and only in appeals (i) against a verdict of not guilty by reason of insanity (ii) against a finding under the Criminal Procedure (Insanity) Act 1964 that the appellant is under a disability or that he did the act or made the omission charged or (iii) under section 16A of the Criminal Appeal Act 1968 (appeal against order made in cases of insanity or unfitness to plead). If the court does not fix the amount of costs to be paid out of central funds, the costs will be determined in accordance with the General Regulations by the appropriate authority. The appropriate authority will calculate the amount payable in respect of legal costs at such rates and scales as are prescribed by the Lord Chancellor.

## **2.5 Costs of Witness, Interpreter or Medical Evidence**

- 2.5.1 The costs of attendance of a witness required by the accused, a private prosecutor or the court, or of an interpreter required because of the accused's lack of English or an intermediary under section 29 of the Youth Justice and Criminal Evidence Act 1999, or of an oral report by a medical practitioner are allowed out of Central Funds unless the court directs otherwise: see regulation 16(1) of the General Regulations. In the case of a witness if, and only if, the court makes such a direction can the expense of the witness be claimed as a disbursement for the purposes of criminal legal aid. A witness includes any person properly attending to give evidence whether or not he gives evidence or is called, but it does not include a character witness unless the court has certified that the interests of justice require his attendance: see section 21(1) of the Act.
- 2.5.2 The Crown Court may order the payment out of Central Funds of such sums as appear to be sufficient reasonably to compensate any medical practitioner for the expenses, trouble or loss of time properly incurred in preparing and making a report on the mental condition of a person accused of murder: see section 34(5) of the Mental Health (Amendment) Act 1982.

## **2.6 Private Prosecutor's Costs from Central Funds**

- 2.6.1 There is no power to order the payment of costs out of Central Funds of any prosecutor who is a public authority, a person acting on behalf of a public authority, or acting as an official appointed by a public authority as defined in the Act. In the limited number of cases in which a prosecutor's costs may be awarded out of Central Funds, an application is to be made by the prosecution in each case. An order should be made save where there is good reason for not doing so, for example, where proceedings have been instituted or continued without good cause. This provision applies to proceedings in respect of an indictable offence or proceedings before the High Court in respect of a summary offence. Regulation 14(1) of the General Regulations extends it to certain committals for sentence from a Magistrates' Court.

- 2.6.2 Where the court is of the opinion that there are circumstances which make it inappropriate to award the full amount of costs out of Central Funds, the order must be for the payment of such lesser amount as is just and reasonable. Where the court considers it appropriate to do so, and the prosecutor agrees the amount, it must fix the amount. Otherwise it must make an order for such costs as are just and reasonable, describing in the order any reduction in the amount of costs required, and the costs will, be determined by the appropriate authority in accordance with the General Regulations.
- 2.6.3 For the purposes of an order under Section 17 of the Act the costs of the prosecutor are taken to include the expense of compensating any witness for the expenses, travel and loss of time properly incurred in or incidental to his attendance.
- 2.6.4 If there has been misconduct a private prosecutor should not be awarded costs out of Central Funds.<sup>6</sup>
- 2.6.5 Where the conduct of a private prosecution is taken over by the Crown Prosecution Service the power of the court to order payment of prosecution costs out of Central Funds extends only to the period prior to the intervention of the CPS.

## **2.7 Procedure**

- 2.7.1 Rule 76.4, and the general rules in Section 1 of Part 76 of the Criminal Procedure Rules, apply to the exercise of the court's powers to award costs out of central funds.

## **PART 3: AWARDS OF COSTS AGAINST DEFENDANTS**

- 3.1. A Magistrates' Court or the Crown Court may make an order for costs

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<sup>6</sup> *R v Esher and Walton Justices ex p. Victor Value & Co Ltd* [1967] 111 Sol Jol 473.

against a person convicted of an offence before it or in dealing with it in respect of certain orders as to sentence specified in regulation 14(3) of the General Regulations. The Crown Court may make an order against an unsuccessful appellant and against a person committed by a Magistrates' Court in respect of the proceedings specified in regulation 14(1)(2). The court may make such order payable to the prosecutor as it considers just and reasonable: section 18(1) of the Act.

- 3.2 In a Magistrates' Court where the defendant is ordered to pay a sum not exceeding £5 by way of fine, penalty, forfeiture or compensation the court must not make a costs order unless in the particular circumstances of the case it considers it right to do so: section 18(4) of the Act. Where the defendant is under 18 the amount of any costs awarded against him by a Magistrates' Court must not exceed the amount of any fine imposed on him: section 18(5).
- 3.3 The Court of Appeal (Criminal Division) may order an unsuccessful appellant to pay costs to such person as may be named in the order. Such costs may include the costs of any transcript obtained for the proceedings in the Court of Appeal: section 18(2),(6) of the Act.
- 3.4 An order should be made where the court is satisfied that the defendant or appellant has the means and the ability to pay. The order is not intended to be in the nature of a penalty which can only be satisfied on the defendant's release from prison. An order should not be made on the assumption that a third party might pay. Whilst the court should take into account any debt of the appellant or defendant, where the greater part of those debts relates to the offence itself, the court may still make an order for costs.
- 3.5 Where co-defendants are husband and wife, the couple's means should not be taken together. Where there are multiple defendants the court may make joint and several orders, but the costs ordered to be paid by an individual should be related to the costs in or about the prosecution of that individual. In a multi handed case where some defendants have insufficient means to pay

their share of the costs, it is not right for that share to be divided among the other defenders.

3.6 The prosecution should serve upon the defence, at the earliest time, full details of its costs so as to give the defendant a proper opportunity to make representations upon them if appropriate. If a defendant wishes to dispute all or any of the prosecution's claim for costs, the defendant should, if possible, give proper notice to the prosecution of the objections proposed to be made or at least make it plain to the court precisely what those objections are. There is no provision for assessment of prosecution costs in a criminal case, such disputes have to be resolved by the court, which must specify the amount to be paid.<sup>7</sup>

3.7 The principles to be applied in deciding on the amount of costs are those set out by the Court of Appeal in *Neville v Gardner Merchant*.<sup>8</sup> The court when awarding prosecution costs may award costs in respect of time spent in bringing the offences to light, even if the necessary investigation was carried out, for example, by an environmental health official.<sup>9</sup> Generally it will not be just or reasonable to order a defendant to pay costs of investigation which the prosecutor itself will not satisfy. In *Balshaw v Crown Prosecution Service*<sup>10</sup> the Court of Appeal considered the circumstances in which the Crown Prosecution Service may be able to recover costs associated with the investigation incurred by the police, The Divisional Court has held that there is a requirement that any sum ordered to be paid by way of costs should not ordinarily be greatly at variance with any fine imposed. Where substantial research is required in order to counter possible defences, the court may also award costs in respect of that work if it considers it to be justified.

3.8 The High Court is not covered by section 18 of the Act but it has complete discretion over all costs between the parties in relation to proceedings before

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<sup>7</sup> See *R v Associated Octel Ltd* [1996] EWCA Crim 1327; [1997] Crim LR 144.

<sup>8</sup> [1983] 5 Cr App R(S) 349 (DC)

<sup>9</sup> *Neville v Gardner Merchant* (1983) 82 LGR 577

<sup>10</sup> [2009] EWCA Crim 470

it.<sup>11</sup>

- 3.9 An order under section 18 of the Act includes the cost of advice, assistance or representation provided under the Criminal Legal Aid provisions: see section 21(4A)(b) of the Act.
- 3.10 Rules 76.5, 76.6 and the general rules in Section 1 of Part 76 of the Criminal Procedure Rules, apply to the exercise of the court's powers to award costs against a defendant on conviction, sentence or appeal.

## **PART 4: OTHER COSTS ORDERS**

### **4.1 Costs Incurred as a Result of Unnecessary or Improper Act or Omission**

- 4.1.1 A Magistrates' Court, the Crown Court and the Court of Appeal (Criminal Division) may order the payment of any costs incurred as a result of any unnecessary or improper act or omission by or on behalf of any party to the proceedings as distinct from his legal representative: section 19 of the Act and regulation 3 of the General Regulations. The court may find it helpful to adopt a three stage approach (a) Has there been an unnecessary or improper, act or omission? (b) As a result have any costs been incurred by another party? (c) If the answers to (a) and (b) are "yes", should the court exercise its discretion to order the party responsible to meet the whole or any part of the relevant costs, and if so what specific sum is involved? Rule 76.8 of the Criminal Procedure Rules sets out the procedure. A form of application is set out in Schedule 5 to this Practice Direction.
- 4.1.2 The court must hear the parties and may then order that all or part of the costs so incurred by one party shall be paid to him by the other party.

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<sup>11</sup> s.51 Supreme Court Act 1981

- 4.1.3 Before making such an order the court may take into account any other order as to costs and the order must specify the amount of the costs to be paid. The court is entitled to take such an order into account when making any other order as to costs in the proceedings: regulation 3(2) – (4) of the General Regulations. The order can extend to legal aid costs incurred on behalf of any party: section 21(4A)(b) of the Act.
- 4.1.4 In a Magistrates’ Court no order may be made which requires a convicted person under 17 to pay an amount by way of costs which exceeds the amount of any fine imposed upon him: regulation 3(5) of the General Regulations.
- 4.1.5 Such an order is appropriate only where the failure is that of the defendant or of the prosecutor. Where the failure is that of a legal representative(s) paragraphs 4.2 and 4.5 (below) may be more suitable.

#### **4.2 Costs Against Legal Representatives - Wasted Costs**

- 4.2.1 Section 19A of the Act allows a Magistrates’ Court, the Crown Court or the Court of Appeal (Criminal Division) to disallow or order the legal or other representative to meet the whole or any part of the wasted costs. The order can be made against any person exercising a right of audience or a right to conduct litigation (in the sense of acting for a party to the proceedings). “Wasted costs” are costs incurred by a party (which includes a legally aided party) as a result of any improper, unreasonable or negligent act or omission on the part of any representative or his employee, or which, in the light of any such act or omission occurring after they were incurred, the court considers it unreasonable to expect that party to pay: section 19A(3) of the Act; section 89(8) of the Proceeds of Crime Act 2002. Rule 76.9 of the Criminal Procedure Rules sets out the procedure. A form of application is set out in Schedule 5 to this Practice Direction.
- 4.2.2 The Judge has a much greater and more direct responsibility for costs in criminal proceedings than in civil and should keep the question of costs in



the forefront of his mind at every stage of the case and ought to be prepared to take the initiative himself without any prompting from the parties.

4.2.3 Regulation 3B of the General Regulations requires the court to specify the amount of the wasted costs and before making the order to allow the legal or other representative and any party to the proceedings to make representations. In making the order the court may take into account any other orders for costs and may take the wasted costs order into account when making any other order as to costs. The court should also give reasons for making the order and must notify any interested party (which includes the Legal Aid Agency and Central Funds determining authorities) of the order and the amount.

4.2.4 Judges contemplating making a wasted costs order should bear in mind the guidance given by the Court of Appeal in *In re A Barrister (Wasted Costs Order) (No 1 of 1991)* [1993] QB 293. The guidance, which is set out below, is to be considered together with all the statutory and other rules and recommendations set out by Parliament and in this practice direction.

- (i) There is a clear need for any Judge or court intending to exercise the wasted costs jurisdiction to formulate carefully and concisely the complaint and grounds upon which such an order may be sought. These measures are draconian and, as in contempt proceedings, the grounds must be clear and particular.
- (ii) Where necessary a transcript of the relevant part of the proceedings under discussion should be available and in accordance with the rules a transcript of any wasted cost hearing must be made.
- (iii) A defendant involved in a case where such proceedings are contemplated should be present if, after discussion with an advocate, it is thought that his interest may be affected and he should certainly be present and represented if the matter might affect the course of his trial. Rule 76.2(1) of the Criminal Procedure Rules requires that the

court must not make a costs order unless each party, and any other person affected, (a) is present, or (b) has had an opportunity to attend or to make representations.

- (iv) A three stage test or approach is recommended when a wasted costs order is contemplated: (a) Has there been an improper, unreasonable or negligent act or omission? (b) As a result have any costs been incurred by a party? (c) If the answers to (a) and (b) are “yes”, should the court exercise its discretion to disallow or order the representative to meet the whole or any part of the relevant costs, and if so what specific sum is involved?
- (v) It is inappropriate to propose any settlement that the representative might forgo fees. The complaint should be formally stated by the Judge and the representative invited to make his own comments. After any other party has been heard the Judge should give his formal ruling. Discursive conversations may be unfair and should certainly not take place.
- (vi) The Judge must specify the sum to be allowed or ordered. Alternatively the relevant available procedure should be substituted should it be impossible to fix the sum: see para 4.2.7 below.

4.2.5 The Court of Appeal has given further guidance in *In re P (A Barrister)* [2001] EWCA Crim 1728; [2002] 1 Cr App R 207 as follows:

- (i) The primary object is not to punish but to compensate, albeit as the order is sought against a non party, it can from that perspective be regarded as penal.
- (ii) The jurisdiction is a summary jurisdiction to be exercised by the court which has “tried the case in the course of which the misconduct was committed” .

- (iii) Fairness is assured if the lawyer alleged to be at fault has sufficient notice of the complaint made against him and a proper opportunity to respond to it.
- (iv) Because of the penal element a mere mistake is not sufficient to justify an order: there must be a more serious error.
- (v) Although the trial Judge can decline to consider an application in respect of costs, for example on the ground that he or she is personally embarrassed by an appearance of bias, it will only be in exceptional circumstances that it will be appropriate to pass the matter to another Judge, and the fact that, in the proper exercise of his judicial function, a Judge has expressed views in relation to the conduct of a lawyer against whom an order is sought, does not of itself normally constitute bias or the appearance of bias so as to necessitate a transfer.
- (vi) The normal civil standard of proof applies but if the allegation is one of serious misconduct or crime clear evidence will be required to meet that standard.

4.2.6 Though the court cannot delegate its decision to the appropriate authority, it may require the appropriate officer of the court to make enquiries and inform the court as to the likely amount of costs incurred. By rule 76.9(5) of the Criminal Procedure Rules, the court is entitled to the assistance in this respect of the party who incurred the costs concerned.

4.2.7 The court may postpone the making of a wasted costs order to the end of the case if it appears more appropriate to do so, for example, because the likely amount is not readily available, there is a possibility of conflict between the legal representatives as to the apportionment of blame, or the legal representative concerned is unable to make full representations because of a possible conflict with the duty to the client.

4.2.8 A wasted costs order should normally be made regardless of the fact that the client of the legal representative concerned is legally aided. However where the court is minded to disallow substantial legal aid costs, it may, instead of making a wasted costs order, make observations to the determining authority that work may have been unreasonably done: see para 4.3 below. This practice should only be adopted where the extent and amount of the costs wasted is not entirely clear.

### **Appeals against Wasted Costs Orders**

4.2.9 A party against whom a wasted costs order has been made may appeal against that order. In the case of an order made by a magistrates' court, appeal is to the Crown Court, and Part 63 of the Criminal Procedure Rules sets out the procedure. In the case of an order made at first instance by the Crown Court, the appeal is to the Court of Appeal and the procedure is set out in Part 68 of the Criminal Procedure Rules. In both cases the time limit for appeal is 21 days from the date of the order.

4.2.10 Having heard the submissions, the appeal court may affirm, vary or revoke the order as it thinks fit and must notify its decision to the appellant, any interested party and the court which made the order.

### **4.3 Disallowance of Criminal Legal Aid Costs**

4.3.1 Where it appears to any Judge of the Crown Court or the Court of Appeal (Criminal Division), sitting in proceedings for which legal aid has been granted, that work may have been unreasonably done, eg, if the represented person's case may have been conducted unreasonably so as to incur unjustifiable expense, or costs may have been wasted by failure to conduct the proceedings with reasonable competence or expedition, the Judge may make observations to that effect for the attention of the appropriate authority. The Judge or the court, as the case may be, should specify as precisely as possible the item, or items, which the determining officer

should consider or investigate on the determination of the costs payable pursuant to the representation order. The precise terms of the observations must be entered in the court record.

- 4.3.2 Article 26 of the Criminal Legal Aid (Remuneration) Regulations 2013 permits the appropriate officer to reduce any fee which would otherwise be payable by such proportion as the officer considers reasonable in the light of any adverse comments made by the court. The power to make adverse comments co-exists with the power to disallow fees when making a wasted costs order. Article 27 of the 2013 Regulations allows the Determining Officer to disallow the amount of the wasted costs order from the amount otherwise payable to the litigator or advocate and allows for deduction of a greater amount if appropriate.
- 4.3.3 Where the Judge or the court has in mind making observations under para 4.3 the litigator or advocate whose fees or expenses might be affected must be informed of the precise terms thereof and of his right to make representations to the appropriate authority and be given a reasonable opportunity to show cause why the observations or direction should not be made.
- 4.3.4 Where such observations or directions are made the appropriate authority must afford an opportunity to the litigator or advocate whose fees might be affected to make representations in relation to them.
- 4.3.5 Whether or not observations under para 4.3.1 have been made the appropriate authority may consult the Judge or the court on any matter touching the allowance or disallowance of fees and expenses, but if the observations then made are to the effect mentioned in para 4.3.1, the appropriate authority should afford an opportunity to the litigator or advocate concerned to make representations in relation to them.

#### **4.4 Very High Cost Cases**

4.4.1 In proceedings which are classified as a very high cost case (“VHCC”) as defined by regulation 2 of the Criminal Legal Aid (Remuneration) Regulations 2013, the Judge or court should, at the earliest opportunity, ask the representative of the legally aided party whether they have notified the Lord Chancellor of the case in accordance with regulation 12 of those Regulations. If they have not they should be warned that they may not be able to recover their costs.

#### **4.5 Wasted costs orders in the High Court**

4.5.1 In the High Court (Divisional Court) where the court is considering whether to make an order under section 51(6) of the Supreme Court Act 1981 (a wasted costs order or disallowing wasted costs) it will do so in accordance with CPR r 46.8 which contains similar provisions as to giving the legal representative a reasonable opportunity to attend a hearing to give reasons why the court should not make such an order.

#### **4.6 Awards of Costs against Solicitors under the Court's Inherent Jurisdiction**

4.6.1 In addition to the power under regulation 3 of the General Regulations to order that costs improperly incurred be paid by a party to the proceedings and the power to make wasted costs orders under section 19A of the Act, the Senior Courts (which includes the Crown Court) may, in the exercise of its inherent jurisdiction over officers of the court, order a solicitor personally to pay costs thrown away by reason of a serious breach on the part of the solicitor of his duty to the court.

4.6.2 No such order may be made unless reasonable notice has been given to the solicitor of the matter alleged against him and he is given a reasonable opportunity of being heard in reply.

4.6.3 This power should be used only in exceptional circumstances not covered by the statutory powers: see para 1.2.3.

## **4.7 Award of Costs Against Third Parties**

- 4.7.1 The Magistrates' Court, the Crown Court and the Court of Appeal may make a third party costs order if there has been serious misconduct (whether or not constituting a contempt of court) by a third party and the court considers it appropriate, having regard to that misconduct, to make a third party costs order against him. A "third party costs order" is an order for the payment of costs incurred by a party to criminal proceedings by a person who is not a party to those proceedings ("the third party"): Section 19B of the 1985 Act and regulations 3E to 3I of the General Regulations. Rule 76.10 of the Criminal Procedure Rules sets out the procedure.
- 4.7.2 The court may make a third party costs order at any time during or after the criminal proceedings, but should only make such an order during the proceedings if it decides that there are good reasons to do so.
- 4.7.3 The court must notify the parties and the third party of those reasons and allow any of them to make representations.
- 4.7.4 A third party costs order may be made on the application of any party, or on the court's own initiative, but not in any other circumstances. Before making an order the court must allow the third party, and any other party, to make representations and may hear evidence.
- 4.7.5 When the court is making a third party costs order, it may take into account any other order as to costs in respect of the criminal proceedings, and may take the third party costs order into account when making any other order for costs in respect of those proceedings.
- 4.7.6 The order must specify the amount of costs to be paid, and the court must notify the third party and any interested party of the order and the amount ordered to be paid.

- 4.7.7 If the court is considering making a third party costs order on its own initiative the appropriate officer should serve notice in writing on the third party and any other parties. Where a party applies for such an order the application must be in writing, and must contain the names and addresses of the applicant, the other parties and the third party against whom the order is sought, together with a summary of the facts upon which the applicant intends to rely, including in particular details of the alleged misconduct of the third party.
- 4.7.8 At the hearing of the application the court may proceed in the absence of the third party, and of any other party if satisfied that that party has been duly served with the notice by the appropriate officer, and with a copy of the application. The power to make a third party costs order extends to making such an order against a Government Department where there has been serious misconduct, including deliberate or negligent failure to attend to one's duties, or falling below a proper standard in that regard, but there is a higher threshold for liability than for a wasted costs order.<sup>12</sup>

#### **Appeals Against Third Party Costs Orders**

- 4.7.9 A third party against whom a third party costs order has been made may appeal against that order. In the case of an order made by a magistrates' court, appeal is to the Crown Court, and Part 63 of the Criminal Procedure Rules sets out the procedure. In the case of an order made at first instance by the Crown Court, the appeal is to the Court of Appeal and the procedure is set out in Part 68 of the Criminal Procedure Rules. In both cases the time limit for appeal is 21 days from the date of the order.
- 4.7.10 Having heard the submissions, the appeal court may affirm, vary or revoke the order as it thinks fit and must notify its decision to the appellant, any interested party and the court which made the order.

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<sup>12</sup> *R v Ahmati (Agron) (Order for Costs)* [2006] EWCA Crim 1826.



## **PART 5: ASSESSMENT OF COSTS**

### **5.1 Assessment of defence costs out of central funds**

5.1.1 Where a legally aided defendant wishes to claim out of pocket expenses or costs for work which has not been done under the representation order, the assessment of those costs should be carried out at the same time as the assessment of his solicitor's costs under the representation order and the solicitors should ensure that the two claims are submitted together for assessment.<sup>13</sup>

### **5.2 Appeals to a Costs Judge**

5.2.1 Under regulation 9 of the General Regulations, or under rule 76.11(7) of the Criminal Procedure Rules, a party dissatisfied with a costs assessment may apply to the relevant authority for a review of that assessment. Under regulation 10 of the General Regulations, or under rule 76.12 of the Criminal Procedure Rules, appeal against a decision on such a review lies to the Senior Costs Judge of the Senior Courts Costs Office. Written notice of appeal must be given within 21 days of receipt of the reasons for the decision, or within such longer time as a Costs Judge may direct.

5.2.2 The notice of appeal should be in the form set out in Schedule 3 below (adapted where appropriate) setting out in separate numbered paragraphs each fee or item of costs or disbursement in respect of which the appeal is brought, showing the amount claimed for the item, the amount determined and the grounds of objection to the decision on the assessment or determination.

5.2.3 Advocates and litigators must provide detailed grounds of objection in respect of each item in accordance with regulation 10(2) of the General

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<sup>13</sup> *R v Supreme Court Costs Office ex p Brewer* [2006] EWHC Civ 1955 (Admin)

Regulations, rule 76.12(2)(b) of the Criminal Procedure Rules and Regulation 29(5) of the Criminal Legal Aid (Remuneration) Regulations 2013. Reference to accompanying correspondence or documents is insufficient and will result in the appeal being dismissed.

5.2.4 The appeal must be accompanied by a cheque for the appropriate fee made payable to “H M Paymaster General”. The notice must state whether the appellant wishes to appear or to be represented, or whether he will accept a decision given in his absence.

The following documents should be forwarded with the notice of appeal:

- (a) a legible copy of the bill of costs (with any supporting submissions) showing the allowance made;
- (b) a copy of the advocate's fee claim and any fee note, together with any note or memorandum by the advocate submitted to the determining authority;
- (c) a copy of the original determination of costs and a copy of the redetermination;
- (d) a copy of the appellant's representations made to the determining authority on seeking redetermination;
- (e) the written reasons of the determining officer;
- (f) a copy of the representation order and any authorities given under it .

### **5.3 Supporting Papers**

5.3.1 Appellants who do not intend to appear at the hearing of their appeal should lodge all relevant supporting papers with the documents listed above. Appellants who do wish to attend the hearing of their appeal should not

lodge their supporting papers until directed to do so by the Senior Courts Costs Office.

5.3.2 Appellants are reminded that it is their responsibility to procure the lodgment of the relevant papers, even if they are in the possession of the Crown Court or other persons. Appeals may be listed for dismissal if the relevant papers are not lodged when required.

5.3.3 Delays frequently arise in dealing with appeals by advocates because the relevant papers have been returned by the court to the litigator whose file may not be readily available or who may have destroyed the papers. These problems would be avoided if the advocate were, immediately on lodging with the court a request for redetermination, to ask instructing litigators to retain the relevant papers.

5.3.4 In complex or multi-handed appeals guidance should be sought from the Clerk of Appeals before lodging a large volume of papers to avoid duplication and unnecessary reading by the Costs Judge.

#### **5.4 Time Limits**

5.4.1 Appellants who are likely to be unable to lodge an appeal within the time limits should make an application prior to the expiry of the time limit seeking a reasonable extension with brief reasons for the request.

5.4.2 Appellants who have not been able to lodge an appeal within the time limits, and who have failed to make application before those time limits have expired, should make application to the Costs Judge for leave to appeal out of time in writing setting out in full the circumstances relied upon.

5.4.3 If the application is refused on the papers it may be renewed to a Costs Judge at an oral hearing. Such oral hearings should not be necessary if a full explanation is given in writing in the initial request for extension of time.

5.4.4 Appeals should not be delayed because certain relevant documents are not available. An accompanying note setting out the missing documents and an undertaking to lodge within a specified period, normally not exceeding 28 days, should be sent with the notice of appeal.

## **5.5 Appeals to the High Court**

5.5.1 An appellant desiring to appeal to a High Court Judge from a decision of the Costs Judge should, within 21 days of the decision, request the Costs Judge to certify that a point of principle of general importance (specifying the same) is involved. The appeal can proceed only if such a certificate is granted. Such an appeal is instituted by Appellant's Notice under CPR Pt 52 in the Queen's Bench Division within 21 days of the receipt of the Costs Judge's certificate. The times may be extended by a Costs Judge or a High Court Judge as the case may be.

5.5.2 The Appellant's Notice must contain full particulars of the item or items, or the amount allowed in respect of which the appeal is brought. After issue of the notice the appellant must forthwith lodge with the Clerk of Appeals at the Senior Courts Costs Office all the documents used on the appeal to the Costs Judge.

5.5.3 The Appellant's Notice should be served in accordance with the provisions of CPR Pt 6 and the practice direction thereto. It is no longer necessary to endorse an estimate of the length of hearing on the Appellant's Notice. The clerk of appeals will obtain from the Judge a date for hearing and will notify the parties.

5.5.4 The appeal, which is final, will be heard by a Judge of the Queen's Bench Division who will normally sit with two assessors, one of whom will be a Costs Judge and the other a practising litigator or advocate.

5.5.5 After the appeal has been heard and determined the clerk will obtain the documents together with a sealed copy of any order of the Judge which may

have been drawn up and will notify the court concerned of the result of the appeal.

## **PART 6: CONTRIBUTION ORDERS AND RECOVERY OF DEFENCE COSTS ORDERS**

### **6.1 Contribution Orders in the Crown Court**

6.1.1 In proceedings to which the Criminal Legal Aid (Contribution Orders) Regulations 2013 apply, namely proceedings in the Crown Court, the represented defendant may be liable to make payments under an income contribution order. If the defendant is convicted or if the representation order is withdrawn, the defendant may be required to pay the whole or part of the cost of the representation under a capital contribution order.

6.1.2 If the trial judge considers that there are exceptional reasons, a defendant who is acquitted may nevertheless be required to pay the whole or part of the costs of the representation in the Crown Court: regulation 25(b).

6.1.3 Where a defendant is convicted of one or more, but not all, offences he may apply in writing to the trial judge (or a judge nominated for that purpose by the resident judge) for an order that he pay a proportion only of the costs of the representation in the Crown Court on the ground that it would be manifestly unreasonable that he pay the whole amount: regulation 26. An application must be made within 21 days of the date on which the individual is dealt with. The judge may refuse the application or make an order specifying the proportion of costs which the defendant must pay.

### **6.2 Recovery of Defence Costs Orders on appeals**

6.2.1 Recovery of defence costs orders (“RDCOs”) are created and regulated by the Criminal Legal Aid (Recovery of Defence Costs Orders) Regulations

2013 made under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. They may be made in proceedings in any court other than the magistrates' court or the Crown Court.

6.2.2 Where an individual receives criminal legal aid in respect of proceedings, the court before which the proceedings are heard (other than a Magistrates' Court or the Crown Court) must make an order requiring him to pay some or all of the costs of any representation, except for the following:

- where the defendant has appeared in the Magistrates' Court and/or the Crown Court only;
  
- where the court has allowed the appeals of the defendant in respect of every conviction, unless the court considers it reasonable in all the circumstances to make an order; or
  
- where the defendant does not have capital exceeding £3,000 or equity in the main dwelling exceeding £100,000 or gross annual income exceeding £22,325 ; or
  
- where the defendant is in receipt of a qualifying benefit; or
  
- where the defendant is under the age of 18 on the date on which his application for legal aid was determined; or
  
- where it would not be reasonable to make an order on the basis of the information and evidence available; or
  
- where in the exceptional circumstances of the case an order would involve undue financial hardship:

Criminal Legal Aid (Recovery of Defence Costs Orders) Regulations 2003, regulations 6-11.

6.2.3 Where the court exercises its discretion on the basis of reasonableness or undue financial hardship it must give reasons for reaching that decision: regulation 11.

6.2.4 Subject to the exceptions set out above, the court must make an RDCO and must give reasons for the terms of the Order: regulation 5.

6.2.5 The court (or the registrar of the Supreme Court or the registrar of criminal appeals, as the case may be) must assess the financial resources of the defendant (including the resources of the defendant's partner unless the partner has a contrary interest) or refer the matter to the Director of Legal Aid Casework for assessment. When determining the amount, other than in exceptional circumstances, the court shall not take into account:

- the first £3,000 of available capital,
- the first £100,000 of equity in the main dwelling, or
- gross annual income of less than £22,235: regulation 15.

These limits are prescribed and are subject to regular amendment.

6.2.6 The court may ask the defendant's litigator to provide an estimate of the total costs which are likely to be incurred under the representation order. It should be borne in mind that whilst the litigator may have little difficulty in producing an estimate of the costs incurred up until the point of request, this estimate may not be accurate. In a very high cost case which has been managed under contract, the litigator will be able to provide accurate figures

of all costs incurred to date and to say what costs have been agreed as reasonable for the next stage of the case. Where an RDCO is made based on this estimate the defendant's litigator must inform the Lord Chancellor if it subsequently transpires that the costs incurred were lower than the amount ordered to be paid under an RDCO. In these circumstances, where the defendant has paid the amount ordered, the balance will be repaid to him: regulation 19.

6.2.7 The defendant is obliged to provide such details or evidence of his means as is required by the court. At the end of the case where the court is considering whether to make an RDCO or what order to make, it may adjourn the making of the order and order that any further information which is required should be provided: regulation 16. This power may be used where further information has come to light during the case about the defendant's means.

6.2.8 Where information required under the Regulations is not provided the court may nevertheless make an RDCO for the full cost of the representation incurred under the representation order or such proportion of the cost as the court considers reasonable: regulation 17.

6.2.9 Where it appears to the court that the defendant has transferred any financial resources to another person, directly or indirectly deprived themselves of any resources, or converted any resources into resources which are to be disregarded under the Regulations, the court must treat such financial resources as part of the defendant's financial resources or as not so converted. Where it appears to the court that another person has been substantially maintaining the defendant or the defendant's partner or that any of the financial resources of another person have been made available to the defendant or the defendant's partner, the court may assess the amount of the maintenance or the resources made available and treat such amounts as



the resources of the defendant: regulation 14.

## **PART 7: COSTS IN RESTRAINT, CONFISCATION OR RECEIVERSHIP PROCEEDINGS**

### **7.1. The Order for Costs**

7.1.1 This part of the practice direction applies where the Crown Court is deciding whether to make an order for costs in relation to restraint proceedings or receivership proceedings brought under the Proceeds of Crime Act 2002. (Confiscation proceedings are treated for costs purposes as part of the criminal trial.) The court has discretion as to: whether costs are payable by one party to another; the amount of those costs; and, when they are to be paid. The general rule is that if the court decides to make an order about costs the unsuccessful party will be ordered to pay the costs of the successful party but the court may make a different order: Criminal Procedure Rules, rule 61.19(3)

7.1.2 Attention is drawn to the fact that in receivership proceedings the Rules provide that the Crown Court may make orders in respect of security to be given by a receiver to cover his liability for his acts and omissions as a receiver: rule 60.5. The court may also make orders in relation to determining the remuneration of the receiver: Criminal Procedure Rules, rule 60.6. (Paragraph 7.3 below deals with determination of the remuneration of a receiver.)

7.1.3 In deciding what if any order to make about costs the court is required to have regard to all the circumstances including the conduct of all the parties and whether a party has succeeded on part of an application, even if that party has not been wholly successful.

7.1.4 The Rules set out the type of order which the court may make (the list is not exclusive):

- (a) a proportion of another party's costs;
- (b) a stated amount in respect of another party's costs;
- (c) costs from or until a certain date only;
- (d) costs incurred before proceedings have begun;
- (e) costs relating to particular steps taken in the proceedings;
- (f) costs relating only to a distinct part of the proceedings; and
- (g) interest on costs from or until a certain date including a date before the making of an order.

7.1.5 The court is required, where it is practicable, to award a proportion (eg, a percentage) of the costs, or costs between certain dates, rather than making an order relating only to a distinct part or issue in the proceedings. The latter type of order makes it extremely difficult for the costs to be assessed.

7.1.6 Where the court orders a party to pay costs it may, in addition, order an amount to be paid on account by one party to another before the costs are assessed. Where the court makes such an order, the order should state the amount to be paid and the date on or before which payment is to be made.

## **7.2 Assessment of Costs**

7.2.1 Where the Crown Court makes an order for costs in restraint, or receivership, proceedings it may make an assessment of the costs itself there and then (a summary assessment), or order assessment of the costs under

rule 76.11: Criminal Procedure Rules, rule 61.20(1). If the court neither makes an assessment of the costs nor orders assessment as specified above, the order for costs will be treated as an order for the amount of costs to be decided by assessment under rule 76.11 unless the order otherwise provides.

7.2.2 Whenever the court awards costs to be assessed it should consider whether to exercise the power to order the paying party to pay such sum of money as it thinks just, on account of those costs.

7.2.3 In carrying out the assessment of costs the court or the assessing authority is required to allow only costs which are proportionate to the matters in issue, and to resolve any doubt which it may have, as to whether the costs were reasonably incurred or were reasonable and proportionate in amount, in favour of the paying party.

7.2.4 The court or assessing authority carrying out the assessment should have regard to all the circumstances in deciding whether costs were proportionately or reasonably incurred or proportionate and reasonable in amount. Effect must be given to any orders for costs which have already been made. The court or the assessing authority should also have regard to:

- (a) the conduct of all the parties, including in particular conduct before as well as during the proceedings;
- (b) the amount or value of any property involved;
- (c) the importance of the matter to all the parties;
- (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
- (e) the skill, effort, specialised knowledge and responsibility involved;
- (f) the time spent on the case; and

- (g) the place where and the circumstances in which work or any part of it was done.

7.2.5 In applying the test of proportionality regard should be had to the objective of dealing with cases justly. Dealing with a case justly includes, so far as practicable, dealing with it in ways which are proportionate to:

- (i) the amount of money involved;
- (ii) the importance of the case;
- (iii) the complexity of the issues; and
- (iv) the financial position of each party.

The relationship between the total of the costs incurred and the financial value of the claim may not be a reliable guide.

7.2.6 In any proceedings there will be costs which will inevitably be incurred and which are necessary for the successful conduct of the case. Litigators are not required to conduct litigation at rates which are uneconomic, thus in a modest claim the proportion of costs is likely to be higher than in a large claim and may even equal or possibly exceed the amount in dispute.

7.2.7 Where a hearing takes place, the time taken by the court in dealing with a particular issue may not be an accurate guide to the amount of time properly spent by the legal or other representatives in preparing for the trial of that issue.

7.2.8 The Criminal Procedure Rules do not apply to the assessment of costs in proceedings to the extent that section 26 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (costs in civil proceedings) applies and statutory instruments made under that Act make different provision.

### **7.3 Remuneration of a Receiver**

7.3.1 A receiver may only charge for his services if the Crown Court so directs and specifies the basis on which the receiver is to be remunerated: Criminal Procedure Rules, rule 60.6(2). The Crown Court (unless it orders otherwise) is required to award such sum as is reasonable and proportionate in all the circumstances. In arriving at the figure for remuneration the court should take into account:

- (a) the time properly given by the receiver and his staff to the receivership;
- (b) the complexity of the receivership;
- (c) any responsibility of an exceptional kind or degree which falls on the receiver in consequence of the receivership;
- (d) the effectiveness with which the receiver appears to be carrying out or to have carried out his duties; and
- (e) the value and nature of the subject matter of the receivership.

7.3.2 The Crown Court may instead of determining the receiver's remuneration itself refer it to be ascertained by the assessing authority of the Crown Court. In these circumstances rules 76.11 to 76.13 of the Criminal Procedure Rules (which deal with review by the assessing authority, further review by a Costs Judge and appeal to a High Court Judge) have effect.

### **7.4 Procedure on Appeal to the Court of Appeal**

The costs of and incidental to all proceedings on an appeal to the Criminal Division of the Court of Appeal against orders made in restraint proceedings, or appeals against or relating to the making of receivership

orders, are in the discretion of the court: Proceeds of Crime Act 2002, section 89(4).

- 7.4.1 The court has full power to determine by whom and to what extent the costs are to be paid.
- 7.4.2 In any such proceedings the court may disallow or (as the case may be) order the legal or other representative concerned to meet the whole of any wasted costs or such part of them as may be determined in accordance with the Criminal Procedure Rules. (As to wasted costs orders see Part 4 above.)
- 7.4.3 These provisions have retrospective effect in relation to proceedings on appeals in respect of offences committed or alleged to have been committed on or after 24 March 2003: Courts Act 2003, section 94(3).

**PART 8: ADVICE ON APPEAL TO THE COURT OF APPEAL (CRIMINAL DIVISION)**

- 8.1 In all cases the procedure set out in “ A Guide to Proceedings in the Court of Appeal (Criminal Division)” published by the Criminal Appeal Office with the approval of the Lord Chief Justice should be followed.
- 8.2 This procedure requires that immediately following the conclusion of a case, legal representatives should see the defendant, and the advocate should express orally his final view as to the prospects of a successful appeal (whether against conviction or sentence or both). Litigators should not wait to be asked for advice by the defendant. In simple cases this will involve little or no expense. If the procedure is not followed and the work has not been done with due care, fees may be reduced accordingly. If there are no reasonable grounds of appeal, that should be confirmed in writing and a copy provided then or as soon as practicable thereafter, to the defendant by the litigator. Where the advocate’s immediate and final view is that there are no reasonable grounds of appeal, no additional fee will normally be allowed.

If there are reasonable grounds, grounds of appeal should be drafted, signed and sent to the instructing litigator as soon as possible. Litigators should immediately send a copy of the documents received from the advocate to the defendant. Provision for advice or assistance on appeal is included in the trial representation order issued by the Crown Court.

- 8.3 Notice and grounds (Form NG and the advocate's advice) should be lodged at the Crown Court (where the trial was conducted) within 28 days from the date of the conviction in the case of an application for leave to appeal against conviction and within 28 days from the date of sentence in the case of an application for leave to appeal against sentence. On a reference by the CCRC, Form NG and grounds should be served on the Registrar not more than 56 days after the Registrar has served notice that the CCRC has referred a conviction and not more than 28 days in the case of a sentence referral.
- 8.4 When (a) positive advice on appeal has been given; and (b) notice and grounds have been lodged with the Crown Court on the strength of that advice, the Registrar of Criminal Appeals is the authority for decisions about representation orders, in accordance with the principle that the Court before which there are proceedings is the Court with power to grant a right to representation. The Crown Court should not determine the fees in respect of the work in connection with the advice, notice and grounds unless the litigator confirms that the notice and grounds were not given on the litigator's or the advocate's advice. Where no notice of application is given, either because of unfavourable advice or despite favourable advice, the appropriate authority is the appropriate officer for the Crown Court.
- 8.5 If it appears that the defendant was never given advice, the Crown Court should direct the litigators' attention to this fact and if there is no satisfactory explanation as to why no advice was sent, the determining officer should bear this in mind when determining the litigator's costs and should draw the litigator's attention to the above mentioned Guide.

- 8.6 Prior to the service of the notice and grounds of appeal, the Registrar of Criminal Appeals has no power to grant a representation order.
- 8.7 The Crown Court can only amend a representation order in favour of fresh legal representatives if advice on appeal has not been given by trial legal representatives and it is necessary and reasonable for another legal representative to be instructed.

## **PART 9: VAT**

- 9.1.1 Every taxable person as defined by the Value Added Tax Act 1994 must be registered and in general terms (subject to the exceptions set out in the 1994 Act) whenever a taxable person supplies goods or services in the United Kingdom in the course of business a liability to VAT arises.
- 9.1.2 Responsibility for making a charge to VAT in a proper case and for accounting to HM Revenue and Customs for the proper amount of VAT is that of the registered person concerned or the person required to be registered.
- 9.1.3 The following directions will apply to all bills of costs lodged for determination or assessment after the date hereof.

### **9.2 VAT Registration Number**

- 9.2.1 The number allocated by HM Revenue and Customs to every person registered under the Act (except a Government department) must appear in a prominent place at the head of every bill of costs, fee sheet, account or voucher on which VAT is being included as part of a claim for costs.

### **9.3 Action Before Assessment**

- 9.3.1 VAT should not be included in a claim for costs in a between the parties bill



of costs if the receiving party is able to recover the VAT as input tax. Where the receiving party is able to obtain credit from HM Revenue and Customs for a proportion of the VAT as input tax only that proportion which is not eligible for credit should be claimed in the bill.

9.3.2 The responsibility for ensuring that VAT is claimed in a between the parties bill of costs only when the receiving party is unable to recover the VAT or a proportion thereof as input tax, is upon the receiving party. On an assessment of costs payable out of public funds the determining officer must continue to satisfy himself as to the tax position.

9.3.3 Where there is a dispute as to whether VAT is properly claimed in a between the parties bill of costs the receiving party must provide a certificate signed by the litigators or the auditors of the receiving party in the form in Schedule 4 below. Where the receiving party is a litigant in person who is claiming VAT, reference should be made by him to HM Revenue and Customs and whenever possible a statement to similar effect produced on assessment.

9.3.4 Where there is a dispute as to whether any service in respect of which a charge is proposed to be made in the bill is zero-rated or exempt, reference should be made to HM Revenue and Customs and wherever possible the view of HM Revenue and Customs obtained and made known on assessment. In the case of a between the parties bill such application should be made by the receiving party.

#### **9.4 Costs Where VAT Rate Changes**

9.4.1 For advocates who use the arrangements under which fee notes do not become VAT invoices until they are receipted, the tax point will normally be the date upon which payment is received. The rate of VAT payable will be the rate applicable on that date even if the rate was different when the work was done. If an advocate has received fees before the rate changes in a case which will not be completed until after a rate change, the fees received

can be recalculated at the new rate and, if appropriate, a credit note issued to the instructing litigator.

9.4.2 For litigators, the normal tax point rules will apply and the rate of VAT payable will be that applicable at the appropriate tax point. If a litigator has issued a VAT invoice or received payment before the rate changes in a case which will not be completed until after the change, the fees received can be recalculated at the new rate and, if appropriate, a credit note issued to the client.

9.4.3 In any case in which an election to charge at the lower rate is not made, such a decision must be justified in accordance with the principles of assessment which are applicable to the basis upon which the costs are ordered to be assessed.

## **9.5 Apportionment**

9.5.1 All bills of costs, fees and disbursements on which VAT is included must be divided into separate parts so as to show work done before, on and after the date or dates from which any change in the rate of VAT takes effect. Where a lump sum charge is made for work which spans a period during which there has been a change in VAT rates, and paras 9.4.1 and 9.4.2 above do not apply, reference should be made to the VAT Guide (HM Revenue and Customs Notice 700 or any revised edition of that notice). If necessary, the lump sum should be apportioned.

## **9.6 Disbursements**

9.6.1 Legal representatives often make payments to third parties for the supply of goods or services where no VAT was chargeable on the supply by the third party: for example the cost of meals taken and travel costs. The question whether legal representatives should include VAT in respect of these payments when invoicing their clients, or in claims between litigants should be decided in accordance with this Direction and with the criteria set out in

the VAT Guide (Notice 700) published by HM Revenue and Customs.

- 9.6.2 Payment to third parties which are normally treated as part of the legal representative's overheads (for example postage costs and telephone costs) will not be treated as disbursements. The third party supply should be included as part of the costs of the legal representative's legal services and VAT must be added to the total bill charged to the client.
- 9.6.3 With effect from 3 January 1978 VAT is added to Sheriff's fees (see the Sheriff's Fees (Amendment No.2) Order 1977, SI 1977/2111).
- 9.6.4 Some payments, although correctly described as disbursements for some purposes, are not classified as disbursements for VAT purposes. Items not classified as disbursements for VAT purposes must be shown as part of the services provided by the legal representative and therefore, VAT must be added in respect of them whether or not VAT was chargeable on the supply by the third party.
- 9.6.5 Guidance as to the circumstances in which disbursements may or may not be classified as disbursements for VAT purposes is given in the VAT Guide (Notice 700 para 25.1). One of the key issues is whether the third party supply:
- (i) was made to the legal representative (and therefore subsumed in the onward supply of legal services); or
  - (ii) was made direct to the receiving party (the third party having no right to demand payment from the legal representative, who makes the payment only as agent for the receiving party).
- 9.6.6 Examples of payments under (i) are: travelling expenses such as an airline ticket, and subsistence expenses, such as the cost of meals, where the person travelling and receiving the means is the legal representative. The supply is

by the airline and restaurant and are supplies to the legal representative not to the client.

9.6.7 Payments under (ii) are classified as disbursements for VAT purposes and, therefore, the legal representatives need not add VAT in respect of them. Simple examples are: payments by a legal representative of court fees and payments of fees to an expert witness.

## **9.7 Legal Aid**

9.7.1 VAT will be payable in respect of every supply made pursuant to a criminal contract or otherwise with the benefit of criminal legal aid where it is made by a taxable person and the assisted person belongs in the United Kingdom or other member state of the European Union and is a private individual or receives the supply for non-business purposes. The place where a person belongs is determined by section 9 of the Value Added Tax Act 1994.

## **9.8 Tax Invoice**

9.8.1 Where costs are payable out of criminal legal aid or Central Funds pursuant to any authority, the tax invoice in the case of an advocate will consist of his fee note and in the case of a litigator his bill of costs as determined or assessed together with the payment advice supplied by the court as to the fees allowed on determination or assessment.

## **9.9 Appeal**

9.9.1 Where the fees or costs as determined or assessed are varied on appeal the VAT charged will be amended as appropriate by the determining officer.

## **9.10 Vouchers**

9.10.1 Where receipted accounts for disbursements made by the litigator or his client are retained as tax invoices a photocopy of any such receipted account may be produced and will be accepted as sufficient evidence of payment when disbursements are vouched.

## **9.11 Solicitors and Other Litigants Acting in Person**

9.11.1 Where a litigant acts in litigation on his own behalf he is not treated for the purposes of VAT as having supplied services and therefore no VAT is chargeable on that litigant's between the parties bill of costs unless VAT has been charged on disbursements when the normal rules will apply.

9.11.2 Similarly, where a litigator acts in litigation on his own behalf even on a matter arising out of his practice he is not treated for the purposes of VAT as having supplied services and therefore no VAT is chargeable on the bill of that litigator.

9.11.3 Consequently where such a bill as is described in the preceding two paragraphs is presented for agreement, determination or assessment, VAT

should not be claimed and will not be allowed on determination or assessment unless tax has been paid on disbursements.

## **9.12 Government Departments**

9.12.1 On an assessment between the parties where costs are being paid to a Government department in respect of services rendered by its legal staff, VAT should not be added since such services do not attract VAT.

## **PART 10: REVOCATIONS**

### **THE FOLLOWING DIRECTIONS ARE HEREBY WITHDRAWN**

10.1 The *Practice Direction (Costs in Criminal Proceedings)* dated July 2010 is revoked with immediate effect.

**The Lord Chief Justice of England and Wales**

## **SCHEDULE 1**

### **Relevant rules and regulations relating to costs in criminal proceedings**

The Criminal Procedure Rules

[http://www.justice.gov.uk/criminal/procrules\\_fin/rulesmenu.htm](http://www.justice.gov.uk/criminal/procrules_fin/rulesmenu.htm)

The Costs in Criminal Cases (General) Regulations 1986 - SI 1986/1335 as amended

The Crown Prosecution Service (Witnesses' etc Allowances) Regulations 1988 – SI 1988/1862

The Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005 (SI 2005/3382) as amended

The Criminal Legal Aid (General) Regulations 2013 SI 2013/9

The Criminal Legal Aid (Remuneration) Regulations 2013 SI 2013/435

The Criminal Legal Aid (Contribution Orders) Regulations 2013 SI 2013/483

The Criminal Legal Aid (Recovery of Defence Costs Orders) Regulations 2013 SI 2013/511

The Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013 SI 2013/614

**SCHEDULE 2**

**Costs from Central Funds and relevant Statutory Authorities**

<b>Proceedings</b>	<b>Court</b>	<b>Extent of Availability</b>	<b>Authority</b>
Information not proceeded with	Magistrates'	Defendant	S.16(1)(a) POA 1985
Decision not to commit for trial	Magistrates'	Defendant	S.16(1)(b) POA 1985
Dismissal of information	Magistrates'	Defendant	S.16(1)(c) POA 1985
Person indicted or committed for trial but not tried	Crown	Defendant	S.16(2)(a) POA 1985
Notice of transfer given but person not tried	Crown	Defendant	S.16(2)(aa) POA 1985
Acquittal on indictment	Crown	Defendant	S.16(2)(b) POA 1985
Successful appeal to the Crown Court against conviction or sentence	Crown	Appellant	S.16(3) POA 1985
Successful appeal to CACD against conviction or sentence or insanity/disability finding	CACD	Appellant	S.16(4) POA 1985
Appeal against order or ruling at preparatory hearing	CACD	Appellant	S.16(4A) POA 1985
Application for leave to appeal to Supreme Court	CACD	Appellant	S.16(5)(c) POA 1985
Attorney General reference to CACD on point of law following acquittal	CACD, Supreme Court	Acquitted Defendant	S.36(5) CJA 1972
Attorney General reference under s.36 CJA 1988 (lenient sentence appeals)	CACD	Convicted Defendant	Sch.3 para 11 CJA 1988
Determination of proceedings in a criminal cause or matter in Divisional Court	Divisional Court	Defendant in criminal proceedings	S.16(5)(a) POA 1985
Determination of appeal or application for leave to appeal from CACD or DC	Supreme Court	Defendant in criminal proceedings	S.16(5)(b)&(c) POA 1985
Proceedings in respect of an indictable offence	Magistrates' and Crown	Private prosecutor	S.17(1)(a) POA 1985
Proceedings before DC or Supreme Court (following summary offence)	Divisional Court and Supreme Court	Private prosecutor	S.17(1)(b) POA 1985



<b>Proceedings</b>	<b>Court</b>	<b>Extent of Availability</b>	<b>Authority</b>
Criminal cause or matter	All	Defence or private prosecution witness, interpreter, intermediary and medical practitioner	S.19(3) POA 1985 – there are restrictions on what may be paid (see regs 18, 19, 20, 21, 24 & 25 CCC (General) Regs 1986.
Murder case	Crown	Medical practitioner	S.34(5) MH(A)A 1982
Criminal Procedure (Insanity) Act proceedings	Crown	Person appointed to put case for the defence	S.19(3)(d) POA 1985
Cross examination of vulnerable witnesses	Magistrates' and Crown	Person appointed to cross examine witness for the defence	S.19(3)(e) POA 1985
Compensation where a court refuses an application for a banning order	Magistrates' and Crown Court (on appeal where compensation refused by the magistrates' court).	Person against whom a banning notice has been given (limited to £5,000)	S 21D Football Spectators Act 1989
Compensation where loss results from closure notice or order or Part 1A closure notice or order	Magistrates' court and Crown Court on appeal	Person incurring financial loss	SS 10 and 11J Anti Social Behaviour Act 2003
Costs where discharge ordered	Magistrates' court, High Court, Supreme Court	Person against whom Part 1 warrant issued	S 61 Extradition Act 2003

### **SCHEDULE 3**

#### **Form of Notice of Appeal to a Costs Judge**

The form is not reproduced here. Instead, it can be viewed on the Criminal Procedure Forms page of the Ministry of Justice website, at

**<http://www.justice.gov.uk/courts/procedure-rules/criminal/formspage>**

See Part 76, Costs

‘Appellants’ Notice Criminal Costs Appeal to a Costs Judge’

**SCHEDULE 4**

**FORM OF CERTIFICATE (VAT)**

To: The Chief Clerk  
Crown Court

Address:

Date:

**Regina v A**

With reference to the pending determination of the [prosecutor's] [defendant's] costs and disbursements herein which are payable by the [defendant] [the prosecutor] [public funds], we the undersigned [solicitors to] [the auditors of] the [prosecutor] [defendant] hereby certify that he on the basis of his last completed VAT return would [not be entitled to recover] [be entitled to recover only                      per cent of the] VAT on such costs and disbursements, as input tax pursuant to section 25 of the Value Added Tax Act 1994 .

Signed

[Solicitors to] [Auditors of] [Defendant] [Prosecutor]

Registered number

## **SCHEDULE 5**

### **Form of application for a Costs Order**

The form is not reproduced here. It can be viewed on the Criminal Procedure Forms page of the Ministry of Justice website, at

**<http://www.justice.gov.uk/courts/procedure-rules/criminal/formspage>**

See Part 76, Costs

**‘ CrimPR Part 76 Application for an order for costs under rules 76.8, 76.9 or 76.10 ’**