



Ministry of  
**JUSTICE**

## **Civil Procedure Rules: Costs Capping Orders**

23 February 2009

**Response to consultation carried out by the Ministry of Justice on behalf of the Civil Procedure Rule Committee**

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## Introduction and contact details

This document is the post-consultation report for the consultation paper, *Civil Procedure Rules: Costs Capping Orders*.

It will cover:

- the background to the report;
- a summary of the responses to the consultation paper;
- a detailed response to the specific questions raised in the consultation paper; and
- the next steps following this report.

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## Background

The consultation paper *Civil Procedure Rules: Costs Capping Orders* was published on 11 September 2008. It invited comments on proposals to amend Part 44 of the Civil Procedure Rules 1998 (CPR) by inserting rules on costs capping orders. It also proposed amendments to the Costs Practice Direction to provide guidance on costs capping. The proposals were drawn from current case law.

The consultation was conducted on behalf of the Civil Procedure Rule Committee (CPRC). The CPRC is an advisory Non-Departmental Public Body 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, s2(6)(a)).

The consultation paper considered the introduction of new rules 44.18 to 44.20 dealing with costs capping into Part 44 of the CPR. It also considered the introduction of a new Section 23A into the Costs Practice Direction.

Costs capping orders have been considered by the courts in a number of cases. In *Willis v Nicolson* [2007] EWCA Civ 199 the Court of Appeal considered whether it should provide guidance on costs capping. It concluded that it was for the CPRC to decide whether, and if so with what degree of urgency, to address the questions that had been identified in its judgment.

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 the 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.

Based on these guidelines the sub-committee was asked to produce draft rules and practice direction provisions for consideration by the CPRC. Subsequently, the proposed rules and practice direction provisions were included in the consultation paper *Civil Procedure Rules: Costs Capping Orders*.

The consultation period closed on 24<sup>th</sup> October 2008 and this report summarises the responses, including how the consultation process influenced the further development of the policy consulted upon.

A list of respondents is at Annex A.

## Summary of responses

A total of 64 responses to the consultation paper were received. Of these the largest sector of respondents were from the legal profession who accounted for 59%. This consisted of solicitors, barristers and their representative organisations. It also included a legal executives representative group. The insurance industry accounted for 9% of respondents (6 responses). The media and their representative organisations accounted for 9% of the respondents (6 responses). Three responses were received from the judiciary (5%) and three legal costs organisations responded (5%). Two responses were received from medical organisations (3%). Responses were also received from 6 'other respondents'.

In summary the responses to the consultation agreed with a significant proportion of the proposals. However, a wide range of issues were raised.

A number of respondents raised the following issues:

- Costs capping should apply to both pre-issue and post-issue costs;
- The costs incurred by the parties together with future costs should be monitored by the court throughout the case. The argument for this was that costs management should be demonstrated at every stage of the case: from pre-issue, through allocation and costs capping to detailed assessment;
- Rule 44.19 should be amended in order to make clear that, on an application for a costs capping order against one party, the court may make a costs capping order against that party and/or against any other party in the same proceedings; and
- Paragraph 23A.1 of the Costs Practice Direction attracted a considerable amount of criticism in the responses to the consultation because it was perceived to introduce a two-stage test. First, that the court's case management powers are insufficient, and second, that the case is exceptional. The intention of the draft paragraph was to make it clear that the court's general case management powers should be sufficient to control costs and that it is likely to be only in exceptional circumstances where this was not possible.

## Responses to specific 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 reasons.

There were 60 responses to this question, 46 (77%) answered ‘yes’ and agreed with the definitions. 13 (22%) respondents disagreed and one respondent was undecided.

All six of the media organisations that responded disagreed and some specifically stated that Article 10 of the ECHR stipulated that any interference with freedom of expression should be proportionate, justifiable and no more than necessary. They argued that in assessing whether the costs are proportionate, the court should look at the overall costs (base costs, success fees and ATE premiums). They stated that judges must be encouraged to manage cases, not just one aspect of them, ie base costs, and should cap the total costs. Eight other respondents from the legal profession and insurers, including one who had agreed the definitions, stated that the cap should apply to additional liabilities as well as base costs.

Four respondents from the legal profession sought clarification on whether VAT was excluded or included in the cap.

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

There were 55 respondents who replied to this question. 56% (31 respondents) of those agreed with rule 44.18(3) and 44% disagreed (24 respondents).

13 respondents from the legal profession, an insurer, a legal costs organisation and one other respondent who disagreed expressed the view that the court should have the power to cap costs for other distinct areas and not just issues which are ordered to be tried separately.

Four respondents from the legal profession and one other respondent suggested that costs capping should be for stages or periods of the litigation. They argued that the order should not be in respect of the whole litigation and the rule should be extended to allow costs capping orders in relation to any aspect of the litigation. It was their view that a more flexible approach was needed for allowing judges to set a costs cap in relation to any part or stage of the litigation and to revisit the costs cap issue following completion of the defined stage.

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**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.**

There were 60 responses to this question. 39 (65%) of those did not wholly agree with the criteria. Of those some commented on all the sub-parts of rule 44.18(4) and some on certain parts. 21 respondents (35%) agreed.

*Rule 44.18(4)(b)*

On rule 44.18(4)(b) a mixture of the legal profession and insurers totalling five respondents argued that the criteria should include the word 'unreasonable' as well as 'disproportionate' because:

- It makes clear that the purpose of the costs capping order is to prevent the parties from incurring disproportionate and unreasonable costs; and
- To exclude reasonableness would make costs capping applications about the monetary worth and instead broader issues such as conduct of the case should also be considered.

Four of the media organisations stated that the rules should provide for a costs capping or costs budgeting order to be made automatically and as a right in all publication proceedings in order to ensure that costs were reasonable and proportionate. They further disagree with the criteria throughout subsections (a) to (c) and express the view that the rules should provide for mandatory prospective costs capping orders in all publication proceedings. This would ensure that costs in such proceedings were reasonable and proportionate.

Three respondents from the legal profession suggested that reference should be made to a 'risk' rather than 'substantial risk'. This was in line with the judgment in *Sheppard v Essex Strategic Health Authority* [2005] EWHC 1518.

*Rule 44.18(4)(c)*

One of the media organisations stated that the criteria were too restricting. It was argued that in the interests of justice, once certain trigger points had been passed, the costs capping order should normally be made.

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

There were 59 responses to this question. 18 (31%) of these had no comment to make. However, 41 (69%) respondents suggested other circumstances which should be included in the rule.

*Other circumstances to be included in the rule*

Two respondents from the legal profession, a member of the judiciary and an insurer suggested inclusion of whether a group litigation order had been made. It was argued that it was important to distinguish between individual actions and multi-party claimants. With the latter, costs could spiral out of control because of higher general costs.

An insurer and a member of the legal profession commented that there should be an overall objective to ensure the costs would not become disproportionate if a costs capping order was not made.

Three respondents from the legal profession and one other respondent commented on 44.18(5)(a) and suggested that the court should take into account the position of the parties in other ways, including the resources or beneficial arrangements available to one party but not to the other.

Five respondents from the media, a medical organisation and one other respondent proposed that the nature of funding for the litigation should be made clearer, in particular the existence of a conditional fee arrangement.

Four respondent from the legal profession, two medical organisations, an insurer and a legal costs organisation suggested that the conduct of the parties should be taken into account.

Six respondents from the legal profession mentioned one or more of the following for inclusion:

- The importance of the matter to the parties;
  - The particular complexity of the matter or the difficulty or novelty of the questions raised;
  - The time spent on the case;
  - The place where and the circumstances in which work or any part of it was done; and
  - The costs that would be incurred if the work was conducted in a reasonable and proportionate manner.
-

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

There were 59 responses to this question. 35 (59%) of those respondents agreed with the rule as drafted. However, 24 (41%) disagreed and some provided comments.

Three respondents from the legal profession and a member of the judiciary commented on 44.18(6)(a) and suggested guidance was needed on the definitions of both 'material' and 'substantial'. It was also stated that it should read 'or' because it should be sufficient for there to have been either a material or a substantial change of circumstances (not both) before a variation could be considered. Four respondents from the media organisations and two from the legal profession stated that variations to costs caps should only be permitted where future, unforeseen and exceptional factors arose which affected costs. It was argued that the proposal that a variation be allowed where there was a 'material and substantial change of circumstances' or a 'compelling reason' would not encourage parties to plan ahead. A member of the judiciary also suggested 'compelling' should be replaced with 'good' to allow greater discretion to the court.

Two respondents from the legal profession and one other respondent suggested that the wording should be changed to make it clear that either party may apply to vary.

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**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.**

A total of 59 responses were received on this question. 27 (46%) respondents agreed with the proposals and 32 (54%) disagreed and provided comments.

Five respondents from the legal profession, three media organisations and one insurer suggested that an applicant would not be in a position to provide the evidence envisaged by the rule until such time as a detailed costs estimate had been provided by a proposed respondent and the applicant had responded. However, the view of a legal profession representative group was that detailed assessment was not required in every case and the costs capping order should be as short and uncomplicated as possible. In addition, they argued that, as trial judges and case managing judges do not undertake detailed assessments of costs, they should not, therefore, be required to undertake the actual task of quantifying the capped costs. That should be left to those most qualified, for example the Costs Judges of the Supreme Court Costs Office.

A member of the judiciary suggested that rule 44.19 should be amended to state that on an application for a costs capping order against one party, the court may make a costs capping order against that party and/or against any other party in the same proceedings. This would provide a measure of mutuality whilst at the same time avoiding a multiplicity of applications. If this amendment was made, rule 44.19(3) should be amended to include the words 'any other party to the proceedings' in substitution for the words 'the respondent' in the two places in which they appear. It was also suggested that an additional paragraph be added:

'44.19(4) The court may make an order limiting the amount of future costs which a party may recover pursuant to an order for costs to such sum as will be decided by a Costs Judge and refer the calculation of that sum to the Costs Judge'.

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

There were 53 responses to this question. Eight (15%) stated they had no comment on the proposed Cost Practice Direction provisions. Ten respondents from the legal profession, three insurers, two media organisations, a member of the judiciary and four other respondents (38% in total) objected to the phrase 'exceptional cases'. One reason given for this was that it was currently the rule rather than the exception that claimant's costs were disproportionate to the damages recovered. It was considered that courts should encourage costs capping rather than limit it with such phrases. The media organisations stated that previous case law revealed that conventional case management was not sufficient to control costs and it would be a retrograde step to introduce a new Costs Practice Direction which was for exceptional cases only.

A member of the legal profession suggested that exceptional cases should be defined.

## **Conclusion and next steps**

The CPRC considered the responses to the consultation and approved changes to the CPR (Annex B) and Costs Practice Direction (Annex C). The amendments have been included in the 49th Update to the Civil Procedure Rules which was laid before Parliament on 7 January 2009 and will come into force on 6 April 2009.

## **Annex A – List of respondents**

### **The legal profession and legal representative organisations**

Addleshaw Goddard LLP

Allen & Overy LLP

Association of Personal Injury Lawyers

Bar Council

John Bates

Beachcroft LLP

Berrymans Lace Mawer

Brachers Law

Browne Jacobson LLP

Capsticks Solicitors LLP

Carter-Ruck

Chancery Bar Association

Clifford Chance LLP

DWF LLP

The Costs Team 39 Essex Street,

Forum of Insurance Lawyers

Allan Gore QC

Herbert Smith LLP

Hill Dickinson LLP

Institute of Legal Executives

Irwin Mitchell

Keelys LLP

Keoghs LLP

The Law Society

Leigh Day & Co

Liverpool Law Society

Kate Louise Livesey

London Solicitors Litigation Association

Manchester Law Society

Motor Accident Solicitors Society

Potter Rees Serious Injury Solicitors

Christopher J L Ryan

Shakespeare Putsman LLP

Anthony Speaight QC

Thompsons Solicitors

Watmores Solicitors

Weightmans LLP

White & Case LLP

**Legal Costs Organisations**

Alliance Legal Costs Ltd

The Association of Law Costs Draftsmen

Gibbs Wyatt Stone

**Judiciary**

Council of Her Majesty's Circuit Judges

His Honour Judge Holman

Senior Costs Judge Peter Hurst

**Insurers and Insurer Representative organisations**

Allianz Insurance PLC

AXA Insurance

Just Law

Lloyd's Market Association

Norwich Union Insurers Limited

Zurich Financial Services

**Medical Organisations**

Medical Defence Union

Medical Protection Society Limited

**Media Organisations**

Associated Newspapers Ltd

The Financial Times Limited

Media Lawyers Association

Newspaper Society

Times Newspaper Limited

Trinity Mirror PLC

**Other respondents**

Civil Court Users Association

Civil Justice Council

Joseph Egerton

A member of the public

Motor Insurers' Bureau

NHS Litigation Authority

## Annex B – Additions and Amendments to the Civil Procedure Rules

In Part 44—

(a) in the table of contents, after the entry “Application of costs rules” insert—

“Costs capping orders – General	Rule 44.18
Application for costs capping order	Rule 44.19
Application to vary a costs capping order	Rule 44.20”;

(b) in rule 44.3(5)(a), after “the parties followed” insert “the Practice Direction (Pre-Action Conduct) or”; and

(c) after rule 44.17, insert—

### “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) This rule does not apply to protective costs orders.

(4) A costs capping order may be in respect of—

- (a) the whole litigation; or
- (b) any issues which are ordered to be tried separately.

(5) 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.

(6) 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.

(7) A costs capping order, once made, will limit the costs recoverable by the party subject to the order unless a 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 made.

### **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 any party to the proceedings—
    - (i) to file a schedule of costs in the form set out in the Practice Direction supplementing this rule;
    - (ii) to file written submissions on all or any part of the issues arising;
  - (b) fix the date and time estimate of the hearing of the application;
  - (c) indicate whether the judge hearing the application will sit with an assessor at the hearing of the application; and
  - (d) include any further directions as the court sees fit.

#### **Application to vary a costs capping order**

**44.20.** An application to vary a costs capping order must be made by application notice pursuant to Part 23.”.

## **Annex C – Additions and Amendments to the Cost Practice Direction**

### **“SECTION 23A COSTS CAPPING ORDERS**

#### When to make an application

23A.1 The court will make a costs capping order only in exceptional circumstances.

23A.2 An application for a costs capping order must be made as soon as possible, 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 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.”

A full version of the making document is available at [www.justice.gov.uk/civil/procrules\\_fin](http://www.justice.gov.uk/civil/procrules_fin)

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