

Legal update

A weapon in the Defendant's armoury or simply a case management tool?

It is now settled law that the Court has jurisdiction to make cost capping orders, so why is there a perceived reluctance on the part of Judges in the first instance cases to make such orders?

The benefits of cost capping are clear; costs are prevented from spiraling out of control and parties know, in advance, the likely level of costs recovery if successful or the costs burden if unsuccessful. The litigation can be managed by each party proportionately in the context of the limit placed on costs. The capped parties ability to behave oppressively, by racking up enormous bills, is reduced and parties can litigate on a more equal footing.

Historically, some Judges were deterred from making Orders in anything other than Group Litigation Cases (GLO's) or Defamation cases. Early case law thus demonstrated that Judges at first instance appeared ready to accept that these orders should rarely be made since the risk of disproportionate costs could be managed by conventional case management powers and detailed assessment of costs after the trial.

In contrast however, when, on at least 3 occasions, the issue came before the Court of Appeal, it adopted a consistent approach in line with that advocated by **Brook LJ in King v Telegraph Group [2004] EWCA Civ 613** wherein he stated:

"it would be very much better for the Court to exercise control over costs in advance, rather than wait reactively until after the case is over and costs are being assessed"

There followed in 2006 a cost capping order delivered in a clinical negligence case, **Shepherd v Mid Essex Health Authority**, where the Court of Appeal reinforced this message:

"it is far better for the Court to attempt control and budget for costs where appropriate, than allow costs to be incurred and then have them submitted to detailed assessment after the event".

Importantly in this judgment, it was suggested that there was no requirement for costs to become unreasonable or disproportionate. All that needed to be shown was a risk that this might occur.

The recent decision in **Willis v Nicholson [2007] EWCA Civ 199** has been regarded by some as a backward step, the Court of Appeal in that instance simply limiting the Claimant's costs to those costs as predicted in the cost estimate.

The judgment however acknowledged a reluctance on the part of the Court of Appeal to make a retrospective order for costs capping. The Defendants applied very late in the day for a costs cap. Whilst the clear message was that the Court of Appeal was concerned by the level of costs incurred (the amount having quadrupled at listing stage, since the initial estimate was provided only 8 months earlier), it were reluctant to limit the costs as this was likely to mean that the Claimant would have to adjust his preparations for the trial which was imminent. The Court of Appeal had drafted a comprehensive set of principles to be applied in respect of cost capping before handing down the judgment. The principles, however, were never published as part of the judgment, nor indeed separately. Having considered the matter further, Buxton LJ concluded that it was inappropriate for the Court to undertake this role, which accordingly has been confined to the Civil Procedural Rules Committee from whom, after extensive consultation, we can expect to receive detailed guidance.

In the meantime, what should Defendants do? It is hardly satisfactory to contemplate merely sitting back and waiting for the principles to be published, as this is likely to maintain the upwards spiral in Claimants' costs. It is incumbent upon Defendants to continue to raise the issue of costs with the court at the earliest opportunity in the litigation – this should become the norm. Even if a cap is not imposed, the mere request to the court to consider the level of costs early on encourages the parties to concentrate their minds on keeping costs proportionate in the furtherance of the litigation and it enables Defendants to challenge unreasonable items before they are incurred.

Our view is that the threat of formal capping application can be costs neutral for clients. As mentioned before, capping lays down a marker for detailed assessment, it forces the Court to case manage the costs using its CPR powers, it encourages opponents to provide bombproof estimates and encourages discipline within your own estimates. Equally, the sheer process of making a capping application can lead the parties to discussion on costs and to the offer or consideration of a voluntary cap.

Overall, capping is an approach where clients may need to spend now to save later.

This approach is again evidenced by certain members of the Judiciary.

His Honour Judge McDuff has been prepared to grasp the nettle and openly spoke out on the benefits of costs capping as long ago as 2003 in **Southern and Others v JMC Holidays 2003** where he was encouraging Judges to take a more active role. He indicated:

“it is becoming ever more necessary for the Courts to control the expenditure of costs before they are incurred”.

Later in 2007, in **Dawson v First Choice Holidays**, a judgment which was delivered at or about the same time as the *Willis v Nicholson* judgment, he spoke out again about the need for control:

“I have to confess to a certain irritation at the suggestion that a cost cap may somehow impede the Claimant's rights to access to justice...there seems to be a feeling in some quarters that even the smallest claims require access to justice at whatever the cost...where is the justice for the Defendant?”

In the catastrophic claims arena, the level of Claimants' costs continues to spiral. It is not uncommon to see bills totaling in excess of £500,000, sometimes outweighing the level of damages recovered. At first blush therefore, this would appear to be an area ripe for challenge. However, there are obvious difficulties. In such cases, we are dealing with the most severely injured Claimants. There will be extensive enquiries into liability and quantum and cases can be litigated for many years. In delivering the judgment in **Willis v Nicholson**, Buxton LJ delivered a word of caution indicating that catastrophic injury claims could perhaps be the most unlikely area where the Court would be prepared to impose any limit.

He observed.

“the Court will be careful before imposing such a restriction, particularly when those restricted are acting for a Claimant who has suffered catastrophic injury”.

He went on to say however:

“both for reasons of fairness and for reasons of practicality the cap cannot be imposed retrospectively so the enquiry must take place at a sufficiently early stage to have a real effect on expenditure. The present case demonstrates the hopelessness of leaving an application until closer to the date of trial”.

It is submitted therefore that the Court of Appeal was not ruling out the possibility of a costs capping order in catastrophic claims, **provided** the application is made promptly.

Perhaps the most immediately fertile area prone to potential costs capping orders is the arena of lower value cases and His Honour Judge McDuff’s approach, of objecting to justice at any cost, even in the smallest claims, is to be commended.

Recently, Judge Sparrow, in an unreported case in Norwich County Court, was prepared to impose a cap. He was invited by the Claimant to permit an amendment to the Particulars of Claim to increase the pleaded value from £50,000 to £150,000. Whilst granting permission, he simultaneously ordered that the base costs of the Claimant should not, without permission of the court, exceed £35,000 and the equivalent figure for the Defendant was not to exceed £20,000.

Whilst the Civil Procedure Rules Committee commences their consultation, Defendants should continue to raise the matter with the court. CPR 44.15 (3) (8) (b) has introduced a requirement that costs estimates are to be provided both at allocation stage and at listing questionnaire stage. The court however has the power to order estimates to be provided at any time (PD 43 Section 6.3). Estimates should be scrutinised closely and where appropriate in straight forward cases, the court should be encouraged to exercise its pre-emptive case management powers to limit costs expenditure generally. It should be stressed to the court that the application for a costs cap is made not punitively, but in the interests of proportionality and so to ensure, as far as practicable, a level playing field.

There is certainly an argument that the question of costs capping should routinely form part of case management directions. It should not be a matter for a costs judge at the conclusion of the litigation as this will introduce more uncertainty, further hearings and thereby further expense and the Claimant will have the benefit of arguing that it is easy to be wise after the event in terms of restricting costs. Certainly concerns should be raised throughout the case management hearings in a more complex or larger value case so as to provide a map showing the extent to which the anticipated costs have been adhered to or exceeded. In this way, any excess will at least call for a reasoned account from the Claimant’s solicitor. It is far more difficult for a Defendant to persuade a costs judge, at the conclusion of an action, to disallow costs which have already been incurred.

Capping could, on one hand, be seen as a confrontational approach by litigants to costs control but there could be other ways of collaboration to control costs.

That there must exist a greater potential for collaboration on costs probably owes something to the fact that the number of technical arguments available to insurers and their solicitors are dwindling since the abolition of the CFA Regulations on 1 November 2005. That said, the disappointment of the MOJ reforms has perhaps galvanised insurers to renew the costs arguments because of the lack of real progress through Government consultation route as a means to achieve a break on costs.

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However, set against the uncertainty of the costs market generally, there is some hope for future progress.

It seems that increasingly there is recognition by all parties that litigation can only be run in the future on a budget. The multi-track code for personal injury cases over £250,000 which is currently being piloted suggests a route map for litigation whereby the claimant's compensation is at the centre of the process and all other matters are ancillary to that. This code makes routine challenges to retainers the exception rather than the rule, envisages payments on account once issues are resolved, e.g. liability. Beyond that, there is also talk about funding disbursements for quantum. All of this should, if the spirit of the code is being followed, be taking place in a collaborative manner.

Clearly this is a million miles away from where we are today. Such plans will only work if claimants' solicitors are not allowed to litigate in a risk free environment so far as costs are concerned.

One wonders whether, with the uncertainty over CFAs and the pressures on cash flow in the current economic climate, whether claimants' solicitors would be prepared to forego the potential riches of success fees and the swings and roundabouts of the CFA funding arrangements where the many are supposed to pay for the few in return for regular payments on account from compensators based around robust costs estimates for defined stages of the litigation process. This could achieve the same aim of fixing costs providing certainty for all parties by agreement rather than by imposition and the rather blunt instrument of a costs capping application.

For a discussion or assistance with any of the above issues, please contact Clare Malpus, Associate by email, clare.maplus@weightmans.com or call on 0116 242 8922

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