Costs Law Brief

The costs team at Kings Chambers in Manchester and Leeds focus on recent judicial developments in costs capping

In a costs world increasingly inhabited by predictable costs, costs estimates and costs capping orders the widely expected momentum towards a state of affairs where parties have a better idea of the costs of litigation at the outset is clearly gathering pace. Indeed, as noted by His Honour Michael Cook (*Cook on Costs* 2005 p 93) there is conjecture amongst some that this could be the path to the demise of the detailed assessment. This article focuses on the recent judicial input into costs capping. It appears that the route for the moment is to be an incremental development of the common law rather than wholesale legislation. Set the online updating services to "costs capping" and wait with anticipation.

Capping orders

The background powers to place in advance a cap on the costs recoverable between the parties are not explicit, but they are simple and clear:

- The Supreme Court Act 1981 s 51(3) states: "the court shall have full power to determine by whom and to what extent costs are to be paid".
- CPR part 3.1(2)(m) contains a power for a court to "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective".

Of course, the overriding objective aims to put parties on an equal footing, save expense and achieve proportionality in litigation.

The usual way in which a cost capping order is made is that the court considers the costs estimates filed with the allocation questionnaire and then makes an order that the base cost of the parties shall not, without the permission of the court, exceed a fixed sum. Interim applications are excluded from that sum. Further, the parties are given permission to apply to the court for an increase in the figure. Usually, any application for an increase has to be accompanied by a statement explaining the need for the increase and providing a revised costs estimate calculated up to the date of trial.

Previous cases have often been in the context of group litigation. The most recent judicial guidance has been in the fields of libel and public law.

The *King* case

In *King v Telegraph Group Ltd* [2004] EWCA Civ 613, the claimant's solicitors had caused the likely costs of a libel action to be inflated by writing a letter before action in inflammatory terms. Further, the claimant in that case was funded by a conditional fee agreement and had no insurance to cover the defendant's costs if he lost. Such circumstances result in claims in litigation becoming little more than ransom demands because the defendant is left staring down the barrel of a substantial costs bill whether he wins or loses.

Although no costs capping order was actually made by the Court of Appeal, in para 93 of its judgment, it said: "If defamation proceedings are initiated under a CFA without ATE cover, the master should at the allocation stage make an order analogous to an order under s 65(1) of (the Arbitration Act 1996)", which states:

"65(1) Unless otherwise agreed by the parties, the tribunal may direct that the recoverable costs of the arbitration, or of any part of the arbitral proceedings, shall be limited to a specified amount;

(2) Any direction may be made or varied at any stage, but this must be done sufficiently in advance of the incurring of

costs to which it relates, or the taking of any steps in the proceedings which may be affected by it, for the limit to be taken into account."

The Court of Appeal recommended that regard be had to the principles in CPR part 44.3 in setting a costs capping order. It was also very concerned that the costs threat posed by an uninsured CFA claimant of insubstantial means could unacceptably infringe the right to freedom of expression. There was a playing field to level or a circle to square.

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At para 105 of the judgment of the Court of Appeal, Brooke LJ said:

"In my judgment the only way to square the circle is to say that when making any costs capping order the court should prescribe a total amount of recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability. It cannot be just to submit defendants in these cases, where their right to freedom of expression is at stake, to a costs regime where the costs they will have to pay if they lose are neither reasonable nor proportionate and they have no reasonable prospect of recovering their reasonable and proportionate costs if they win".

The court also indicated that it wished to see a particular master assigned to handle case management applications in libel cases so that considerations of costs capping or other forms of budgeting came before a judge experienced in the field.

The *Corner House* case

Guidance on the making of protective costs orders (PCOs) in public law proceedings was given by the Court of Appeal in *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192. Here the problem confronted by the court was the opposite of that in *King*. Often a public law issue arises as a result of some alleged failure on the part of a substantial, well resourced, organisation. Such alleged failures might go unchallenged were it not for the various charities or other non-governmental "watch dogs" who are, in modern times, accepted as having sufficient interest in the issues to bring an application for judicial review. Clearly, the costs consequences of losing a judicial review application could prove an unfair and overpowering disincentive to a meritorious application concerning issues of public importance. The answer is to make some sort of order that reassures the applicant that a loss can be survived by limiting the costs consequences—rather like reassuring David that in his encounter with Goliath the worst he will do is suffer a broken leg.

Corner House is a non-profit making company limited by guarantee that has a particular interest and expertise in examining the incidence of bribery and corruption in international trade. It complained in an application for judicial review that it had been frozen out of the consultations conducted by the Export Credit Guarantee Department of the DTI on measures to avoid corruption in international trade. The problem was that whilst the issue was of public importance, Corner House only had access to £8,000 in unrestricted funds and no other means of funding. The risk that it might have to pay the full costs of a failed application was such that Corner House would have withdrawn the application had a PCO not been made.

The following points arise from paras 73 to 81 of the judgment of the Court of Appeal (the court expressed the hope that the Civil Procedure Rules Committee and the senior costs judge might formalise its guidance in an appropriate codified form with allowance where necessary for cost inflation):

- PCOs should only be made in exceptional circumstances;
- no PCO should be granted unless the judge considers that the application for judicial review has a real prospect of success and that it is in the public interest to make the order;
- a PCO may be made at any stage of the proceedings on such conditions as the court thinks fit;
- the court will require to be satisfied that: the issues raised are of general public importance; the public interest requires that those issues should be resolved; the applicant has no private interest in the outcome of the case; having regard to the financial resources of the parties and the likely costs involved it is fair to make the order; if the order were not made the claimant would probably and reasonably discontinue the proceedings;
- the fact that those acting for the applicant are acting pro bono is likely to enhance the merits of an application for a PCO;

- in return for the grant of a PCO the court should make a costs capping order in respect of the applicant's costs in all cases other than those where the applicant's lawyers were acting for free;
- when making a costs capping order in respect of the applicant's costs the court should prescribe a total amount of the recoverable costs which would be inclusive, in a CFA case, of any additional liability;
- the cap on the applicant's costs should restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that were no more than modest;
- the reason for making a protected costs order was to enable the applicant to present its case with a reasonably competent advocate without being exposed to such serious financial risks that it would be deterred from advancing a case of general public importance. An applicant who benefits from a PCO must arrange its representation accordingly;
- if a protected costs order is sought, that should be stated on the face of the initiating claim form, supported by evidence and a schedule of the estimated future costs of the full judicial review application;
- the defendant's resistance to the making of such an order should be set out in the acknowledgement of service;
- the initial consideration whether to make a protective costs order will be on the papers. If the court refuses such an order, the claimant may pursue his application at a hearing. Such a hearing should be limited to one hour;
- the claimant will have to pay the court fee for pursuing such a claim and will also be liable for the defendant's costs should the application for the PCO be successfully resisted. The court indicated that it expected that proportionate claims for costs from defendants who successfully resisted applications for PCOs would not exceed either £1,000 for a paper application or £2,500 if the application were dismissed after hearing. Those figures were doubled for cases where there are multiple respondents, the court indicating that it would expect respondents to co-operate in its response to such an application.

Life after *Corner House*

Since *Corner House*, two further applications for PCO's have been dismissed:

R v Wiltshire & Swindon Coroner

In *R v Wiltshire & Swindon Coroner* [2005] All ER (D) 242, Collins J refused to grant a PCO to the coroner in respect of whose rulings the ministry had made an application for judicial review. The application arose from a lengthy inquest into a death following an experiment at the Porton Down military installation in the 1950s. The inquest jury had returned a verdict of unlawful killing. The inquest had cost the local authority, who would be indemnifying the coroner, a substantial amount of money. The coroner argued that it would be appropriate for his costs in the judicial review proceedings to be met from central funds. The court ruled that, whilst it might be unlikely for a PCO to be made to protect the defendant in a public law case there was no reason why such an order should not extend to protecting the position of a defendant as part of the exercise of the course general discussion on costs. On the facts of this case however no PCO was made.

The lessons

The lessons are clear:

(i) Always consider whether some form of costs cap might be appropriate to cases you handle. Although the courts have been careful to state the special circumstances of the cases where such orders are made, there are often good arguments for capping costs in all sorts of litigation;

(ii) When required to file a costs estimate be aware that an ambitious one might provoke the imposition of a cap. An unduly modest one will cause problems later when it is exceeded. The preparation of the costs estimate now clearly deserves the attention to detail of a bill or points of dispute.

Weir & Ors v SS for Transport

In *Weir & Ors v Secretary of State for Transport (unreported)* Lindsay J refused an application for a PCO to cap at £1.35m the costs of the Secretary of State in the action the Railtrack Private Shareholders Action Group have brought against her. The action is a private law action alleging misfeasance in public office and breach of Art 1 of the European Convention on Human Rights. It appears that significant factors leading to the refusal of the PCO were the facts that the claimants had a private interest in the outcome of the case and the costs did not appear to be spiralling out of control (the Secretary of State was prepared to cap her costs at £2.5m provided that sum was paid into court or a solicitor's account).

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