



Consultation

Civil Procedure Rules:
Costs Capping Orders

Response of Browne Jacobson LLP
22 October 2008

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Introduction

Browne Jacobson LLP

Browne Jacobson LLP is a leading firm of solicitors in the Midlands, having offices in Nottingham, Birmingham and London. Among its clients the firm counts the NHSLA, a number of national insurers, the Motor Insurers Bureau and Local Authorities. The firm deals with a substantial volume of litigation on behalf of these clients in all areas, including professional negligence, personal injury and employment claims.

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Interest in the Consultation

Browne Jacobson handles a wide variety of high value claims, including claims proceeding under Group Litigation Orders. Such claims frequently give rise to issues in relation to costs.

We consider it unsatisfactory that these issues can generally only be dealt with at the conclusion of a claim, when costs have already been incurred. There has, for some time, been a need for measures which allow parties to monitor their spending against appropriate parameters, and costs capping orders offer such a facility.

We have significant experience of advising clients in relation to costs capping, but there is presently an unsatisfactory degree of uncertainty as to when such orders will be granted. We therefore welcome the introduction of rules outlining when a costs cap is appropriate and setting out the procedure to obtain one.

The Response

This response is based upon the experiences of lawyers at Browne Jacobson LLP and upon feedback from a number of the firm's clients.

In order to assist in considering the views set out in this response, we include at appendix 1 revised drafts of paragraphs in relation to which we have proposed amendments .

Summary

Costs capping is an established case management power available to the courts to prevent excessive or disproportionate costs being incurred in the course of a claim. Whilst it is only one of a number of powers available to the court for this purpose, it is an invaluable tool in certain cases.

Costs capping will not be appropriate for routine, low value cases where the expense of setting a cap will outweigh its benefits. In such cases fixed fees are a much more effective approach to controlling costs. However, in high value claims or group litigation a more bespoke means of controlling costs is appropriate.

Costs caps have a significant advantage over other control measures as they are set **before** costs are incurred. They allow parties to budget during the litigation utilising the costs cap as a reference point, encouraging a focus on proportionate expenditure and the resolution of issues. They reduce the risk of parties incurring costs which they may later find are not recoverable.

The issue of excessive or disproportionate costs is one which has received a great deal of attention recently, most notably in relation to low value personal injury claims. However the need to control costs extends throughout the legal system and it is important that the courts retain the flexibility to use case management powers to address this.

We therefore welcome the approach taken by the CPR Committee of seeking to lay down procedural guidance for costs capping applications and broad guidelines as to factors relevant to those applications. We note the committee has concluded that it would be inappropriate to attempt to create new substantive law in relation to costs capping and we agree this.

We therefore agree with many of the committee's proposals. However, within our response we highlight some key areas in which we consider the draft rules stray into the territory of creating substantive law

While broad guidelines in relation to the issues to be considered in a costs capping application might appropriately be incorporated into the draft rules, it will be important that those guidelines are not so narrow or prescriptive that they might alter the existing law or fetter the courts in considering future costs capping applications. There are a number of areas in which the rules appear to set out a narrower test than that within the current case law, and we have identified these

We have also proposed that the rules be incorporated into part 3 of the CPR, as costs capping is a case management tool.

Response to Consultation Questions

Question 1 – Definition of a costs capping order

We agree the proposed definition.

Question 2 – Orders relating to whole litigation or specific issues

Whilst we agree with the general definition of Part 44.18(3), we would suggest an amendment as per Appendix 1.

Question 3 – Criteria for a costs cap

We do not agree with the extent of the criteria set out in Rule 44.18(4):

1. We would substitute “substantial risk” with *real risk*.
2. We would amend paragraph (c) as follows:-
[The court] is satisfied that a costs capping order is the most appropriate means of controlling costs.

We note the intention of the CPR Committee that where appropriate costs capping orders should be sought at the earliest stage in litigation. We consider that it would be unfeasible at that stage for the court to be able to say that there was a substantial risk of costs being disproportionate, given the inherent uncertainties in litigation.

If there is a real risk of disproportionate costs then the court should be able exercise its discretion in determining how to addressing this and to impose a costs capping order if appropriate.

With regard to the amendments to paragraph (c) of Part 44.18(3) we do not believe that the court’s case management powers should be fettered by such prescriptive measures (see also response to question 4).

Question 4 – Circumstances to be considered

Please see response to Question 3. We consider that it is appropriate for the court to consider the availability of other means of controlling costs when deciding whether a costs capping order is appropriate.

Question 5 - Variation

We agree with the limits on variation imposed in Rule 44.18(6).

Question 6 – Application for a costs capping order

We agree with the provisions set out in Rules 44.19 and 44.20.

Question 7 – Practice Direction

We do not agree with the provision in 23.A.1. We do not consider that costs capping orders should be limited to “exceptional circumstances”. This is inconsistent with the draft amendments to rule 44 and with case law.

We would suggest that paragraph 23.A.1 states that “*costs capping orders should be made in accordance with Rule 44.18(4)*”.

We understand that it was not the intention of the CPR Committee to vary the existing law on costs capping orders¹(paragraph 2 Proposals for Constitution). While costs capping orders are not routinely made, and while the court will, of course, have regard to other means of controlling costs before imposing a costs cap, the case law does not support the suggestion that a cap will only be imposed in ‘exceptional’ circumstances.

We have considered the minutes of the Civil Procedure Rules Committee and the Costs Capping Sub Committee which have given rise to these proposals. We have been unable to identify from these minutes the source of the requirement for ‘exceptional circumstances’ to be present before a costs capping order is made. We see no justification for this test, as the circumstances in which a costs capping order should be made are already included within proposed amendments to rule 44.

Further Comments – CPR Part 3

Costs capping orders form part of the court’s general case management powers and as such the provision in relation to costs capping orders should be within Part 3 of the CPR.

Alternatively, we suggest that the provisions within part 44 should be referred to within part 3.

¹ as set out in *Smart v East Cheshire NHS* [2003] EWHC 2806, *King v Telegraph Group Ltd* [2005] 1 WLR 2282 and *Willis v Nicholson* [2007] EWCA Civ 199

Appendix 1 – Proposed Draft Rules

The proposed rules set out below incorporate the amendments proposed within our consultation response. Rules in relation to which we propose no amendment are not included. In addition to amendments set out below, we have proposed in our response that these provisions should be incorporated into Part 3 of the CPR.

Rules

- (3) A costs capping order may be in respect of:
- a) the whole litigation and/or
 - b) any issues which are ordered to be tried separately.
- (4) The court may at any stage of proceedings make a costs capping order against all or any of the parties if:
- a) it is in the interest of justice to do so;
 - b) there is a real risk that without such an order costs will be disproportionately incurred and
 - c) it is satisfied that a costs capping order is the most appropriate means of controlling costs.
- (5) In considering whether to exercise its discretion under this Rule, the court will consider all the circumstances of the case, including:
- a) whether there is a substantial imbalance between the financial position of the parties;
 - b) whether the costs of determining the amount of the cap are likely to be disproportionate to the overall costs of the litigation;
 - c) the stage which the proceedings have reached;
 - d) the costs which have been incurred to date and the future costs;
and
 - e) the availability of other case management powers and detailed assessment as a means of controlling costs.

Practice Direction

23A.1 The circumstances in which costs capping orders can be made are set out in rule 44.18(4)

Appendix 2 – Ministry of Justice Consultation Paper

Civil Procedure Rules: Costs Capping Orders

Proposals for Consultation

Introduction

1. The consultation is being conducted on behalf of the Civil Procedure Rule Committee (CPRC). The CPRC is an advisory Non-Departmental Public Body (NDPB) responsible for making the Civil Procedure Rules governing civil cases in the Court of Appeal, High Court and county courts. It has a statutory duty to 'consult such persons as they consider appropriate' when making rules of court (Civil Procedure Act 1997, s. 2(6)(a)).
2. The paper seeks views on proposals to amend Part 44 of the Civil Procedure Rules 1998 (CPR) by inserting rules on costs capping orders. It also proposes amendments to the Costs Practice Direction to provide guidance on costs capping. The proposals are drawn from current case law and so do not propose new policy.
3. The consultation is primarily aimed at the legal profession, insurers, court users and others with an interest in this issue in England and Wales.
4. The proposed rules on costs capping orders and proposed amendments to the Costs Practice Direction are set out in the Annex to this consultation paper.

The proposals

Background

5. Costs capping orders have been considered by the courts in a number of cases¹. In *Willis v Nicolson* [2007] EWCA Civ 199 the Court of Appeal considered whether it should provide guidance on costs capping. However it concluded that it was for the CPRC to decide whether, and if so with what degree of urgency, to take up the issues that had been identified in its judgment.
6. The CPRC decided that a sub-committee should be established to consider whether it should take this forward, and if so, what should be covered in any consultation. The CPRC subsequently considered the various views put forward by the sub-committee and concluded that:
 - the court had jurisdiction to make costs capping orders;
 - the approach to such orders should be conservative and such orders should only be made in exceptional circumstances when there is a particular reason for doing so, not as a matter of course; and
 - costs capping orders should generally be made on application.
7. Based on these guidelines the sub-committee was asked to produce draft rules and practice direction provisions for consultation. The draft rules and practice direction provisions were discussed by the CPRC and the proposed rules and practice direction provisions annexed to this paper are the outcome of that discussion.
8. The draft rules do not apply to protective costs orders (PCOs). Although PCOs can have a similar effect they are made in public interest challenge cases and are made subject to different principles (see for example *R (on the application of Corner House Research) v the Secretary of State for Trade and Industry* [2005] EWCA Civ 192).

¹ Including: *Leigh v Michelin Tyre plc* [2003] EWCA Civ 1766, [2004] 2 All ER 175; *Smart v East Cheshire NHS Trust* [2003] EWHC 2806 (QB); *AB v Leeds Teaching Hospitals NHS Trust* [2004] 2 FLR 365; *King v Telegraph Group Ltd* [2004] EWCA Civ 613; *Campbell v MGN Ltd* (No. 2) [2005] UKHL 61, [2005] 4 All ER 793; *Knight v Beyond Properties Pty Ltd* [2007] 1 All ER 91; *Henry v BBC* [2005] EWHC 2503 (QB), [2006] 1 All ER 154 C; *Dawson v First Choice Holidays* (Birmingham District Registry, 12th March 2007).

Draft Rules

9. It is proposed that new rules 44.18 to 44.20 should be inserted into Part 44 of the CPR. The new rules are set out in the Annex to this consultation paper.
10. Rule 44.18(1) defines a costs capping order as an order limiting the amount of future base costs (including disbursements) which a party may recover pursuant to an order for costs subsequently made. Rule 44.18(2) defines 'future costs'.

Q1. Do you agree with the definitions of 'a costs capping order' and 'future costs (rule 44.18 (1) and (2))'? If not, please give your reasons.

11. Rule 44.18(3) provides that an order may be made for the whole litigation or any issues that are ordered to be tried separately.

Q2. Do you agree with rule 44.18(3)? If not, please give your reasons.

12. Rule 44.18(4) provides that a costs capping order can be made at any stage of the proceedings, and against all or any of the parties, if certain criteria are met. These are that it is in the interests of justice to do so; there is a substantial risk that without such an order costs will be disproportionately incurred; and the court is not satisfied that the risk can be adequately controlled by case management and detailed assessment of costs.

Q3. Do you agree with the criteria that have to be met for a costs capping order to be made (rule 44.18 (4))'? If not, please give your reasons.

13. Rule 44.18(5) makes clear that in exercising its discretion, the court will take into account all the circumstances of the case, including whether there is a substantial imbalance between the financial position of the parties; whether the costs of determining the amount of the cap are likely to be proportionate to the overall costs of the litigation; the stage which the proceedings have reached; and the costs which have been incurred to date and the future costs.

Q4. Are there any other circumstances which you consider should be included in rule 44.18(5)?

14. Rule 44.18(6) provides that a variation to a costs capping order will not be allowed unless there has been a material and substantial change of circumstances since the order was made or there is some other compelling reason why a variation should be granted.

Q5. Do you agree the limits on variation (rule 44.18(6))? If not, please give your reasons.

15. Rule 44.19(1) provides that an application for a costs capping order must be made on notice. Rule 44.19(2) requires that the notice must set out why a costs capping order should be made and whether it is in respect of the whole of the litigation or for a particular issue. An estimate of costs setting out the costs and disbursements incurred to date and those likely to be incurred in the future must accompany the application.

16. Rule 44.19(3) provides that the court may give directions for the determination of the application and sets out the sort of directions that may be given.

17. Rule 44.20 provides that an application to vary must be made by application notice pursuant to Part 23 of the CPR and that the evidence in support must include a further estimate of costs.

Q6. Do you agree the proposals on how an application for a costs capping order and an application to vary should be made (rules 44.19 and 44.20)? If not, please give your reasons.

Draft Costs Practice Direction Provisions

18. It is proposed that a new Section 23A will be inserted into the Costs Practice Direction. This new Section is also set out in the Annex to this consultation paper.
19. The proposed provisions explain that costs capping orders are intended to be made in exceptional cases only where conventional case management is not sufficient to control costs adequately. An application for a costs capping order should be made as soon as possible and one of the factors that the court will consider when deciding whether to make an order is the stage that the proceedings have reached when the application is made.
20. The proposed provisions provide that the estimate of costs must be in a designated form. It also indicates the way in which the schedule of costs must be set out and that a statement of truth must support the schedule. Finally, the proposed provisions set out the factors that the court will take into account when assessing the quantum of the costs cap and clarifies that this may include a reasonable allowance on costs for contingencies.

Q7. Do you have any comments on the proposed Costs Practice Direction provisions?

Summary of questions

- Q1. Do you agree with the definitions of 'a costs capping order' and 'future costs' (rule 44.18 (1) and (2))? If not, please give your reasons.**
- Q2. Do you agree with rule 44.18(3)? If not, please give your reasons.**
- Q3. Do you agree with the criteria that have to be met for a costs capping order to be made (rule 44.18 (4))? If not, please give your reasons.**
- Q4. Are there any other circumstances which you consider should be included in rule 44.18(5)?**
- Q5. Do you agree the limits on variation (rule 44.18(6))? If not, please give your reasons.**
- Q6. Do you agree the proposals on how an application for a costs capping order and an application to vary should be made (rules 44.19 and 44.20)? If not, please give your reasons.**
- Q7. Do you have any comments on the proposed Costs Practice Direction provisions?**

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Annex

Civil Procedure Rules Costs Capping Orders

AMENDMENTS TO PART 44

New rules 44.18 to 44.20 to be inserted into Part 44.

Costs capping orders – General

- 44.18(1) A costs capping order is an order limiting the amount of future costs (including disbursements) which a party may recover pursuant to an order for costs subsequently made.
- (2) In this rule, ‘future costs’ means costs incurred in respect of work done after the date of the costs capping order but excluding the amount of any additional liability.
- (3) A costs capping order may be in respect of—
- (a) the whole litigation; or
 - (b) any issues which are ordered to be tried separately.
- (4) The court may at any stage of proceedings make a costs capping order against all or any of the parties if—
- (a) it is in the interests of justice to do so;
 - (b) there is a substantial risk that without such an order costs will be disproportionately incurred; and
 - (c) it is not satisfied that the risk in sub-paragraph (b) can be adequately controlled by—
 - (i) case management directions or orders made under Part 3; and
 - (ii) detailed assessment of costs.
- (5) In considering whether to exercise its discretion under this rule, the court will consider all the circumstances of the case, including—
- (a) whether there is a substantial imbalance between the financial position of the parties;
 - (b) whether the costs of determining the amount of the cap are likely to be proportionate to the overall costs of the litigation;
 - (c) the stage which the proceedings have reached; and
 - (d) the costs which have been incurred to date and the future costs.

- (6) A costs capping order, once made, will limit the costs recoverable by the party subject to the order unless that party successfully applies to vary the order. No such variation will be made unless—
- (a) there has been a material and substantial change of circumstances since the date when the order was made; or
 - (b) there is some other compelling reason why a variation should be granted.

Application for a costs capping order

44.19(1) An application for a costs capping order must be made on notice in accordance with Part 23.

- (2) The application notice must—
- (a) set out—
 - (i) whether the costs capping order is in respect of the whole of the litigation or a particular issue which is ordered to be tried separately; and
 - (ii) why a costs capping order should be made; and
 - (b) be accompanied by an estimate of costs setting out—
 - (i) the costs (and disbursements) incurred by the applicant to date; and
 - (ii) the costs (and disbursements) which the applicant is likely to incur in the future conduct of the proceedings.
- (3) The court may give directions for the determination of the application and such directions may—
- (a) direct the respondent to file a schedule of costs in the form set out in the Practice Direction supplementing this rule;
 - (b) direct the respondent to file written submissions in response to the application;
 - (c) fix the date and time estimate of the hearing of the application;
 - (d) indicate whether the judge hearing the application will sit with an assessor at the hearing of the application; and
 - (e) include any further directions as the court sees fit.

Application to vary a costs capping order

44.20(1) An application to vary a costs capping order must be made on notice in accordance with Part 23.

- (2) The evidence in support of the application must include a further estimate of costs.

AMENDMENTS TO THE COSTS PRACTICE DIRECTION

New Section 23A to be inserted into the Costs Practice Direction.

SECTION 23A COSTS CAPPING ORDERS

When to make an application

- 23A.1 Costs capping orders are intended to be made in exceptional cases only where conventional case management is not sufficient to control costs adequately.
- 23A.2 An application for a costs capping order must be made as soon as possible within the proceedings, preferably before or at the first case management hearing or shortly afterwards. The stage which the proceedings have reached at the time of the application will be one of the factors the court will consider when deciding whether to make a costs capping order.

Estimate of costs

- 23A.3 The estimate of costs required by rules 44.19(2) and 44.20(2) must be in the form illustrated in Precedent H in the Schedule of Costs Precedents annexed to this Practice Direction.

Schedule of costs

- 23A.4 The schedule of costs referred to in rule 44.19(3)—
- (a) must set out—
 - (i) each sub-heading as it appears in the applicant’s estimate of costs (column 1);
 - (ii) alongside each sub-heading, the amount claimed by the applicant in the applicant’s estimate of costs (column 2); and
 - (iii) alongside the figures referred to in sub-paragraph (ii) the amount that the respondent proposes should be allowed under each sub-heading (column 3); and
 - (b) must be supported by a statement of truth.

Assessing the quantum of the costs cap

- 23A.5 When assessing the quantum of a costs cap, the court will take into account the factors detailed in rule 44.5 and the relevant provisions supporting that rule in this Practice Direction. The court may also take into account when considering a party’s estimate of the costs they are likely to incur in the future conduct of the proceedings a reasonable allowance on costs for contingencies.