

## **Frequently Asked Questions**

### ***Pro Bono Costs Orders***

What are Pro Bono Costs Orders? .....	1
Where can I find the text of Section 194? .....	1
What is 'pro bono'? .....	2
What is The Access to Justice Foundation? .....	2
What provisions of the Civil Procedure Rules (CPR) apply? .....	2
Which courts can make Pro Bono Costs Orders? .....	2
Who seeks the order? .....	2
What are the criteria for making a Pro Bono Costs Order?.....	2
How much can the court award? .....	3
How is the amount determined - summary or detailed assessment? .....	3
What representation is covered? .....	3
What information does the court need? .....	3
Should I produce a statement/schedule of costs? .....	3
What about costs estimates? .....	4
How do I draft a Pro Bono Costs Order? .....	4
Do I need to notify the Foundation?.....	4
How should payment be made? .....	4
What happens if detailed assessment is ordered? .....	4
What if my case may have further stages ahead e.g. trial or appeal?.....	5
If a costs order would ordinarily be deemed to be made? .....	5
Must I disclose that representation is pro bono, or that a Pro Bono Costs Order will be sought? .....	5
Can Pro Bono Costs be agreed, or included in settlements? .....	5
Can I express a preference for the distribution of a Pro Bono Costs sum? .....	6
Who enforces a Pro Bono Costs Order?.....	6
Further information.....	6
Contact .....	6
Text of Section 194 .....	7
Text of CPR 44.3C.....	8

#### **What are Pro Bono Costs Orders?**

- Section 194 of the Legal Services Act 2007 provides for 'Pro Bono Costs Orders'.
- Pro Bono Costs Orders are broadly equivalent to normal costs orders, and are available when the 'winning' party is represented pro bono (free of charge).
- The 'losing' party is ordered by the court to make a payment in an amount equivalent to legal costs to The Access to Justice Foundation.
- Previously the losing party would otherwise escape liability for costs simply because the winning party had been helped pro bono.

#### **Where can I find the text of Section 194?**

- At the end of this document
- At [www.opsi.gov.uk/acts/acts2007/ukpga\\_20070029\\_en\\_14#pt8-pb8-l1q194](http://www.opsi.gov.uk/acts/acts2007/ukpga_20070029_en_14#pt8-pb8-l1q194)

## What is 'pro bono'?

- Pro bono assistance in this context is free legal help that provides access to justice for someone who cannot afford to pay for legal assistance and cannot get legal aid.
- Where the case is won, obtaining a Pro Bono Costs Order may help others in a similar position to gain access to justice.

## What is The Access to Justice Foundation?

- The Access to Justice Foundation is the prescribed<sup>1</sup> charity under Section 194, having been established to receive and help distribute these (and other) additional financial resources in order to help get pro bono legal assistance to others who need it.
- Taking a strategic view, the Foundation will distribute those monies to Regional Legal Support Trusts, to the national pro bono organisations, and to strategic projects.
- The Regional Legal Support Trusts will in turn distribute to local advice agencies and law centres.
- For more information visit [www.accesstojusticefoundation.org.uk](http://www.accesstojusticefoundation.org.uk)

1. The Legal Services Act 2007 (Prescribed Charity) Order 2008. S.I. 2008/2680.  
[www.opsi.gov.uk/si/si2008/uksi\\_20082680\\_en\\_1](http://www.opsi.gov.uk/si/si2008/uksi_20082680_en_1)

## What provisions of the Civil Procedure Rules (CPR) apply?

- Amendments were made to the Civil Procedure Rules<sup>2</sup> and to the Practice Directions<sup>3</sup> which came into force on 1<sup>st</sup> October 2008. The full amendments can be seen at [www.justice.gov.uk/civil/procrules\\_fin](http://www.justice.gov.uk/civil/procrules_fin).
- In particular see the new rule 44.3C, reproduced at the end of this document.
- Parts 43 to 48 apply with the wording modified where appropriate per CPR 44.3C(5).

2. Civil Procedure (Amendment) Rules 2008. SI 2008 No 2178 (L 10)  
[www.opsi.gov.uk/si/si2008/uksi\\_20082178\\_en\\_1](http://www.opsi.gov.uk/si/si2008/uksi_20082178_en_1)

3. Practice Direction Amendments 47th Update:  
[www.justice.gov.uk/civil/procrules\\_fin/pdf/preview/PD\\_making\\_document\\_47th\\_update.pdf](http://www.justice.gov.uk/civil/procrules_fin/pdf/preview/PD_making_document_47th_update.pdf)

## Which courts can make Pro Bono Costs Orders?

- Pro Bono Costs Orders may be made by a "civil court", which is defined by Section 194(10) as any county court, the High Court or the civil division of the Court of Appeal.

## Who seeks the order?

- The pro bono represented party, assisted by their pro bono lawyers, seeks the order.
- Note however the order must provide for payment to The Access to Justice Foundation (CPR 44.3C(3)).

## What are the criteria for making a Pro Bono Costs Order?

- See the text of Section 194 and CPR 44.3C (reproduced at the end of this document).
- In deciding whether to make an order, and on what terms, the court must have regard to what order it would have made if the party applying for the order had not been represented pro bono (Section 194(4)).

### **How much can the court award?**

- CPR 44.3C(2) sets out how the court may determine the amount payable under Section 194.
- The court may order payment by a ‘losing’ party of a sum equivalent to all or part of the legal costs that would have been ordered to the ‘winning’ party (had the representation not been free).
- This cannot be a greater amount than would have been determined under a conventional costs order.

### **How is the amount determined - summary or detailed assessment?**

- The amount of the Pro Bono Costs payment may be decided by summary or detailed assessment, as with ordinary costs (CPR 44.3C(2) and 47.5).
- If Part 45 fixed costs would have otherwise applied, the amount is determined by reference to how much would have been payable under Part 45.
- Paragraph 10A of the Costs Practice Direction<sup>4</sup> provides that the general rule contained in paragraph 13.2 applies to pro bono cases, namely that the court should make a summary assessment of the costs unless there is good reason not to do so (and as outlined in that paragraph).

4. [www.justice.gov.uk/civil/procrules\\_fin/contents/practice\\_directions/pd\\_parts43-48.htm](http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_parts43-48.htm)

### **What representation is covered?**

- Pro Bono Costs Orders may be made in any proceedings in which a party had legal representation which was provided, all or in part, free of charge.
- An order may be made even if one of the parties’ legal representatives (for example, counsel) was not acting free of charge, although the Pro Bono Costs Order will only be in respect of the free representation.
- Pro Bono Costs Orders may not, however, be made against a party who was himself wholly represented pro bono, or under LSC (legal aid) funding.

### **What information does the court need?**

- The court will need information from the lawyers who gave pro bono help about the costs that would have been incurred had the winning party not received its legal assistance free of charge. See below FAQ “should I produce a statement/schedule of costs?”.

### **Should I produce a statement/schedule of costs?**

- Yes.
- When a Pro Bono Costs Order is sought, to assist the court in making a summary assessment of the costs, paragraph 10A.2 of the Costs Practice Direction requires the party who has pro bono representation to prepare, file and serve in accordance with paragraph 13.5(2) a written statement of the sum equivalent to the costs that party would have claimed for that legal representation had it not been provided free of charge.
- Any bill of costs prepared for a Pro Bono Costs Order must not include a claim for VAT (paragraph 5.21 Costs Practice Direction).

- Where the receiving party had pro bono representation for only part of the proceedings, the bill must be divided into different parts so as to distinguish between: (a) the sum equivalent to the costs claimed for work done by the legal representative acting free of charge; and (b) the costs claimed for work done by the legal representative not acting free of charge (paragraph 4.2 Costs Practice Direction).

### **What about costs estimates?**

- Paragraph 6.2 of the Costs Practice Direction, concerning estimates of costs, has been adapted to extend them to pro bono cases.
- An “estimate of costs” in the Pro Bono Costs context means an estimate of the sum equivalent to (i) the base costs (including disbursements) that the party would have already incurred had the legal representation provided to that party not been free of charge; and (ii) the base costs (including disbursements) that the party would incur if the legal representation to be provided to that party were not free of charge.

### **How do I draft a Pro Bono Costs Order?**

- A suggested draft order can be found at [www.accesstojusticefoundation.org.uk](http://www.accesstojusticefoundation.org.uk)
- The Pro Bono Costs Order will be made within the substantive order, as with any normal costs order.
- CPR rule 44.3C(3) requires that “the order must specify that the payment by the paying party must be made to the prescribed charity”. The prescribed charity is “*The Access to Justice Foundation*”.

### **Do I need to notify the Foundation?**

- CPR 44.3C(4) requires the party obtaining the order to send a copy of the order to The Access to Justice Foundation within 7 days of receipt.
- Please send to *The Access to Justice Foundation, PO Box 64162, London WC1A 9AN*. Alternatively email a scanned copy to [enquiries@atjf.org.uk](mailto:enquiries@atjf.org.uk)

### **How should payment be made?**

- The party ordered to make a Pro Bono Costs payment must make the payment directly to The Access to Justice Foundation.
- Payments should be made by cheque payable to “The Access to Justice Foundation” sent to *The Access to Justice Foundation, PO Box 64162, London WC1A 9AN*.
- Alternatively contact [enquiries@atjf.org.uk](mailto:enquiries@atjf.org.uk) to enquire about paying by BACS or CHAPS.
- The Foundation will send a receipt to the paying party or their representative, copied to the pro bono lawyers who sought the order.

### **What happens if detailed assessment is ordered?**

- In the event the Pro Bono Costs amount is not summarily assessed, the amended CPR part 47 provides for detailed assessment.
- Rule 47.18(1A) provides that the ‘winning’ party is not entitled to their costs of the detailed assessment, however it makes provision for that party to apply for an order in respect of that (pro bono) representation under Section 194.

- During detailed assessment proceedings of a Pro Bono Costs sum, where any form of certificate of costs is made, amended or set aside, the party obtaining the order must send a copy of that certificate/order to The Access to Justice Foundation (see CPR 47.11(4) obtaining default costs certificate; 47.12(5) default costs certificate set aside or varied; 47.15(4) interim costs certificate issued or varied; 47.16(6) interim costs certificate).

### **What if my case may have further stages ahead e.g. trial or appeal?**

- Special care is needed where a Pro Bono Costs Order is being considered in a case that may have further stages ahead or that may go on to an appeal.
- Where there is a series of costs orders going either way if the first order is made in favour of The Access to Justice Foundation and the second made in favour of the opponent, it will not be possible to direct a set-off of these orders, as they lack the necessary mutuality.
- In addition, Pro Bono Costs payments are not returnable in the event of a subsequent adverse costs order.
- Given this the court might instead be asked to reserve costs (with a liberty to apply) until the trial or other final hearing, perhaps with a note on the court file to indicate the order which would have been made but for this problem. The court conducting the final hearing can then make a single order, one way or the other, which reflects the justice of the case overall including the interlocutory successes and failures.

### **If a costs order would ordinarily be deemed to be made?**

- Where costs orders are deemed to have been made under CPR 44.12, if deemed in favour of a party with pro bono representation, that party may apply for a Pro Bono Costs Order (CPR 44.12 (1A)).
- This includes:
  - CPR 3.7 - defendant's right to costs where claim struck out for non-payment of fees.
  - CPR 36.10(1) and (2) - claimant's entitlement to costs where a Part 36 offer is accepted.
  - CPR 38.6 - defendant's right to costs where claimant discontinues.
- In partly discontinued proceedings, CPR 38.8(2) allows a court to stay the remainder of the proceedings until claimant makes the payment pursuant to the Pro Bono Costs Order.

### **Must I disclose that representation is pro bono, or that a Pro Bono Costs Order will be sought?**

- There is no general obligation under the CPR to inform another party of an intention to seek a Pro Bono Costs Order in due course, in the same way that there is no requirement to disclose that representation is being provided pro bono.
- This does not prevent a party choosing to inform the other party of their intention to seek Pro Bono Costs.

### **Can Pro Bono Costs Orders be agreed, or included in settlements?**

- It is open to parties in agreed orders or settlements to include a payment to The Access to Justice Foundation.

- An agreed order could include a Pro Bono Costs Order by consent.
- An out of court settlement could include provision for a sum equivalent to a Pro Bono Costs payment.
- Even if the outcome of settlement means no Pro Bono Costs Order is made, the Foundation welcomes being informed of when the Pro Bono Costs regime has assisted in achieving a settlement. The Foundation can be contacted by email [enquiries@atjf.org.uk](mailto:enquiries@atjf.org.uk).

### **Can I express a preference for the distribution of a Pro Bono Costs sum?**

- Those associated with a successful Pro Bono Costs Order, such as the pro bono lawyers, may express a preference as to the distribution of the Pro Bono Costs sum by The Access to Justice Foundation.
- The Foundation will have regard to any such preferences, but in order to maintain a strategic approach, is not bound by them. For further information see the Foundation's Distribution Principles at [www.accesstojusticefoundation.org.uk](http://www.accesstojusticefoundation.org.uk).
- Preferences may be communicated to the Foundation by any convenient method. You may email [enquiries@atjf.org.uk](mailto:enquiries@atjf.org.uk) or write to *The Access to Justice Foundation, PO Box 64162, London WC1A 9AN*.

### **Who enforces a Pro Bono Costs Order?**

- It is the pro bono assisted party who seeks the Pro Bono Costs Order, and similarly it is hoped that this party with continued pro bono assistance will enforce an order if enforcement became necessary.
- It is however expected that those who are ordered to make a Pro Bono Costs payment will obey the court order. The Access to Justice Foundation is the statutory recipient of the payments, and does not play any role in individual cases nor enforcement of orders.

### **Further information**

- For general guidance on Pro Bono Costs visit The Access to Justice Foundation's website at [www.accesstojusticefoundation.org.uk](http://www.accesstojusticefoundation.org.uk).

### **Contact**

- Solicitors or advice agencies involved in pro bono matters please contact LawWorks [www.lawworks.org.uk](http://www.lawworks.org.uk) 020 7929 5601.
- Barristers please contact the Bar Pro Bono Unit [www.barprobono.org.uk](http://www.barprobono.org.uk) 020 7611 9500.
- For general enquiries the Foundation may be contacted by email at [enquiries@atjf.org.uk](mailto:enquiries@atjf.org.uk).
- Media and press enquiries please telephone 020 7320 5902.

## **Text of Section 194, Legal Services Act 2007**

### **194 Payments in respect of pro bono representation**

- (1) This section applies to proceedings in a civil court in which—
- (a) a party to the proceedings (“P”) is or was represented by a legal representative (“R”), and
  - (b) R’s representation of P is or was provided free of charge, in whole or in part.
- (2) This section applies to such proceedings even if P is or was also represented by a legal representative not acting free of charge.
- (3) The court may order any person to make a payment to the prescribed charity in respect of R’s representation of P (or, if only part of R’s representation of P was provided free of charge, in respect of that part).
- (4) In considering whether to make such an order and the terms of such an order, the court must have regard to—
- (a) whether, had R’s representation of P not been provided free of charge, it would have ordered the person to make a payment to P in respect of the costs payable to R by P in respect of that representation, and
  - (b) if it would, what the terms of the order would have been.
- (5) The court may not make an order under subsection (3) against a person represented in the proceedings if the person’s representation was at all times within subsection (6).
- (6) Representation is within this subsection if it is—
- (a) provided by a legal representative acting free of charge, or
  - (b) funded by the Legal Services Commission as part of the Community Legal Service.
- (7) Rules of court may make further provision as to the making of orders under subsection (3), and may in particular—
- (a) provide that such orders may not be made in civil proceedings of a description specified in the rules;
  - (b) make provision about the procedure to be followed in relation to such orders;
  - (c) specify matters (in addition to those mentioned in subsection (4)) to which the court must have regard in deciding whether to make such an order, and the terms of any order.
- (8) “The prescribed charity” means the charity prescribed by order made by the Lord Chancellor.
- (9) An order under subsection (8) may only prescribe a charity which—
- (a) is registered in accordance with section 3A of the Charities Act 1993 (c. 10), and
  - (b) provides financial support to persons who provide, or organise or facilitate the provision of, legal advice or assistance (by way of representation or otherwise) which is free of charge.
- (10) In this section—
- “legal representative”, in relation to a party to proceedings, means a person exercising a right of audience or conducting litigation on the party’s behalf;
- “civil court” means the civil division of the Court of Appeal, the High Court, or any county court;
- “free of charge” means otherwise than for or in expectation of fee, gain or reward.
- (11) The court may not make an order under subsection (3) in respect of representation if (or to the extent that) it is provided before this section comes into force.

## **Text of CPR 44.3C**

### **Orders in respect of pro bono representation**

#### **44.3C**

- (1) In this rule, 'the 2007 Act' means the Legal Services Act 2007.
- (2) Where the court makes an order under section 194(3) of the 2007 Act –
  - (a) the court may order the payment to the prescribed charity of a sum no greater than the costs specified in Part 45 to which the party with pro bono representation would have been entitled in accordance with that Part and in respect of that representation had it not been provided free of charge; or
  - (b) where Part 45 does not apply, the court may determine the amount of the payment (other than a sum equivalent to fixed costs) to be made by the paying party to the prescribed charity by –
    - (i) making a summary assessment; or
    - (ii) making an order for detailed assessment,  
of a sum equivalent to all or part of the costs the paying party would have been ordered to pay to the party with pro bono representation in respect of that representation had it not been provided free of charge.
- (3) Where the court makes an order under section 194(3) of the 2007 Act, the order must specify that the payment by the paying party must be made to the prescribed charity.
- (4) The receiving party must send a copy of the order to the prescribed charity within 7 days of receipt of the order.
- (5) Where the court considers making or makes an order under section 194(3) of the 2007 Act, Parts 43 to 48 apply, where appropriate, with the following modifications –
  - (a) references to 'costs orders', 'orders about costs' or 'orders for the payment of costs' are to be read, unless otherwise stated, as if they refer to an order under section 194(3);
  - (b) references to 'costs' are to be read, as if they referred to a sum equivalent to the costs that would have been claimed by, incurred by or awarded to the party with pro bono representation in respect of that representation had it not been provided free of charge; and
  - (c) references to 'receiving party' are to be read, as meaning a party who has pro bono representation and who would have been entitled to be paid costs in respect of that representation had it not been provided free of charge.