

## Annex B: The draft rules

### IV. Costs Protection in Publication and Privacy Proceedings

#### Scope and interpretation

- 44.19.**— (1) This section applies to publication and privacy proceedings.
- (2) In this section—
- (a) a “costs protection order” means an order limiting the extent to which an order for costs made against the party in whose favour the order has been made may be enforced;
  - (b) “publication and privacy proceedings” means any proceedings which include a claim for a remedy in respect of—
    - (i) defamation;
    - (ii) malicious falsehood;
    - (iii) breach of confidence involving publication to the general public;
    - (iv) misuse of private information; or
    - (v) harassment where the defendant is a person who publishes a newspaper, magazine or website containing news or information about or comment on current affairs.

#### Costs protection

- 44.20.**— (1) A costs protection order may provide—
- (a) that any orders for costs made against the party in whose favour the order has been made may be enforced only to the extent that the aggregate amount in money terms of such orders for costs does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of that party; or
  - (b) that the liability of the party in whose favour the order has been made to pay the costs of the other party or parties shall not exceed such sum as is specified in the order (whether or not that sum exceeds the aggregate amount in money terms of any orders for damages and interest made in favour of that party).
- (2) Costs protection orders do not apply to the costs of the proceedings insofar as they are not publication or privacy proceedings.
- (3) At any stage of the proceedings—
- (a) any party may apply for a costs protection order;
  - (b) any party may apply for an order setting aside or varying a costs protection order made in favour of another party.
- 44.21.** A costs protection order may be varied with the consent of the parties.

**Acquisition of costs protection: nil net liability**

- 44.22.—** (1) Subject to paragraph (3), the court may make a costs protection order containing the provision in rule 44.20(1)(a) where the court is satisfied that—
- (a) the party applying for such an order would suffer severe financial hardship if an order containing that provision were not made and that party were ordered to pay another party's costs of the proceedings; and
  - (b) it is in the interests of justice to make such an order.
- (2) An order made pursuant to paragraph (1) may provide that the order shall have retrospective effect.
- (3) Where the party applying for the order is both—
- (a) the claimant; and
  - (b) an individual,
- the court will make a costs protection order containing the provision in rule 44.20(1)(a) unless the court is satisfied that that party would not suffer severe financial hardship without the benefit of an order containing that provision in the event that that party were ordered to pay costs of the proceedings of another party (in which event the court may make an order under rule 44.23(1)).

**Acquisition of costs protection: capped liability**

- 44.23.—** (1) Where the court is not satisfied that the party applying for a costs protection order would suffer severe financial hardship unless an order containing the provision in rule 44.20(1)(a) is made, the court may instead make an order containing the provision in rule 44.20(1)(b).
- (2) Where the court makes an order containing the provision in rule 44.20(1)(b), the sum specified must be such sum as the court considers it reasonable for the party in whose favour the order is made to pay, having regard to the factors in rule [*Criteria for determining level of liability*].

DRAFTING NOTE: The question arises of the criteria to which the court should have regard in determining what would be a reasonable sum for the party to pay. It is proposed that these should be set out in a separate rule rather than listed here (partly to avoid duplication, because they are relevant for rule 44.25 also).

- (3) Where the court is satisfied that it is reasonable for there to be no restriction on the liability of the party in whose favour the order was made to pay any other party's costs, the court may refuse to make a costs protection order.

### Removal of nil net liability costs protection

- 44.24.—** (1) The court may make an order setting aside a costs protection order containing the provision in rule 44.20(1)(a) where the court is satisfied that—
- (a) that party would not suffer severe financial hardship without the benefit of a costs protection order in the event that party were ordered to pay costs of the proceedings of another party; and
  - (b) it is in the interests of justice to make such an order, for example in the light of any offers made to that party.
- (2) Where the court makes an order setting aside a costs protection order under paragraph (1), the court may make in its place an order containing the provision in rule 44.20(1)(b).
- (3) An order made pursuant to paragraph (1) or (2) shall have not have retrospective effect save as provided in rule 44.27.

### Variation or revocation of capped liability costs protection order

- 44.25.—** (1) Where an order has been made containing the provision in rule 44.20(1)(b), the court may—
- (a) revoke the order if it is satisfied that it is no longer reasonable for there to be a restriction on the liability of the party in whose favour the order was made to pay any other party's costs; or
  - (b) vary the order by substituting for the sum specified in the order such revised sum as the court considers it reasonable for the party in whose favour the order was made to pay, having regard to the factors in rule [*Criteria for determining level of liability*].

DRAFTING NOTE: As above with rule 44.23, the question arises of the criteria to which the court should have regard in determining what would be a reasonable sum for the party to pay. These would be the same criteria for this rule and rule 44.23, so it is proposed that they should be set out in a separate rule cross-referenced to both.

- (2) An order made pursuant to paragraph (1) shall have not have retrospective effect save as provided in rule 44.27.

### Assessment of severe financial hardship

- 44.26.—**(1) Unless otherwise ordered or agreed by the parties—
- (a) a party making an application under rule 44.20(3)(a) must file a statement of assets with the application notice;
  - (b) where a party makes an application under rule 44.20(3)(b), the respondent must file a statement of assets within 28 days of service of the application notice.
- (2) A statement of assets must be verified with a statement of truth and must set out in sufficient detail for the purpose of assessing severe financial hardship the assets of the party making the statement, including but not limited to details of income and capital wherever they may be and any insurance that may be relevant to the question of costs.

- (3) The court will not disclose a statement of assets to any other party without a hearing or the consent of the party making it.
- (4) The statement of assets will be referred to a judge who will give directions—
  - (a) as to the disclosure of the identity and assets of any person who is not a party to the proceedings but who has a financial interest in the proceedings;
  - (b) as to any further evidence that may be required for the purpose of assessing severe financial hardship;
  - (c) as to whether the statement of assets and any such further evidence are to be shown to any other party and, if so, whether subject to restrictions as to their further use or to whom else they may be shown;
  - (d) to the effect that failure to comply with any direction given under paragraph (c) may be a contempt of court;
  - (e) for the determination of the issue of severe financial hardship.
- (5) Directions under paragraph (4) will be given on paper without a hearing unless the judge directs otherwise.

#### **Further provisions for the removal of costs protection**

- 44.27.** The court may make an order setting aside a costs protection order with retrospective effect where it determines that the party who has the benefit of such an order—
- (a) has made a claim which has been found, on the balance of probabilities, to be fundamentally dishonest;
  - (b) has disclosed no reasonable grounds for bringing the proceedings;
  - (c) has abused the court's process; or
  - (d) has obstructed or attempted to obstruct the just disposal of the proceedings.

#### **Miscellaneous**

- 44.28.—** (1) Orders for costs made against a party who has the benefit of a costs protection order may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.
- (2) An order for costs which is enforced only to the extent permitted by a costs protection order shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record.

#### **Criteria for determining level of liability**

[This rule, when drafted, might be placed after rule 44.26.]