Costs Law Update

Fixed Recoverable Costs Special – Issue 1

The 1st of October 2023 saw a major expansion of Fixed Recoverable Costs (FRC) in civil litigation. The majority of civil claims valued at £100,000 or less are now subject to FRC for both claimants and defendants. The rules are complex and lengthy. This Newsletter is not designed as a substitute for careful study of the rules themselves. Rather, this Newsletter will explore some of the issues and problems that will arise with the application of the rules.

In this issue …

Transitional Provisions

The transitional provisions concerning the new rules relating to Fixed Recoverable Costs (FRC) appear to contain a fairly obvious and significant drafting error.

s1(1) of The Civil Procedure (Amendment No. 2) Rules 2023 provides:

> "These Rules may be cited as the Civil Procedure (Amendment No. 2) Rules 2023 and come into force on 1st October 2023, subject to rule 2."

s2 contains the transitional provisions:

> "(1) Subject to paragraphs (2) and (3), in so far as any amendment made by these Rules applies to—
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> (a) allocation;
>
> (b) assignment to a complexity band;
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> (c) directions in the fast track or the intermediate track; or
>
> (d) costs,
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> those amendments only apply to a claim where proceedings are issued on or after 1st October 2023.

(2) The amendments referred to in paragraph (1) only apply—

(a) to a claim which includes a claim for personal injuries, other than a disease claim, where the cause of action accrues on or after 1st October 2023; or

(b) to a claim for personal injuries, which includes a disease claim, in respect of which no letter of claim has been sent before 1st October 2023."

The new PD 45 sets out the Tables of the amount of the FRC.

Table 14 sets out the costs payable in the new Intermediate Track.

This includes Stage 1 costs, which are defined as "From pre-issue up to and including the date of service of the defence". The recoverable costs for Complexity Band 4, for example, are: "£9,300 + an amount equivalent to 8% of the damages". Interestingly, this amount is not fixed for non-personal injury cases but is a capped amount (as per CPR 45.50(3): "The costs to be awarded for stage S1 are subject to assessment up to a maximum of the figure shown for stage S1 in Table 14, except in a claim for personal injuries where the figure shown is fixed").

It is therefore clear that non-personal injury cases that would fall into the Intermediate Track are intended to attract the new cap where they settle pre-issue. However, the transitional provisions expressly state that these new (costs) rules "only apply to a claim where proceedings are issued on or after 1st October 2023". Self-evidently, a claim which settles pre-issue will never be a case where proceedings are issued on or after 1st October 2023. That is the case whether it is a claim that has been ongoing for the past 12 months or a new claim that arises 12 years from now.

The latest Minutes from the Civil Procedure Rules Committee recognised this issue but then suggested that the problem was solved by the fact that where costs could not be agreed in such a case, it would be necessary for costs only proceedings to be issued to determine the amount of costs and that the issuing of such proceedings would itself mean that proceedings had been issued on or after the 1st October 2023. There are a number of technical problems with this analysis, and the latest update to the CPR (due to come into force on 1st April 2024) fails to amend the obvious defect with the current wording.

The intention behind the rules is clear but the poorly drafted rules will inevitably lead to dispute.

Fixed Recoverable Costs – Complexity Bands

Claims that are allocated to the Fast or Intermediate Track will be assigned to one of four complexity bands. The higher the complexity band, the greater the amount of FRC.

One of the likely future battlegrounds arising from the extension of FRC is the issue of what complexity band a matter should be assigned to.

The natural assumption is that claimants will seek to have matters assigned to higher complexity bands (where the recoverable costs will be higher), whereas defendants will seek to have them allocated to lower complexity bands so as to reduce their potential adverse costs liability. This may well be true in personal injury claims, due to Qualified One-Way Costs Shifting (QOCS). However, this may not be the case in non-personal injury matters, at least if the claimant has been properly advised.

FRC cuts both ways. Although a claimant may want to maximise their costs recovery if they are successful, they will equally want to minimise their potential costs exposure if the claim fails. As such, claimants may have just as much interest as defendants in having a claim assigned to a lower complexity band.

Unfortunately, there is virtually nothing within the new rules in terms of guidance as to which

complexity band should apply for the new Intermediate Track for non-personal injury matters.

CPR 26.16 sets out the relevant criteria for assignment.

Complexity Band 1 is straightforward. Ignoring claims involving personal injury, it covers:

> "Any claim where – (a) only one issue is in dispute; and (b) the trial is not expected to last longer than one day, including – (i) … (ii) road traffic accident related, non-personal injury claims; and (iii) defended debt claims"

So far, so good.

Complexity Band 2, ignoring claims involving personal injury, is then defined as:

> "Any less complex claim where more than one issue is in dispute"

The requirement that there is more than one issue in dispute is easy to understand. Less obvious is the reference to "less complex". Less complex than what?

This appears to be in comparison to claims that are suitable to Complexity Band 3.

However, Complexity Band 3, ignoring claims involving personal injury, is defined as:

> "Any more complex claim where more than one issue is in dispute, but which is unsuitable for assignment to complexity band 2"

As with Complexity Band 2, there needs to be more than one issue in dispute. However, the relative complexity is simply defined by reference to Complexity Band 2: "which is unsuitable for assignment to complexity band 2".

Complexity Band 4, ignoring claims involving personal injury, is no more helpful, being defined as:

> "Any claim which would normally be allocated to the intermediate track, but which is unsuitable for assignment to complexity bands 1 to 3"

Therefore, although Bands 2, 3 and 4 are meant to be of increasing complexity, that complexity is simply by reference to the other bands without any objective starting point. This will inevitably generate much judicial inconsistency and satellite litigation.

The FRC increase as you move up the complexity Bands. The intention was clearly that more complex cases would attract higher FRC. Unfortunately, due to poor drafting this will not always be the case.

Let us say you have two cases of similar complexity where the trials are each estimated to take two days. Both claims are relatively straightforward. In the first case, both liability and quantum are in dispute. In the second case, only liability is in issue.

Neither case will be assigned to Complexity Band 1 as that is limited to cases where "the trial is not expected to last longer than one day".

The first case will probably be allocated to Complexity Band 2 ("Any less complex claim where more than one issue is in dispute") or possibly Complexity Band 3 ("Any more complex claim where more than one issue is in dispute, but which is unsuitable for assignment to Complexity Band 2")

The second case cannot be allocated to Band 2 or 3 as those two bands are restricted to cases where "where more than one issue is in dispute". The only Band it can therefore go into is Band 4, despite being no more (or perhaps even less) complex than the first case and despite there being only one issue in dispute.

Sir Rupert Jackson's Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs suggested:

> "What about non-personal injury cases? Straightforward cases, where only one issue is in dispute (e.g. proving a debt), will generally go into Band 1. Most intermediate track cases will go into Band 2 or Band 3. Complex cases falling within the intermediate track will go into Band 4."

What made the rule drafters introduce the words "where more than one issue is in dispute" into Bands 2 and 3?

Fixed Costs Where Settlement Occurs Pre-Assignment to Complexity Band

There is no doubt that the rules allow a court on detailed assessment to limit a party's recoverable costs to those that would have been applicable to a particular track even if the matter settled pre-allocation.

That is what CPR 46.13(3) expressly provides for:

> "Where the court is assessing costs on the standard basis of a claim which concluded without being allocated to a track, it may restrict those costs to costs that would have been allowed on the track to which the claim would have been allocated if allocation had taken place."

Costs are then limited to FRC for matters that would normally have been limited to the fast track even if they settle pre-allocation:

CPR 45.43(1):

> "This Section applies to any claim which **would normally be** or is allocated to the fast track."

CPR 45.44:

> "For so long as the claim is allocated neither to the small claims track, the intermediate track or the multi-track, the only costs allowed in any claim which **would normally be** or is allocated to the fast track are (a) the fixed costs in Table 12"

Identical provisions apply for the intermediate track:

CPR 45.49(1):

> "This Section sets out the costs which are to be allowed in any claim which **would normally be** or is allocated to the intermediate track."

CPR 45.50(1):

> "For as long as the case is not allocated to the multi-track, the only costs allowed in any claim which **would normally be** or is allocated to the intermediate track are (a) the fixed costs in Table 14".

It is therefore clear that on detailed assessment a court has the power to determine which track a matter was likely to be allocated to when determining the relevant FRC.

However, the FRC are not just based on which track a matter is allocated to but also which complexity band the case is assigned to. Unfortunately, there does not appear to be any corresponding rule (as in CPR 46.13(3)) that expressly allows a court to impose the fixed costs for the complexity band a matter would have been assigned to if it settles pre-assignment.

Another drafting oversight?

No doubt the courts will decide that it is implicit in the other relevant provisions that the court has the power to notionally assign a case to a complexity band during the assessment process, but it would have been sensible if this had been expressly dealt with by something along the following lines:

> "Where the court is assessing costs on the standard basis of a claim which concluded without being allocated to a track **and/or assigned to a complexity band**, it may restrict those costs to costs that would have been allowed on the track **and/or complexity band** to which the claim would have been allocated **and/or assigned** if allocation**/assignment** had taken place."

Defendant's Fixed Recoverable Costs

The extension of FRC sets the level of recoverable costs for both claimants and defendants.

Where the claimant wins, the claimant's costs are set by reference to the damages as agreed/awarded (see CPR 45.45(1)(a)(iv) and CPR 45.50(2)(b)(iv)). It is the settlement value which is determinative.

The position is very different when the defendant is awarded costs.

CPR 45.6(2) and (3) provide that the defendant's costs shall be calculated by reference to the value of the claim and that this shall be based on "the amount specified in the claim form, without taking into account any deduction for contributory negligence, but excluding – (i) any amount not in dispute; (ii) interest; or (iii) costs".

Previously, the only likely sanction for a claimant serving a claim form giving an unrealistically high value to the claim was the possibility that the issue fee might be knocked down at detailed assessment. Now, there is the risk that any adverse costs may be significantly higher as a consequence.

Certainly, outside personal injury, solicitors need to give very careful advice to their clients when deciding what level to pitch a claim at.

There are also significant dangers in personal injury claims in submitting inflated claims, notwithstanding Qualified One-Way Costs Shifting:

If the claimant does not have the benefit of ATE/BTE cover that provides protection against failing to beat Part 36 offers, an inflated claim may lead to a much higher proportion of damages being eroded for the period where the defendant is awarded costs. Claimant solicitors leave themselves open to negligence claims if they have encouraged their clients to submit claims at an unrealistic level.

Even if the claimant has the benefit of ATE/BTE protection against failing to beat a Part 36 offer, insurers may not be willing to fully cover the adverse costs order if it is unnecessarily high as a result of pitching the claim at an unrealistic level.

The fact that claimants' costs and defendants' costs are based on entirely different figures (settled damages vs claimed amount) will lead to some interesting outcomes.

Let us say that a non-personal injury claim is issued with a value of £90,000. The matter settles during Stage 4 ("From the end of Stage 3 [being from the date of service of the defence up to the earlier of the date set for CMC or the order giving directions] up to and including the date set by the court for inspection of documents" for £30,000 having been allocated to the Intermediate Track and assigned to Complexity Band 4.

If the claimant recovers all their costs, they will recover profit costs of £3,600 for the Stage 4 work. This calculation is based on the awarded damages of £30,000.

However, if the defendant has succeeded on a Part 36 offer made during Stage 3, such that they are awarded the Stage 4 costs, they will recover profit costs of £4,800 for the Stage 4 work. This calculation is based on the amount specified in the claim form of £90,000.

(The above figures are based on the difference between the Stage 3 costs (£13,000 + an amount equivalent to 14% of the damages) and the Stage 4 costs (£16,000 + an amount equivalent to 16% of the damages).)

Therefore, even though in both cases the claims are allocated to the same track, assigned to the same Complexity Band and the damages are the same, the profit costs calculation is much more generous to the defendant compared to claimant for the same Stage.

The difference between what a claimant and defendant may recover becomes ever greater the larger the difference between the damages recovered and the amount specified in the claim form.

Was this deliberate or is this another drafting error?

Clearly, if a claim fails then there is no damages figure from which to calculate the % element of the profit costs. In this case it makes sense to use the amount stated in the claim form, even if this will probably be a somewhat higher figure than the actual settlement value would have been if the claim had succeeded.

However, if a claim succeeds there will be a known damages figure which could have been used to calculate the defendant's costs. Instead, the defendant's costs are based on the amount stated in the claim form.

In any event, claimants clearly need to be cautious about submitting inflated claims.

Please contact Simon Gibbs if you are interested in receiving training on the new Fixed Recoverable Costs regime or would like us to undertake a review of your existing retainers to ensure they are ready for the new regime.

Contact Us …

If you wish to discuss the contents of this update in more detail, please contact:

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