

## **PART 38 General Rules About Costs**

### **PART 38**

#### **Definitions and application 38.1 - 38.2**

##### **38.1**

In this Part, unless the context otherwise requires:

- (1) 'receiving party' means a party entitled to be paid costs;
- (2) 'paying party' means a party liable to pay costs;
- (3) 'fixed costs' means the amounts which are to be allowed in respect of legal representatives' charges in the circumstances set out in Part 39.

##### **38.2**

The costs to which Parts 38 to 40 apply include the following costs where those costs may be assessed by the Court:

- (1) costs of proceedings before an arbitrator or umpire;
- (2) costs of proceedings before a tribunal or other statutory body; and
- (3) costs which are payable by one party to another party under the terms of a contract, where the Court makes an order for an assessment of those costs.

#### **Meaning of immediate assessment 38.3**

##### **38.3**

'Immediate assessment' means the procedure by which the Court, when making an order about costs, orders payment of a sum of money instead of fixed costs or 'detailed assessment'.

#### **Meaning of detailed assessment 38.4**

##### **38.4**

'Detailed assessment' means the procedure by which the amount of costs is decided by the Court in

accordance with Part 40.

Legal representative's duty to notify client

## **Legal representative's duty to notify client 38.5**

### **38.5**

Where:

- (1) the Court makes a costs order against a legally represented party; and
- (2) the party is not present when the order is made;

the party's legal representative must notify his client in writing of the costs order no later than 7 days after the legal representative receives notice of the order.

Court's discretion and circumstances to be taken into account when exercising its discretion as to costs

## **Court's discretion and circumstances to be taken into account when exercising its discretion as to costs 38.6 - 38.14**

### **38.6**

Subject to Rules 38.15 to 38.16 the Court has discretion as to:

- (1) whether costs are payable by one party to another;
- (2) the amount of those costs; and
- (3) when they are to be paid.

### **38.7**

If the Court decides to make an order about costs:

- (1) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
- (2) the Court may make a different order.

**38.8**

In deciding what order (if any) to make about costs, the Court must have regard to all the circumstances, including:

- (1) the conduct of all the parties;
- (2) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
- (3) any payment into Court or admissible offer to settle made by a party which is drawn to the Court's attention and which is not a Part 32 offer.

**38.9**

The conduct of the parties includes:

- (1) conduct before, as well as during, the proceedings;
- (2) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- (3) the manner in which a party has pursued or defended his case or a particular allegation or issue; and
- (4) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

**38.10**

The orders which the Court may make include an order that a party must pay:

- (1) a proportion of another party's costs;
- (2) a stated amount in respect of another party's costs;
- (3) costs from or until a certain date only;
- (4) costs incurred before proceedings have begun;
- (5) costs relating to particular steps taken in the proceedings;
- (6) costs relating only to a distinct part of the proceedings; and
- (7) interest on costs from or until a certain date, including a date before judgment .

### 38.11

Where the Court would otherwise consider making an order under Rule 38.10(6), it must instead, if practicable, make an order under paragraph 38.10(1) or 38.10(3).

### 38.12

There are certain costs orders which the Court will commonly make in proceedings before trial. The following table sets out the general effect of these orders. The table is not an exhaustive list of the orders which the Court may make.

<b>Term</b>	<b>Effect</b>
Costs	The party in whose favour the order is made is entitled to the costs in respect of the part of the proceedings to which the order relates, whatever other costs orders are made in the proceedings.
Costs in any event	
Costs in the case	The party in whose favour the Court makes an order for costs at the end of the proceedings is entitled to his costs of the part of the proceedings to which the order relates.
Costs in the application	
Costs reserved	The decision about costs is deferred to a later occasion, but if no later order is made the costs will be costs in the case.
Claimants Defendant 's costs in case/application	If the party in whose favour the costs order is made is awarded costs at the end of the proceedings, that party is entitled to his costs of the part of the proceedings to which the order relates. If any other party is awarded costs at the end of the proceedings, the party in whose favour the final costs order is made is not liable to pay the costs of any other party in respect of the part of the proceedings to which the order relates.
Costs thrown away	Where, for example, a judgment or order is <i>set aside</i> , the party in whose favour the costs order is made is entitled to the costs which have been incurred as a consequence. This includes the costs of—
<ul style="list-style-type: none"> <li>(a) preparing for and attending any hearing at which the judgment or order which has been set aside was made;</li> <li>(b) preparing for and attending any hearing to set aside the judgment or order in question;</li> <li>(c) preparing for and attending any hearing at which the Court orders the proceedings or the part in question to be adjourned;</li> <li>(d) any steps taken to enforce a judgment or order which has subsequently been set aside .</li> </ul>	

#### **Costs of and caused by**

Where, for example, the Court makes this order on an application to amend a *statement of case*, the party in whose favour the costs order is made is entitled to the costs of preparing for and attending the application and the costs of any consequential amendment to his own *statement of case*.

**Costs here and below**

The party in whose favour the costs order is made is entitled not only to his costs in respect of the proceedings in which the Court makes the order but also to his costs of the proceedings in any lower Court .

**No order as to costs****Each party to pay his own costs**

Each party is to bear his own costs of the part of the proceedings to which the order relates whatever costs order the Court makes at the end of the proceedings.

**38.13**

Where the Court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed.

**38.14**

Where a party entitled to costs is also liable to pay costs the Court may assess the costs which that party is liable to pay and either:

- (1) set off the amount assessed against the amount the party is entitled to be paid and direct him to pay any balance; or
- (2) delay the issue of a certificate for the costs to which the party is entitled until he has paid the amount which he is liable to pay.

**Costs in the small claims tribunal ('SCT') 38.15 - 38.16****38.15**

The SCT may not order a party to a small claim to pay a sum to another party in respect of that other party's costs, fees and expenses, including those relating to an appeal, except:

- (1) such part of any Court or Tribunal fees paid by that other party as the SCT may consider appropriate;
- (2) such further costs as the SCT may assess by the summary procedure and order to be paid by a party who has behaved unreasonably.

**38.16**

A party's rejection of an offer in settlement will not of itself constitute unreasonable behaviour under Rule 38.15(1) but the Court may take it into consideration when it is applying the unreasonableness test.

**Basis of assessment 38.17 - 38.20****38.17**

Where the Court is to assess the amount of costs (whether by immediate or detailed assessment) it will assess those costs:

- (1) on the standard basis; or
- (2) on the indemnity basis;

but the Court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

**38.18**

Where the amount of costs is to be assessed on the standard basis, the Court will:

- (1) only allow costs which are proportionate to the matters in issue; and
- (2) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party .

**38.19**

Where the amount of costs is to be assessed on the indemnity basis, the Court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party .

**38.20**

Where:

- (1) the Court makes an order about costs without indicating the basis on which the costs are to be assessed; or
- (2) the Court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis;

the costs will be assessed on the standard basis.

## **Factors to be taken into account in deciding the amount of costs 38.21 - 38.26**

### **38.21**

The Court is to have regard to all the circumstances in deciding whether costs were:

- (1) if it is assessing costs on the standard basis:
  - (a) proportionately and reasonably incurred; and
  - (b) were proportionate and reasonable in amount; or
- (2) if it is assessing costs on the indemnity basis:
  - (a) unreasonably incurred; or
  - (b) unreasonable in amount.

### **38.22**

In particular, the Court must give effect to any orders which have already been made.

### **38.23**

The Court must also have regard to:

- (1) the conduct of all the parties, including in particular:
  - (a) conduct before, as well as during, the proceedings; and
  - (b) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;

- (2) the amount or value of any money or property involved;
- (3) the importance of the matter to all the parties;
- (4) the particular complexity of the matter or the difficulty or novelty of the questions raised;
- (5) the skill, effort, specialised knowledge and responsibility involved;
- (6) the time spent on the case; and
- (7) the place where and the circumstances in which work or any part of it was done.

### **38.24**

In applying the test of proportionality the Court will have regard to Rule 1.6(3). The relationship between the total of the costs incurred and the financial value of the claim may not be a reliable guide. A fixed percentage cannot be applied in all cases to the value of the claim in order to ascertain whether or not the costs are proportionate.

### **38.25**

In any proceedings there will be costs which will inevitably be incurred and which are necessary for the successful conduct of the case. Legal representatives 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.

### **38.26**

Where a trial 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 preparation for the trial of that issue.

### **Fixed costs 38.27**

### **38.27**

A party may recover the fixed costs specified in Part 39 in accordance with that Part.

### **Procedure for assessing costs 38.28 - 38.39**

### **38.28**

Where the Court orders a party to pay costs to another party (other than fixed costs ) it may either:

- (1) make an immediate assessment of the costs; or
- (2) order detailed assessment of the costs;

unless any Rule, Practice Direction or other enactment provides otherwise.

### **38.29**

Whenever the Court makes an order about costs which does not provide for fixed costs to be paid, the Court should consider whether to make an immediate assessment of costs.

### **38.30**

The general rule is that the Court should make an immediate assessment of the costs:

- (1) at the conclusion of any hearing, which has lasted no more than one day, in which case the order will deal with the costs of the application or matter to which the hearing related. If this hearing disposes of the claim, the order may deal with the costs of the whole claim;
- (2) in hearings in the Court of Appeal to which FRDC 44.165 / ARDC 44.140 applies;

unless there is good reason not to do so e.g. where the paying party shows substantial grounds for disputing the sum claimed for costs that cannot be dealt with on the material available or there is insufficient time to carry out an immediate assessment.

### **38.31**

If an immediate assessment of costs is appropriate but the Court awarding costs is unable to do so on the day, the Court will give directions as to a further hearing before the same Judge.

### **38.32**

Where the parties agree an order without the need for any party to attend, the parties must agree a figure for costs to be inserted in the agreed order or agree that there should be no order for costs.

### **38.33**

It is the duty of the parties and their legal representatives to assist the Judge in making an immediate assessment of costs in any case to which Rule 38.30 applies, in accordance with Rules 38.34 to 38.36.

**38.34**

Each party who intends to claim costs must prepare a written statement of the costs he intends to claim showing separately in the form of a schedule:

- (1) the number of hours to be claimed;
- (2) the hourly rate to be claimed;
- (3) the qualifications and seniority of fee earner;
- (4) the amount and nature of any disbursement to be claimed;
- (5) the amount of the legal representative's costs to be claimed for attending or appearing at the hearing; and
- (6) any tax to be claimed on these amounts.

**38.35**

The statement of costs should follow as closely as possible Form P38/01 and must be signed by the party or his legal representative .

**38.36**

The statement of costs must be filed at Court and copies of it must be served on any party against whom an order for payment of those costs is intended to be sought. The statement of costs should be filed and the copies of it should be served as soon as possible and in any event not less than 24 hours before the date fixed for the hearing.

**38.37**

The failure by a party, without reasonable excuse, to comply with Rules 38.33 to 38.36 will be taken into account by the Court in deciding what order to make about the costs of the claim, hearing or application, and about the costs of any further hearing or detailed assessment hearing that may be necessary as a result of that failure.

**38.38**

The Court will not make an immediate assessment of the costs of a receiving party who is a child or patient unless the legal representative acting for the child or patient has waived the right to further costs.

**38.39**

The Court may make an immediate assessment of costs payable by a child or patient.

**Time for complying with an order for costs 38.40****38.40**

A party must comply with an order for the payment of costs within 14 days of:

- (1) the date of the judgment or order if it states the amount of those costs;
- (2) if the amount of those costs (or part of them) is decided later in accordance with Part 40, the date of the certificate which states the amount; or
- (3) in either case, such later date as the Court may specify.

**Cases where costs orders will be considered to have been made 38.41 - 38.42****38.41**

Where a right to costs arises under:

- (1) Rule 4.31 (defendant's right to costs where claim struck out for nonpayment of fees);
- (2) Rules 32.28 and 32.29 (claimant's entitlement to costs where a Part 32 offer is accepted); or
- (3) Rules 34.15 and 34.16 (defendant's right to costs where claimant discontinues);

a costs order will have been made on the standard basis.

**38.42**

Interest on the costs deemed to have been ordered under Rule 38.41 shall begin to run from the date on which the event which gave rise to the entitlement to costs occurred.

**Costs-only proceedings 38.43 - 38.54****38.43**

Rules 38.44 to 38.53 set out a procedure which may be followed where:

- (1) the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs) which is made or confirmed in writing; but
- (2) they have failed to agree the amount of those costs; and
- (3) no proceedings have been started.

**38.44**

Either party to the agreement may start proceedings under Rules 38.44 to 38.53 by issuing a claim form in accordance with Part 8.

**38.45**

The claim form must:

- (1) identify the claim or dispute to which the agreement to pay costs relates;
- (2) state the date and terms of the agreement on which the claimant relies;
- (3) set out or have attached to it a draft of the order which the claimant seeks;
- (4) state the amount of the costs claimed; and,
- (5) state whether the costs are claimed on the standard or indemnity basis. If no basis is specified the costs will be treated as being claimed on the standard basis.

**38.46**

In proceedings to which Rules 38.44 to 38.53 apply the Court:

- (1) may:
  - (a) make an order for costs to be determined by detailed assessment; or
  - (b) dismiss the claim; and
- (2) must dismiss the claim if it is opposed.

**38.47**

For the purposes of Rule 38.46(2):

- (1) a claim will be treated as opposed if the defendant files an acknowledgement of service stating that he intends to contest the making of an order for costs or to seek a different remedy; and
- (2) a claim will not be treated as opposed if the defendant files an acknowledgement of service stating that he disputes the amount of the claim for costs.

**38.48**

An order dismissing the claim will be made as soon as an acknowledgement of service opposing the claim is filed. The dismissal of a claim under Rule 38.46(2) does not prevent the claimant from issuing another claim form under Part 7 or Part 8 based on the agreement or alleged agreement to which the proceedings under this rule related.

**38.49**

The evidence to be filed and served with the claim form under Rule 8.23 must include copies of the documents on which the claimant relies to prove the defendant's agreement to pay costs.

**38.50**

The Registrar has jurisdiction to hear and decide any issue which may arise in a claim issued under Rules 38.44 to 38.53 irrespective of the amount of the costs claimed or of the value of the claim to which the agreement to pay costs relates.

**38.51**

When the time for filing the defendant's acknowledgement of service has expired, the claimant may by letter request the Court to make an order in the terms of his claim, unless the defendant has filed an acknowledgement of service stating that he intends to contest the claim or to seek a different order.

**38.52**

An order for costs made under Rule 38.50 will be treated as an order for the amount of costs to be decided by a detailed assessment.

**38.53**

In cases in which an additional liability is claimed, regard should be had to the time when and the extent to which the claim has been settled and to the fact that the claim has been settled without the need to commence proceedings.

**38.54**

Nothing in Rules 38.44 to 38.53 prevents a person from issuing a claim form under Part 7 or Part 8 to sue on an agreement made in settlement of a dispute where that agreement makes provision for costs, nor from claiming in that case an order for costs or a specified sum in respect of costs.

**Special situations 38.55 - 38.58****38.55**

Where the Court makes an order which does not mention costs:

- (1) subject to Rules 38.56 and 38.57, the general rule is that no party is entitled to costs in relation to that order; but
- (2) this does not affect any entitlement of a party to recover costs out of a fund held by him as trustee or personal representative, or pursuant to any lease, mortgage or other security.

**38.56**

Where the Court makes:

- (1) an order granting permission to appeal;
- (2) an order granting permission to apply for judicial review; or
- (3) any other order or direction sought by a party on an application without notice;

and its order does not mention costs, it will be considered to include an order for applicant's costs in the case.

**38.57**

Any party affected by an order for costs under Rule 38.56 may apply at any time to vary the order.

**38.58**

The Court hearing an appeal may, unless it dismisses the appeal, make orders about the costs of the proceedings giving rise to the appeal as well as the costs of the appeal.

**Court's powers in relation to misconduct 38.59 - 38.63****38.59**

The Court may, in connection with an immediate or detailed assessment, make an order under Rule 38.60 where:

- (1) a party or his legal representative fails to comply with a Rule, Practice Direction or Court order; or
- (2) it appears to the Court that the conduct of a party or his legal representative , before or during the proceedings which gave rise to the assessment proceedings, was unreasonable or improper.

**38.60**

Where Rule 38.59 applies, the Court may:

- (1) disallow all or part of the costs which are being assessed; or
- (2) order the party at fault or his legal representative to pay costs which he has caused any other party to incur.

**38.61**

Where:

- (1) the Court makes an order under Rule 38.60 against a legally represented party; and
- (2) the party is not present when the order is made;

the party's legal representative must notify his client in writing of the order no later than 7 days after the legal representative receives notice of the order and either in the order under Rule 38.60 or in a subsequent order, require the legal representative to produce to the Court evidence that he took reasonable steps to do so.

**38.62**

Before making an order under Rule 38.60 the Court must give the party or legal representative in question a reasonable opportunity to attend a hearing to give reasons why it should not make such an order.

**38.63**

Conduct before or during the proceedings which gave rise to the assessment which is unreasonable or improper includes steps which are calculated to prevent or inhibit the Court from furthering the Overriding Objective.

**Production of documents and inspection of property before commencement or against a non-party 38.64 - 38.66****38.64**

Rule 38.65 applies where a person applies:

(1) for an order under:

- (a) Rule 25.1(9); or
- (b) Rules 28.47 to 28.50;

which give the Court powers exercisable before commencement of proceedings; or

(2) for an order under:

- (a) Rule 25.1(10); or
- (b) Rules 28.51 to 28.54;

which give the Court power to make an order against a non-party for disclosure of documents, inspection of property etc.

**38.65**

The general rule is that the Court will award the person against whom the order is sought his costs:

(1) of the application; and

(2) of complying with any order made on the application.

### **38.66**

The Court may however make a different order, having regard to all the circumstances, including the extent to which it was reasonable for the person against whom the order was sought to oppose the application.

## **Costs orders in favour of or against non-parties 38.67 - 38.68**

### **38.67**

Where the Court is considering whether to exercise its power to make a costs order in favour of or against a person who is not a party to proceedings:

- (1) that person must be added as a party to the proceedings for the purposes of costs only; and
- (2) he must be given a reasonable opportunity to attend a hearing at which the Court will consider the matter further.

### **38.68**

Rule 38.67 does not apply:

- (1) where the Court is considering whether to make a wasted costs order; and
- (2) in proceedings to which Rule 38.65 applies.

## **Amount of costs where costs are payable pursuant to a contract 38.69 - 38.70**

### **38.69**

Where the Court assesses (whether by the immediate or detailed procedure) 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:

- (1) have been reasonably incurred; and
- (2) are reasonable in amount, and the Court will assess them accordingly.

**38.70**

Rule 38.69 does not apply where the contract is between a legal representative and his client.

**Limitations on court's power to award costs in favour of trustee or personal representative 38.71 - 38.73****38.71**

Rules 38.72 and 38.73 apply where:

- (1) a person is or has been a party to any proceedings in the capacity of trustee or personal representative ("person representing his estate"); and
- (2) Rule 38.69 does not apply.

**38.72**

The general rule is that he is entitled to be paid the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the relevant trust fund or estate.

**38.73**

Where he is entitled to be paid any of those costs out of the fund or estate, those costs will be assessed on the indemnity basis.

**Costs where money is payable by or to a child or patient 38.74 - 38.75****38.74**

Rule 38.75 applies to any proceedings where a party is a child or patient and:

- (1) money is ordered or agreed to be paid to, or for the benefit of, that party; or
- (2) money is ordered to be paid by him or on his behalf.

**38.75**

The general rule is that:

- (1) the Court must order a detailed assessment of the costs payable by, or out of money belonging

to, any party who is a child or patient; and

(2) on an assessment under (1), the Court must also assess any costs payable to that party in the proceedings, unless the Court has issued a default costs certificate in relation to those costs under Part 40.

(3) The Court need not order detailed assessment of costs:

(a) where there is no need to do so to protect the interests of the child or patient or his estate;

(b) where another party has agreed to pay a specified sum in respect of the costs of the child or patient and the legal representative acting for the child or patient has waived the right to claim further costs;

(c) where the Court has decided the costs payable to the child or patient by way of immediate assessment and the legal representative acting for the child or patient has waived the right to claim further costs; or

(d) where an insurer or other person is liable to discharge the costs which the child or patient would otherwise be liable to pay to his legal representative and the Court is satisfied that the insurer or other person is financially able to discharge those costs.

(4) Where:

(a) a claimant is a child or patient; and

(b) a detailed assessment has taken place under this Rule the only amount payable by the child or patient is the amount which the Court certifies as payable.

## **Costs where the Court has made a Group Litigation Order 38.76 - 38.82**

### **38.76**

Rules 38.77 to 38.82 apply where the Court has made a Group Litigation Order ('GLO').

### **38.77**

In Rules 38.78 to 38.82:

(1) 'individual costs' means costs incurred in relation to an individual claim on the group register;

(2) 'common costs' means:

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

- (b) individual costs incurred in a claim while it is proceeding as a test claim; and
- (c) costs incurred by the lead legal representative in administering the group litigation;

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

### **38.78**

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

### **38.79**

The general rule is that where a group litigant is the paying party , he will, in addition to any costs he is liable to pay to the receiving party , be liable for:

- (1) the individual costs of his claim; and
- (2) an equal proportion, together with all the other group litigants, of the common costs.

### **38.80**

Where the Court makes an order about costs in relation to any application or hearing which involved:

- (1) one or more GLO issues; and
- (2) issues relevant only to individual claims;

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

### **38.81**

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

**38.82**

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

**Personal liability of legal representative for costs – Wasted costs orders****38.83 - 38.87****38.83**

The Court shall have power to 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.

**38.84**

The Court must give the legal representative a reasonable opportunity to attend a hearing to give reasons why it should not make such an order.

**38.85**

When the Court makes a wasted costs order, it must:

- (1) specify the amount to be disallowed or paid; or
- (2) direct the Registrar to decide the amount of costs to be disallowed or paid.

**38.86**

The Court may direct that notice must be given to the legal representative's client, in such manner as the Court may direct:

- (1) of any hearing under Rule 38.84; or
- (2) of any order made against his legal representative .

**38.87**

The Court may refer the question of wasted costs to the Registrar instead of making a wasted costs order.

## **Costs order in favour of a party represented pro bono 38.88 - 38.97**

### **38.88**

Where a party ("the claiming party") is represented by a law firm acting pro bono, the law firm may apply for an order that the other party ("the paying party") make a payment in respect of the costs of legal services provided to the pro bono litigant at no charge ("a pro bono costs order"). The Court shall consider the application and assess the costs as if the claiming party were obliged to pay the fees of the law firm at the normal commercial rates charged by the law firm.

### **38.89**

Where the Court makes a pro bono costs order, such costs shall be assessed summarily by a Judge or the Registrar, unless a detailed assessment is necessary.

### **38.90**

Any costs payable pursuant to a pro bono costs order shall be paid to an account ("the Account") established by the Chief Justice by Practice Direction, for the following purposes:

- (1) Scholarships providing financial support to Emirati students studying law in the Emirate of Dubai and in need of such financial support;
- (2) The provision of a Pro Bono Clinic within the DIFC Courts;
- (3) The DIFC Courts Academy; and/or
- (4) Such other purposes as the Chief Justice may direct or order from time to time.

### **38.91**

The Account shall be administered by the signatories of the Account who are the Chief Justice, the Deputy Chief Justice, the Registrar and the Deputy Registrar in accordance with the purposes of the Account.

### **38.92**

Any individual, group or organisation may apply to the Account by way of letter stating the extent of support that is required and the reasons for requiring such support to the designated Pro Bono Programme Leader at the DIFC Courts Registry.

**38.93**

All applications will be determined by the signatories of the Account. The Chief Justice will have the final determination on such applications. When making a decision on the allocation of funds, the signatories will have an absolute discretion and the signatories shall not accept any duty or liability to any individual, group or organisation seeking a distribution.

**38.94**

The allocation of funds will be listed in available records, on the Court website and in its Annual Report.

**38.95**

Where a pro bono costs order is sought, to assist the Court in making an immediate assessment of the amount payable to the Account, the pro bono litigant must prepare, file and serve in accordance with Rules 38.34 to 38.36 a written statement of the sum which the pro bono law firm would have claimed for legal representation had it not been provided free of charge.

**38.96**

If a detailed assessment of costs is required then it shall be undertaken in accordance with Part 40 in the usual manner and the costs of the detailed assessment proceedings shall also be awarded to the Account.

**38.97**

In proceedings where a party is represented pro bono the Court, wherever possible, shall reserve the issue of costs until the conclusion of the trial or the final hearing. At the conclusion of the trial or the final hearing, a single costs order may be made which reflects the overall justice of the case.

**Costs-free trials 38.98 - 38.106****38.98**

A pro bono litigant may be entitled to a costs-free trial, where the pro bono litigant will not be obliged to meet the legal costs of the opposing party or parties even if the pro bono litigant is unsuccessful. The pro bono litigant will only be entitled to a costs-free trial once an application has been approved by the DIFC Courts Pro Bono Panel (the 'Panel').

**38.99**

Applications for a costs-free trial should, save in exceptional circumstances, be submitted before the trial commences. Only those applications qualifying for pro bono assistance will be forwarded to the Panel for its consideration by the designated Programme Leader (chosen by the Chief Justice and responsible for all aspects of the operation and administration of the Pro Bono Programme).

**38.100**

Applications for a costs-free trial:

- (1) should be supported by the pro bono lawyer of the applicant. The pro bono lawyer must certify that in their opinion there is a reasonable prospect of the applicant's case succeeding; and
- (2) will be forwarded to the opposing party's or parties' lawyers for an opportunity to respond to the application and to provide any reasons why the applicant should not be permitted a costs-free trial.

**38.101**

In determining the application, the Panel shall consider whether the applicant meets the threshold of:

- (1) financial inability;
- (2) case merit; and
- (3) such other criteria as the Panel may consider relevant from time to time.

The Panel has absolute discretion as to whether an applicant meets the threshold for a costs-free trial. The Panel may decide that the applicant shall be entitled to costs protection in respect of any stage of proceedings, including any appeal.

**38.102**

The designated Programme Leader shall ensure that a decision of the Panel that an applicant is entitled to a costs-free trial be delivered in a Court Order.

**38.103**

A party may only appeal against an Order that an applicant is entitled to a costs-free trial:

(1) to a judge of the Court; and

(2), either prior to or during the course of the trial, save where, in exceptional circumstances, new information has come to light after the trial which affects or may affect the pro bono litigant's eligibility for a costs-free trial.

### **38.104**

A pro bono litigant may at any time apply to the designated Programme Leader to have the Court fees suspended until the end of the case. The designated Programme Leader has absolute discretion in determining whether Court fees are to be suspended, and to what extent.

### **38.105**

Where the Court makes an order under Rule 38.88, the order must specify that the payment by the paying party must be made to the Account.

### **38.106**

The administrative costs and other expenses related to the office and to the management and investment of the fund will be borne by the Account.