



Hailsham Chambers Annual

Costs Group Seminar

Costs Caps, Protective Costs

Orders & Costs Estimates

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Costs Capping in Private Litigation

(a) The Story So Far...

“In modern litigation...it is necessary for parties to make an assessment at the outset of the likely value of the claim and its complexity and importance and then to plan in advance the necessary work... and the likely overall cost.” (Alton HHJ / Woolf LCJ – Jefferson v National Freight Carriers [2001] 2 Costs LR 313)

If the parties won't do it themselves, the courts will have to intervene.

The Court has the power to impose a costs cap via s. 51 Supreme Court Act 1981 and CPR 3.1(2)(m): AB & Ors – Nationwide Organ Group Litigation [2003] EWHC 1034; King v. Telegraph Group Limited [2005] 1 WLR 2282

Two Judge-made approaches to costs caps in private law developed:

Smart v East Cheshire NHS Trust [2003] EWHC 2806

Courts can impose caps in non-GLO cases. Effectively a three stage test. The applicant must show, by evidence, that there is:

- (i) a real and substantial risk that without such an order costs will be disproportionately or unreasonably incurred
- (ii) that this risk may not be managed by conventional case management and a detailed assessment of costs after a trial
- (iii) and it is just to make such an order.

Under this approach, a costs cap will rarely be appropriate in 'ordinary' cases

Sheppard v Essex SHA [2005] EWHC 1518 (QB),

The alternative, more liberal, approach, under which the mere risk of costs being disproportionate was enough to justify imposing a cap.

Both approaches had their judicial supporters, but when the Court of Appeal had the opportunity in Willis v Nicolson [2007] EWCA Civ 199 to

choose authoritatively between them, it declined to give any guidance at all:

“It will be for the Rules Committee to decide whether, and if so with what degree of urgency, to take up the issues that we have identified earlier in this judgment.”

(b) The New Rules

CPR 44.18, 44.19 and 44.20; s. 23A Costs Practice Direction, in force since 6 April 2009, put costs capping on a statutory basis.

They essentially adopt the Smart approach. CPR 44.18(5):

“(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.”

Factors to be taken into account (44.18(6)):

- any imbalance in financial positions
- whether costs of determining cap likely to be proportionate
- stage of proceedings
- costs to date and future costs

In general, costs caps will only be imposed in “*exceptional circumstances*” (CPD s. 23A.1)

If a cap is to be imposed, the process of quantifying it will take into the CPR 44.5 factors and may make some allowance for contingencies (CPD s. 23A.5)

Other points to note:

- New rules do not apply to protective costs orders
- Cap can apply to whole claim or to an issue to be tried separately
- Cap does not apply to additional liabilities

Making the application (44.19):

- In accordance with CPR 23
- Must say why an order should be made
- Must be accompanied by an estimate of past and future costs

- Court may order the respondent to provide a schedule of costs showing what it is proposed should be allowed in respect of each item in the applicant's estimate
- Court may sit with an assessor

Varying a costs cap:

- A “*material and substantial change of circumstances*” or “*some other compelling reason*”, otherwise a request for variation will be refused (44.18(7)).
- An application to vary must be made in accordance with CPR 23 (44.20)

Practical considerations:

- Any application should be made as early as possible in the proceedings, preferably before the first case management hearing. Presumably late applications will continue to be refused (see Henry v British Broadcasting Corporation [2005] EWHC 2503 (QB))
- Even if the application is made on time, it may be difficult for the Court to list the application and, if imposed, quantify the cap quickly. If either or both decisions is appealed, a lot of time may pass before the issue is resolved

- Applications will continue to be expensive – the process of quantifying the cap may be as extensive as a full detailed assessment.
- The cap is only a limit; there might still have to be a detailed assessment at the end of the case.
- A cap is of no assistance if the case settles before trial

Protective Costs Orders

A pre-emptive order absolving a claimant from liability for adverse costs or limiting his/her liability. Generally sought in public law proceedings.

The criteria for making a PCO, as set out in R v Lord Chancellor ex p. CPAG [1999] 1 WLR 347 and restated in R (Corner House) v Secretary of State for Trade and Industry [2005] EWCA Civ 192:

- 1) Issues raised must be of general public importance
- 2) The public interest must require that the issues be resolved
- 3) The applicant must have no private interest in the outcome, though recent cases have taken a “flexible approach” to this criterion, so that a private interest is not per se a disqualifying factor (see most recently Morgan v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107).

- 4) Having regard to the financial resources of the parties and the amount of costs that are likely to be involved it must be fair to make the order;
- 5) If the order is not made the applicant will probably and reasonably have to discontinue.

Such orders will be made only exceptionally, since they represent a departure from the normal rule that costs should be determined at the end of a case and should generally follow the event. Per Dyson J in ex parte CPAG [1999] 1 WLR 347:

“the discretion to make pre-emptive costs orders even in cases involving public interest challenges should be exercised only in the most exceptional circumstances”

On the other hand, parties with a case with real public interest should be allowed to litigate with the assistance of reasonably competent lawyers without being exposed to financial risks which would deter the litigation.

Recent cases have involved consideration of the Aarhus Convention¹, which requires that the taking of proceedings to enforce rights under the Convention should not be “prohibitively expensive”. However, the

¹ Full title: The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

Courts have resisted treating “environmental” cases differently from other cases, in particular in relation to obtaining PCO’s (see Compton v Wiltshire PCT [2008] EWCA Civ 749; Morgan (above)).

Practical considerations:

- A PCO should be sought at the outset of the case on the face of the claim form with supportive evidence, including a schedule of future costs
- The procedure for determining whether to make one is intended to be informal and low-cost. In particular, decisions can be made on paper

An attempt to secure a “PCO in disguise” in a private law case: Belcour v Wheeldon (23 January 2009, HHJ Faber, unreported)

Costs Estimates

(a) Inter partes – life after Leigh

“We do not ... consider that it would be a correct use of the power conferred by para 6.6 to hold a party to his estimate simply in order to penalise him for providing an inadequate estimate. Thus, if (a) the

paying party did not rely on the estimate in any way, (b) the court concludes that, even if the estimate had been close to the figure ultimately claimed, its case management directions would not have been affected, and (c) the costs claimed are otherwise reasonable and proportionate, then in our view it would be wrong to reduce the costs claimed simply because they exceed the amount of the estimate. That would be tantamount to treating a costs estimate as a costs cap, in circumstances where the estimate does not purport to be a cap.” (Leigh v Michelin Tyre plc [2003] EWCA Civ 1766, per Dyson LJ).

What is reliance? It need not amount to an estoppel, but there must be some reliance on the estimate (Mastercigars Direct Ltd v Withers LLP (No.1) [2007] EWHC 2733 (Ch)).

An example of proved reliance on an estimate resulting in a reduction in costs: Tribe v Southdown Gliding Club [2007] EWHC 90080 (costs). The reliance was in obtaining ATE with a lower limit of indemnity. The estimate was not, however, treated as a cap. Instead the Costs Judge considered what a reasonable estimate should have been and derived a figure from the lower end of the range, because of the bad estimate.

(b) The new rules – a damp squib?

CPD s. 6.6:

“ (1) On an assessment of the costs of a party, the court may have regard to any estimate previously filed by that party, or by any other party in the same proceedings. Such an estimate may be taken into account as a factor among others, when assessing the reasonableness and proportionality of any costs claimed.

(2) In particular, where –

(a) there is a difference of 20% or more between the base costs claimed by a receiving party and the costs shown in an estimate of costs filed by that party; and

(b) it appears to the court that –

(i) the receiving party has not provided a satisfactory explanation for that difference; or

(ii) the paying party reasonably relied on the estimate of costs;

the court may regard the difference between the costs claimed and the costs shown in the estimate as evidence that the costs claimed are unreasonable or disproportionate.”

The new rules appear to confer a power to reduce the costs simply because a wrong estimate was given and in the absence of reliance. However, in Woolley v Haden Building Services [2008] EWHC 90111 (costs), all parties approached the new rule on the basis that reasonable reliance still had to be established.

A party cannot plead reliance on an estimate given “without prejudice”:
Dadu Ltd v Barrowfen Properties Ltd [2008] EWHC 90110 (costs).

(c) Solicitor-client estimates – an end to the *Wong* margin?

In two decisions (Mastercigars Direct Ltd v Withers LLP (No. 1) [2007] EWHC 2733 (Ch) and (No. 2) [2009] EWHC 651 (Ch)) Morgan J considered the practice of giving effect to a bad estimate on which a client relied by allowing the solicitors the estimate plus a margin of around 15% as per Wong v Vizards [1997] 2 Costs LR 46 and Anthony v Ellis & Fairbairn [2000] 2 Costs LR 277. Morgan J held that the decisions in Wong and Anthony were examples of effect being given to estimates in particular cases and did not lay down a rule of law that solicitors were always and only entitled to the amount of an estimate plus a margin. Morgan J applied the guidance of the Court of Appeal in Leigh v Michelin Tyre plc [2003] EWCA Civ 1766 and Garbutt v Edwards [2006] 1 WLR 2907 and gave the following guidance:

- Although a question of contractual construction in each case, an estimate is not generally a fixed quotation
- Where it is not, the question to be asked in every case is: *“What in all the circumstances is it reasonable for the client to pay?”*
- An estimate may be a useful yardstick in answering that question
- The client must show that they relied on the estimate, but does not have to establish an estoppel or that they would have done anything different on the balance of probabilities
- If reliance is established, the court must decide at the outset how to give effect to that reliance, which may be in a number of ways:
 - Allowing a percentage margin over the estimate
 - Allowing specific items over and above the estimate
 - Allowing a lump sum
 - Forming a preliminary view as to the reasonable costs and making specific deductions where justice requires (the Leigh approach)
- Any explanation for the difference between the costs as estimated and claimed is not directly relevant to the question of how to give effect to reliance (though it may in fact be relevant to whether and to what extent there was reliance)
- *“It is not the proper function of the court to punish the solicitor for providing a wrong estimate or for failing to keep it up to date as events unfolded”*

Morgan J made clear in No. 2 that a margin approach was permissible, but its use must be tailored to the facts of the case. In practice, therefore, it may be that things continue much as before, but Judges will have to be careful to provide good reasons for adopting the approach.

For an example of a margin approach being upheld post-Mastercigars (No. 1) see Reynolds v Stone Rowe Brewer [2008] EWHC 497 (QB), which also addresses the problem of the creeping estimate (the solicitors were essentially held to their first estimate).

Some unanswered questions:

- If an explanation for the discrepancy is not relevant to the question of how to give effect to the estimate, where does it come in?
- How should the court approach a case in which no estimate is given at all?

Practical considerations:

- Give realistic estimates from the outset. Don't give over-optimistic estimates for fear of scaring the client off.

- Make sure any estimate makes clear what work it is intended to cover. Consider, in particular, the effect of interim hearings
- Inform the client as soon as there are developments which were not provided for in the estimate or there is any likelihood that the estimate may be exceeded. Give a new estimate and clear reasons for the change
- As a client attempting to rely on an estimate on assessment, make sure there is evidence of reliance: say what steps might have been taken if given better information, for example not proceeding with the litigation at all, settling/abandoning the litigation, or instructing different solicitors
- Give the Costs Judge reasons to enable him to adopt any particular method of giving effect to the estimate
- An argument that the estimate was in fact a fixed quotation will require proof as a matter of contract law
- Ask for a full reasoned decision. A decision unsupported by clear reasons will be more open to attack on appeal

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