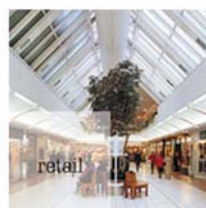
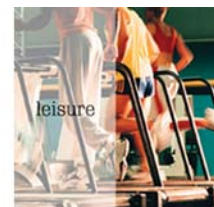
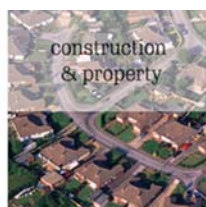


Civil Procedure Rules: Costs Capping Orders

A response by **Berrymans
Lace Mawer**

24 October 2008





Ministry of
JUSTICE

Civil Procedure Rules: Costs Capping Orders Proposals for consultation

List of questions for response

We would welcome responses to the following questions set out in this consultation paper.

Please email your completed form to:

or fax to: 020 7210 0613. Thank you!

Question 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.
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Comments: Yes.

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

Comments: Yes.

A general point which we would raise here – and will return to again – is to raise the prospect of a capping order being deployed in the pre-action stages of a claim. Whilst we can see some procedural complexity here, we nevertheless suggest that there is a strong case for permitting application for a cap in the pre-action stages.

In respect of 44.18(3)(b) [“any of the issues which are ordered to be tried separately”], we wonder if this may limit the scope unnecessarily? Our suggestion is that a cap could theoretically be used for certain defined stages of a case or for issues within a case. Whilst we understand that costs for stages and issues could, conventionally, perhaps be dealt with by case management, in complex cases we can see a very respectable argument for caps or mini-caps for these aspects. Such an approach would examine the case other than as specified in the draft rule, which simply divides it into the “issues which are ordered to be tried separately”. We would welcome a response to this suggestion. Note that the same point applies equally to draft rule 44.19(2)(a)(i).

Question 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.**

Comments: **Yes.**

We repeat our earlier proposal that applying for a capping order should be possible in the pre-action stages of a claim. In serious injury cases for example, if a claimant lacks capacity (either as a child or as a result of the incident) the limitation period will not run. It would therefore be possible – although we stress we do not see this behaviour too often – for proceedings to be delayed, and significant costs incurred, by the claimant. Limiting the use of capping orders to cases in which proceedings are issued would prevent the defence from challenging this behaviour other than at assessment.

We also add that there may be a place in 44.18(4) for reference to the overriding objective. It is not immediately clear to us if the point is to be intended to be captured within the phrase “the interests of justice” at 44.18(4)(a).

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

Comments: **No.**

There may however (as above) be a place for reference to the overriding objective here, perhaps within the first sentence of 44.18(5):

In considering whether to exercise its discretion under this rule, the court *will have regard to the overriding objective in Part 1* and will consider all the circumstances of the case, including-

We also question whether (b) necessarily adds to the draft. We regret that we could foresee unhelpful satellite litigation, founded on (b), about the proportionality of the costs of determining the cap. It may as a consequence be preferable to remove (b) from the draft rule.

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

Comments: **Yes - to 44.18(6)(a) only.**

In our view, the formulation at (a) “a material and substantial change of circumstances” should be adequate to cater for all cases in which a variation to the cap is sought. We are concerned that the use of the phrase “some other compelling reason” at (b) raises a real risk of satellite litigation aimed at establishing what such a reason might be. Should there be a need for a catch-all provision here – and we are not convinced that there is – it may be preferable once again to refer to the overriding objective.

Question 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.**

Comments: **Yes.**

Our concept of the capping mechanism is that the applicant would generally be seeking to cap another party’s (or opponent’s) costs. This would generally mean us seeking to cap the claimant’s costs – as was the case in *Willis v Nicholson*.

Taking this example, whilst we see that it would be helpful to the court for us – the defendant applicant – to file an estimate of our costs incurred to date and in the future, what is really at issue in the capping application are the costs incurred by the respondent, both those to date and especially any estimates of those proposed to be incurred in the future. Hence it seems to us that the key is to file details/estimates of the costs which one would be seeking to cap rather than one’s own. It is not clear to us that 44.19 and 44.20 as currently draft reflect that this is what happens in practice, and they therefore give rise to some concern. We would be grateful for clarification of this aspect.

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

Comments: **Yes.**

We re-iterate the earlier point that it should be possible to apply for a capping order pre-issue. If this is accepted as a matter of principle, it may be necessary to review the present draft of PD 23A.2.

Draft PD 23A.5 provides for “a reasonable allowance on costs for contingencies”. In our view it would be appropriate to indicate what such an allowance might be – in order to provide guidance and to avoid satellite litigation on the point. We are attracted to either of the 5% or 10% figures proposed by Mr Justice Akenhead in *The Corby Group Litigation* [2008] EWHC 619 (TCC) at paragraph 30:

A contingency is a fair and sensible allowance to make given the nature of the litigation and the likely encountering of expenditure or increase in levels of expenditure which is probably inevitable even if it can not be specifically now foreseen. I suggested the figure of 10% to the parties as a possible allowance, but, having considered further emailed submissions on the matter, that is too high in circumstances where the parties are able to provide relatively precise estimates of future costs. I consider that 5% is realistic.

In our view the 20% difference which is tolerated for cost estimates - Costs PD 6.5A(1) – is simply too high for contingencies in a capping order. We would suggest that differences of that order (or greater) are perhaps either grounds for seeking a variation to the order and/or could be dealt with at assessment.

About you

Please use this section to tell us about yourself

Full name	Alistair Kinley
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Date	24 October 2008
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If you would like us to acknowledge receipt of your response, please tick this box	X
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.