Ministry of Justice / Civil Procedure Rules Committee (CPRC)

Civil Procedure Rules: costs capping orders

A response by the Association of Personal Injury Lawyers
Dated 23 October 2008

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation whose members help injured people to gain the access to justice they deserve. Our members are mostly solicitors, who are all committed to serving the needs of people injured through the negligence of others. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues.

The aims of the Association of Personal Injury Lawyers are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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Introduction

In the case of *Willis v Nicolson* (CA) March 2007, the Court of Appeal declined to make a cost capping order and indicated that courts should not do so until the Rules Committee had provided guidance to the courts as to those circumstances in which such orders should be made. Courts should try to influence the way in which a case is run to minimise costs, said the Court, but a cap was a last resort as the level of costs charged by lawyers were guided by market forces.

Many of APIL's members fear cost capping from district judge level and this case sent a clear message to the lower courts that costs caps were not a solution in the majority of stand-alone cases.

This response to consultation echoes that view. We accept that codification of the current case law is required, but we believe that cost capping should only be applied to very high cost cases. At present, this view is not reflected in the proposed rules, and our comments and suggestions can be found in the body of this response.

While the capping of costs may work to reduce the final amounts paid by the losing party to the receiving party, the high cost, of what would in effect be cost capping satellite litigation, causes us some concerns. For each application a Form H bill of costs must be drafted and senior counsel instructed to attend the hearing: this is an expensive process.

We must also point out that the CPRC needs to protect the litigant's Article 6 rights, under the Human Rights Act, to a fair trial and that costs capping applications should not be used to circumvent or frustrate that.

Answers to specific consultation questions

1. 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.

44.18(1): definition of costs capping order

We are content with the reference to 'future costs (including disbursements)', but feel that the rule should explicitly state that it is 'base costs' which are referred to and should expressly exclude VAT from the definition. In addition, the rule should deal with the issue of counsel's fees in a CFA claim. Are they included in base costs or are they to be treated as a disbursement?

44.18 (2) Future costs definition

We agree that the rule should not allow retrospective caps on costs.

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

We are content with the drafting of this rule.

3. 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.

Can the court make an order of its own motion? It is not clear from the wording for this particular rule. It states, "the court may at any stage of proceedings make a costs capping order…."

If the court is minded to make an order of its own motion and under this rule has the power to do so, then the rule should clearly state that the court must give proper notice to the parties concerned. The court should not be permitted to raise the issue for the first time, at a CMC for example, unless there has been prior notice given, to enable all parties to be fully prepared to deal with the issue.

We note that the wording in this clause has been based upon the decision of Gage J, in *Smart v East Cheshire NHS Trust [2003]*, and we agree that these rules should also reflect the link to that case in other aspects. See our comments in our answer to questions 4 and 7 below.

We also suggest that after 44.18(4)(a) the CPRC should add the word 'and' because the rule should ensure that all the criteria listed should be satisfied, not just the first one listed. With the present wording, this is not the case, because this particular 'and' is missing.

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

We have already noted approvingly that these criteria originate from Gage J in *Smart*. We are generally happy with them, subject to the following comments:

44.18(5)(a): "Substantial financial imbalance between the parties." We are unsure exactly how this is intended to be interpreted. We suggest that there should be clearer directions for the judiciary, contained in the Practice Direction perhaps, as to what the issue is, here. For example, if one party has substantially more funds to spend on the litigation, although it is impossible to cap 'spend', is the court trying to limit the 'recoverable spend' in effect, to reduce the inequality of arms between the parties? If

so, this should be made clear to the judiciary by way of guidance contained in the Practice Direction.

Other circumstances:
Case law indicates that more often than not, cost capping orders will be made in **group litigation**, rather than in stand-alone cases. This may be something which needs to be added to the Practice Direction by way of guidance to the judiciary. (See our quotation of Gage J, from *Smart* in answer to question seven).

In addition, it is normal in such cases that the cap only applies to the **generic issues**, according to case law (such as the organ retention litigation. See *AB v Leeds Teaching Hospitals NHS Trust* [2003] EWHC 1034) Gage, J, at paragraph 28: "the costs cap should only relate to the costs incurred in relation to generic issues").

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

We agree with the limits on variation in this rule.

6. 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.

We are generally content with this rule as drafted, subject to the following comments:

44.19(3)(d) here the rule indicates that the court can give directions which may 'indicate whether the judge hearing the application will sit with an assessor at the hearing of the application;'

We view this as a helpful improvement on current practice in cost capping application procedures. Current practical experience suggests that what happens is that there is a hearing to determine whether a cap should be imposed at all, and then a further hearing is arranged if a cap has been ordered, this time before a costs judge or an assessor for the amount of the cap to be fixed, which substantially increases delay and costs for all parties involved. This procedure will reduce the application process to one hearing, substantially reducing both costs and delay.

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

More guidance on what is an exceptional case

We believe that the most important addition which is required to the Practice Direction is the need to explain or qualify the reference to exceptionality within these rules. We recommend the use of Gage's wording from *Smart*, (see below) although with the Practice Direction referring more generally to personal injury claims rather than simply clinical negligence, as was the case in that particular decision. The CPRC is no doubt well aware that these rules will also affect other types of claim such as defamation, for example, where the amounts of costs involved are on a completely different (and far more expensive) level.

Currently the rules make no mention of the level of costs being incurred as being one of the criteria for deciding whether to impose a cap. Guidance as to value, for example for cases where the base costs amount to £200,000 or more, where costs capping could be an option, could be considered. APIL's concern is that without a minimum costs level indicator, district judges around the country will apply these rules to all sorts of inappropriate claims.

There is a genuine concern, based on the personal experiences of some of those who have prepared this response paper, that costs capping can be used to frustrate the claimant's right to pursue the claim and that as a consequence, it will become part of the defendant's arsenal to attempt to defeat legitimate claims.

There is already a danger that cost capping tends to creep into multi track, catastrophic, or clinical negligence cases; at the moment there is nothing to stop that happening. The benefit of these rules is that they will allow judges to understand when to apply such orders, but indicating that exceptionality is the key word is not enough. Repeated in the Practice Direction should be the words of Gage LJ in the Smart case: *Smart v East Cheshire NHS Trust* [2003] EWHV 2806, that stand alone cases are unlikely to be suitable. At para 22 of his judgment he says:

> "…In my judgment, the court should only consider making a costs cap order in such cases
>
> - **where the applicant shows by evidence that there is a real and substantial risk that without such an order costs will be disproportionately or unreasonably incurred**;
> - **and that this risk may not be managed by conventional case management and a detailed assessment of costs after a trial**;
> - **and it is just to make such an order**.
>
> It seems to me that it is unnecessary to ascribe to such a test the general heading of exceptional circumstances. I would expect that in the run of ordinary actions it will be rare for this test to be satisfied but it is impossible to predict all the circumstances in which it may be said to arise. Low value claims will inevitably mean a higher proportion of costs to

> value than high value claims. Some high value claims will involve greater factual and legal complexities than others. Clinical negligence cases, for example, will involve more complicated issues on liability than personal injury cases arising out of road traffic accidents. In my judgment, it would be quite wrong to attempt to set a specified ratio of costs to value for any particular type or class of case. I stress, in my opinion, **each case must be considered on its own facts**. In those circumstances, **it seems to me very unlikely that it would be appropriate for the court to adopt a practice of capping costs in the majority of clinical negligence cases**."

(Our emphasis and bullet points)

We would also refer the CPRC to the words of Master Hurst in the Tui holiday travel cases *A A & Ors v Tui UK Ltd & Ors* ([2005] EWHC 90017 (Costs) – who said that when fixing the cap the judge should have broad brush approach and that any benefit of "doubt should be decided in favour of the receiving party" (at para 13). Guidance along these lines should also be contained within the Practice Direction.

Finally, we wish to reiterate our first concern. The CPRC must to protect the litigant's Article 6 rights, under the Human Rights Act, to a fair trial. Costs capping applications should not be used to circumvent or frustrate that.

All comments and enquiries relating to this briefing note should be directed in the first instance to:

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