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Small claims costs – the exceptions explained

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Overview

- The general principle of the small claims track is that parties will not be ordered to pay costs

CPR r 27.14(2) - The court may not order a party to pay a sum to another party in respect of that other party's costs, fees and expenses, including those relating to an appeal

- However, there are a few exceptions to this, some of which are mentioned in the Civil Procedure Rules…
- …and some of which are less obvious
- Today: what are the exceptions, and how can you be best placed to get a client's costs back?

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Unreasonableness

- **CPR r 27.14(2)(g):** such further costs as the court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably

  supported by:

- **CPR r 27.14(3):** a party's rejection of an offer of settlement will not of itself constitute unreasonable behaviour under paragraph (2)(g) but the court may take it into consideration when it is applying the unreasonableness test

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Test for unreasonableness

Dammermann v Lanyon Bowdler LLP [2017] EWCA Civ 269

Costs given at first appeal as:

a) Skeleton and argument submissions considered not to have good prospects of success
b) A fairly generous offer had been made to settle the matter previously

At Court of Appeal, Counsel for Appellant submitted:

a) Skeleton argument and submissions were clearly not unarguable as permission had been given to appeal
b) The point of law on which the case was decided was obscure and would have been unfair to expect it to always be identified
c) The offer may have been rejected but Appellant had made a counteroffer and was clearly still negotiation, matter should not have been considered

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Test for unreasonableness

Dammermann v Lanyon Bowdler LLP [2017] EWCA Civ 269

At Court of Appeal, Counsel for Respondent submitted:

a) Although not "unarguable" and permission to appeal was given because of obscurity of law, previous judgment was clear that Appellant had been "barking up the wrong tree"
b) While the point of law was obscure, it had been drawn to Appellant's attention by Defendant's own skeleton argument
c) Previous judgment had made clear the offer was "very generous" and so rejection should be taken into account

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Test for unreasonableness

Dammermann v Lanyon Bowdler LLP [2017] EWCA Civ 269

Judgment:

- The Appellant's submission had had enough merit to receive permission to appeal and still required careful analysis of a fairly obscure point, even if it was ultimately clearly wrong following that analysis
- Even with the assistance of an opposing skeleton argument, this was a 'contrived' contractual provision giving rise to an intricate point

So appeal allowed on these two points but…

- Previous judgment had made clear the offer was "very generous" and so rejection should be taken into account

- **BUT…**

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Test for unreasonableness

Dammermann v Lanyon Bowdler LLP [2017] EWCA Civ 269

"We doubt if we can usefully give general guidance in relation to the circumstances in which it will be appropriate for a court to decide whether a party "has behaved unreasonably" since all such cases must be highly fact-sensitive.

So this is illustrative but not prescriptive!

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Test for unreasonableness

Borrowed the dictum for the wasted costs jurisdiction from *Ridehalgh v Horsefield* [1994] Ch 205, 232F:

"conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting in a practitioner's judgment, but it is not unreasonable"

(see also CPR r 46.8)

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Test for unreasonableness

Two concrete points:

- "Litigants in person should not be in a better position than legal representatives but neither should they be in a worse position than such representatives."

So clearly a limit to the obscurity argument and litigants in person can't use it as an easy excuse

- The only other thing we can usefully add is that it would be unfortunate if litigants were too easily deterred from using the Small Claims Track by the risk of being held to have behaved unreasonably and thus rendering themselves liable for costs.

So arguably even more caution than wasted costs and *Ridehalgh* – **especially** at appeal stage if costs were not ordered below.

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Test for unreasonableness

And the reasonable offer?

Although the first appeal had been right to consider the offer reasonable, the rejection of a reasonable offer is not itself unreasonable! Was not enough to make an order for costs.

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Test for unreasonableness

Summary

So useful things to have…

- A plainly and obviously bad point…
- …preferably in a well-trod area of law
- The rejection of a very generous offer

As well as more obvious cases: vexatious conduct, litigation designed to harass, causing serious delay in the conduct of proceedings

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The "secret" cost – contracts for costs

Chaplair Ltd v Kumari [2015] EWCA Civ 798:

If there is some contractual provision to allow a party to reclaim costs, they can still do so:

"Because Chaplair had a right to all it costs, it was not restricted to the fixed costs which can be awarded under the CPR in a case on the small claims track."

Why? Because the costs were not payable under the other provisions of the CPR but under the terms of the lease. It's part of the contract.

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The secret cost – contracts for costs

Church Commissioners v Ibrahim [1997] E.G.L.R. 13:

"The successful litigant's contractual rights to recover the costs of any proceedings to enforce his primary contractual rights is a highly relevant factor when it comes to making a costs order. He is not, in my view, to be deprived of his contractual rights to costs where he has claimed them unless there is good reason to do so and that applies both to the making of a costs order in his favour and to the extent that costs are to be paid to him"

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The secret cost – contracts for costs

Church Commissioners v Ibrahim [1997] E.G.L.R. 13:

"The court's power to decide by whom costs should be paid could probably not be fettered by a prior contract between the parties to the effect that a successful litigant should have to pay costs to an unsuccessful litigant. Clearly it would be contrary to the public interest that the court should be deprived of the powers given under section 51(6) to disallow wasted costs."

Not unfettered **but** still a considerable weight in favour

See also *Gomba Holdings (UK) Ltd v Minories Finance Ltd (No.2)* [1993] Ch. 171

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The secret cost – contracts for costs

Further, *Chaplair* provides that CPR r 27.14 is read subject to CPR r 44.5:

(1) Subject to paragraphs (2) and (3), where the court assesses (whether by summary or detailed assessment) costs which are payable by the paying party to the receiving party under the terms of a contract, the costs payable under those terms are, unless the contract expressly provides otherwise, to be presumed to be costs which –

(a) have been reasonably incurred; and
(b) are reasonable in amount,

and the court will assess them accordingly.

(2) The presumptions in paragraph (1) are rebuttable. Practice Direction 44 – General rules about costs sets out circumstances where the court may order otherwise.

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Specific example: section 146 proceedings

- Covenant to pay "Expenses/costs/charges incurred by the landlord in or in contemplation of proceedings or notice under s.146 of the Law of Property Act 1925"

- Variations on this wording very common

Section 146 prevents a landlord from exercising a right of re-entry or forfeiture under a lease until a notice has been served on the lessee specifying the breach complained of, requiring remedy for the breach if possible, and requiring the lessee to make compensation

Seems quite specific…

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Specific example: section 146 proceedings

…. but actually quite broad.

Freeholders of 69 Marina, St Leonards-on-Sea v Oram [2011] EWCA Civ 1258

Section 81(1) of the Housing Act 1996 – a landlord cannot exercise a right of re-entry or forfeiture for failure by a tenant to pay a service charge unless a leasehold valuation tribunal has determined the service charge payable or the tenant has admitted it is so payable

Section 168 of the Commonhold and Leasehold Reform Act 2002 – a landlord cannot service a s. 146 notice on the tenant of a dwelling house under a long lease unless it has been finally determined that a breach of the covenant or condition has occurred

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Specific example: section 146 proceedings

Freeholders of 69 Marina, St Leonards-on-Sea v Oram [2011] EWCA Civ 1258

- A necessary precondition of any s 146 notice or proceedings that the service charge has been determined
- So contemplation of s 146 notice is going to involve running up costs on determining that service charge
- So the costs in service charge cases fall within the terms of that cost clause

This applied even though no s 146 notice served – you don't have to get the determination, serve the notice, then come back for costs

Nor is there a need to plead a s 146 notice will be served at some future point

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Special case: possession hearings

CPR r 55.9:

(2) The court will only allocate possession claims to the small claims track if all the parties agree.

(3) Where a possession claim has been allocated to the small claims track the claim shall be treated, for the purposes of costs, as if it were proceeding on the fast track except that trial costs shall be in the discretion of the court and shall not exceed the amount that would be recoverable under rule 45.38 (amount of fast track costs) if the value of the claim were up to £3,000.

(4) Where all the parties agree the court may, when it allocates the claim, order that rule 27.14 (costs on the small claims track) applies and, where it does so, paragraph (3) does not apply.

Don’t forget that (2) and (4) are separate agreements!

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Small claims track rule extent

Not always just the small claims track!

CPR r 46.11(2): Once a claim is allocated to a particular track, those special rules shall apply to the period before, as well as after, allocation except where the court or a practice direction provides otherwise.

Good reason to think about the timing of certain applications

PD48 para 8.2: Where a settlement is reached or a Part 36 offer accepted in a case which has not been allocated but would, if allocated, have been suitable for allocation to the small claims track, rule 46.13 enables the court to allow only small claims track costs in accordance with rule 27.14. This power is not exercisable if the costs are to be paid on the indemnity basis.

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Smaller exceptions

Usual fixed costs allowable under CPR Part 45 and court fees, but also:

CPR 27.14(2)(d) - expenses which a party or witness has reasonably incurred in travelling to and from a hearing or in staying away from home for the purposes of attending a hearing

No upper bound on this – can be a good reason to consider a remote hearing

CPR 27.14(2)(e) - a sum not exceeding the amount specified in Practice Direction 27 for any loss of earnings or loss of leave by a party or witness due to attending a hearing or to staying away from home for the purpose of attending a hearing

Currently £95 per day per person

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Smaller exceptions

CPR 27.14(2)(f) - a sum not exceeding the amount specified in Practice Direction 27 for an expert's fees

Currently £750 per expert

CPR 27.14(2)(b) - in proceedings which included a claim for an injunction or an order for specific performance a sum not exceeding the amount specified in Practice Direction 27 for legal advice and assistance relating to that claim

Currently not exceeding £260

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