

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.