Costs Law Update

Fixed Recoverable Costs Special – Issue 3

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.

This third newsletter in the series continues to explore some of the issues and problems that will arise with the application of the rules. The previous newsletters in the series are available here.

In this issue …

Can Defendants Recover Costs If a Claim Settles Pre-Issue?

Does the extension of FRC enable defendants to recover their costs if a matter settles pre-issue? There are certainly a number of commentators who have suggested that this is indeed the case. If correct, this would mean that the mere act of sending a letter of claim might trigger an entitlement for the defendant to recover costs if the claim is then not pursued.

It is important to note that defendants have traditionally had no entitlement to recover costs where a matter settles pre-issue, regardless of how much work they have had to undertake to defeat the potential claim.

CPR 45.6 (1) states:

> "Where, in any case to which Section VI, Section VII or Section VIII of this Part applies, the court makes an order for costs in favour of the defendant, the allowable costs are—
>
> (a) the fixed costs set out in Section VI, Section VII or Section VIII"

Section VII (dealing with costs in the Intermediate Track), for example, has the following in Table 14 for the first line:

	Complexity Band			
Stage	**1**	**2**	**3**	**4**
S1 From pre-issue up to and including the date of service of the defence	£1,652 + an amount equivalent to 3% of the damages	£5,162 + an amount equivalent to 6% of the damages	£6,607 + an amount equivalent to 6% of the damages	£9,601 + an amount equivalent to 8% of the damages

If these costs are also the costs where "the court makes an order for costs in favour of the defendant", does this create the entitlement for defendants to recover pre-issue costs?

For those who consider that such an entitlement arises, the issue they have focused on is trying to identify what mechanism is available to obtain the order for costs. Costs-only proceedings under CPR 46.14 would not assist as this requires agreement as to "which party is to pay the costs", which would be unlikely to come from a claimant.

The answer is probably more straightforward. The relevant FRC figures for Stage 1 of the Intermediate Track, or the corresponding stage in the Fast Track, allow for FRC of £x + a % of damages (e.g. £9,300 + an amount equivalent to 8% of the damages).

Defendant's costs are calculated by reference to the "value of the claim". This is dealt with at CPR 45.6(3) as:

> "For the purposes of paragraph (2)(a), 'the value of the claim' is –
>
> (a) the amount specified in the claim form …
>
> (b) if no amount is specified in the claim form, the maximum amount which the claimant reasonably expected to recover according to the statement of value included in the claim form under rule 16.3;
>
> (c) if the claim form states that the claimant cannot reasonably say how much is likely to be recovered –
>
> (i) £25,000 in a claim to which Section VI applies; or
>
> (ii) £100,000 in a claim to which Section VII applies"

Unless and until proceedings are issued, there will be no claim form. There is no way to quantity the level of FRC the defendant would be entitled to.

As such, the rules as drafted do not appear to enable defendants to recover costs where a claim is abandoned pre-issue. The trigger point for recovery would be when proceedings are issued. Whether this was the intention is a moot point. It would obviously have been preferable if the rules had spelt this out so as to avoid the confusion which has arisen.

Transitional Provisions for Increases to FRC

The FRC figures were increased from 6th April 2024 to allow for inflation. The increases are based on the Services Producer Price Index for the period between January 2023 and October 2023.

What transitional provisions govern this?

The latest update to the CPR amends CPR 45.1(8) and inserts a new CPR 45.1(9) from 6th April 2024. The new rules now read (with the amendments in **bold**):

> "(8) **Subject to paragraph (9), a** reference in any rule to an amount in a table in Practice Direction 45 is a reference to the amount applicable to a claim on the date that proceedings are issued, regardless of any subsequent amendment.
>
> **(9) In respect of any amendment made to Table 12, Table 14 or Table 15 which comes into force on 6th April 2024, the amounts in those Tables as so amended are also applicable to any order for costs made after that date in a claim issued before that date."**

This is clumsily worded. CPR 45.1(9) appears to contradict CPR 45.1(8). If, by virtue of CPR 45.1(9), the updated amounts are recoverable regardless of when proceedings were issued, then CPR 45.1(8) is redundant. It is not the date proceedings are issued that determines the amount of the FRC but when the costs order is made.

It seems that the retention of CPR 45.1(8) is simply to preserve the old FRC where the order for costs was made pre-6th April 2024.

It appears that the combination of the two sections is intended to mean:

- Where an order for costs is made before 6th April 2024, the FRC will be those in place at the time.
- Where an order for costs is made after 6th April 2024, the FRC will be those in the amended Tables.

This appears consistent with the December 2023 Minutes of the Civil Procedure Rules Committee:

> "A discussion as to the principle concerning application of the new, uprated, figures ensued. Two options were considered: (i) that the uprated figures apply to all claims from the April 2024 in-force date, whenever started. This means that any claim which is started before that date, but which concludes after that date, will be subject to the new figures, or (ii) that the uprated figures will apply only to claims which are issued on or after the April 2024 in-force date. MoJ consider option (i) to be the preferred approach and this was AGREED, meaning that as at April 2024 there will be one set of costs that apply, as now. However, whether this approach continues, at such time as the figures are considered for uprating again in the future, is something to be reviewed afresh at that time."

The previous FRC Tables in Practice Direction 45 are headed: "Tables of Fixed Costs (2023)". These were amended from 6th April 2024 to: "Tables of Fixed Costs (2024)", with the Tables showing the increased FRC.

It would have been much clearer for the rules to read something like:

> "CPR 45.1(8):
>
> Where an order for costs is made before 6th April 2024 a reference in any rule to an amount in a table in Practice Direction 45 is a reference to the costs set out in the Tables of Fixed Costs (2023).
>
> Where an order for costs is made on or after 6th April 2024 a reference in any rule to an amount in a table in Practice Direction 45 is a reference to the costs set out in the Tables of Fixed Costs (2024)."

Contracting Out Of FRC

Are parties free to contract out of FRC if a case would otherwise be subject to the regime?

There was previously some doubt as to this but, from 6th April 2024, CPR 45.1(3) reads:

> "Where—
>
> (a) a claim is one to which Section IV, Section VI, Section VII or Section VIII of this Part applies; and
> (b) the parties agree or the court orders that a party is entitled to costs,
>
> subject to rule 44.5 and to the application of any rule in those Sections or this Section by which costs are to be allowed, disallowed, increased or reduced, the court may only award costs in an amount that is neither more nor less than the fixed costs allowed by the applicable Section and set out in the relevant table in Practice Direction 45, unless the paying party and the receiving party have each expressly agreed this Part should not apply."

Some commentators have suggested this simply reverts to the position in *Doyle v M&D Foundations & Building Services Ltd* [2022] EWCA Civ 927. In that case, which would otherwise have been subject to the previous FRC regime, the parties had settled the case by way of a Consent Order including the provision: "such costs to be the subject of detailed assessment if not agreed". The Court of Appeal interpreted this as meaning costs to be assessed on the standard basis and not subject to FRC. It treated "subject to detailed assessment" as being wholly inconsistent with costs being subject to FRC. The parties were treated as having contracted out of FRC.

Does this rule change simply take us back to *Doyle*? Probably not.

The key word in the amended rule is surely "expressly". It was very possibly an oversight on the part of the paying party in *Doyle* that led to the wording of the agreement. Or, perhaps, more likely, that they believed the earlier Court of Appeal decision in *Ho v Adelekun* [2019] EWCA Civ

1988 had definitively ruled that the phrase "reasonable costs … on the standard basis to be the subject of detailed assessment if not agreed" was not inconsistent with FRC.

The inclusion of the word "express" almost certainly requires much more than happened in *Doyle*. This is likely to require the settlement agreement to say something like: "the defendant to pay the claimant's reasonable costs on the standard basis to be the subject of detailed assessment if not agreed (and not subject to fixed recoverable costs under Practice Direction 45)".

It also requires "each" party to expressly agree to this. Does this add a further requirement? If so, what? Does the second party simply saying "we agree" amount to "express" agreement or is something further required?

Nevertheless, we can guarantee that this will be one of the early battlegrounds in interpretation of the new rules.

Fixed Costs and Deemed Orders for Costs

Acceptance of a Part 36 offer creates a deemed order for costs. Right?

Not necessarily.

So far as relevant:

> CPR 44.9
>
> "(1) Subject to paragraph (2), where a right to costs arises under –
>
> …
>
> (b) rule 36.13(1) or (2) (claimant's entitlement to costs where a Part 36 offer is accepted);
>
> …
>
> a costs order will be deemed to have been made on the standard basis."

Firstly, CPR 44.9(2) expressly states it:

> "does not apply where a Part 36 offer is accepted before the commencement of proceedings".

In this situation, it would be necessary to issue costs-only proceedings to obtain the order for costs. (Copies of the Part 36 offer and acceptance would be the evidence required under CPR 46.14(4).)

Where a Part 36 offer is accepted late, there will also be no deemed costs order (see *Bayliss v Powys County Council* [2021] EWHC 662).

What about FRC cases?

Under the recent extension of FRC, acceptance by way of a Part 36 offer is dealt with under CPR 36.23. This deals with various issues including what costs the claimant is entitled to where the offer is accepted in time (CPR 36.23(1)), what costs are payable if a defendant's offer is accepted late (CPR 36.23(3)) and what costs a defendant is entitled to (CPR 36.23(8)). CPR 36.23(4) deals with the fixed costs where a claim no longer continues under the RTA or EL/PL Protocols.

It will immediately be seen that CPR 36.23 is not mentioned in CPR 44.9. Acceptance of a Part 36 offer in a fixed costs matter does not create a deemed order for costs.

This is not an entirely new problem.

Previously, the rules relating to Part 36 offers accepted in claims that no longer continued under the RTA or EL/PL Protocols were to be found in CPR 36.20. Again, this did not fall within the category of settlement that created a deemed order for costs under CPR 44.9.

Costs Judge Leonard considered this issue in *Nema v Kirkland* [2019] EWHC B15 (Costs). He concluded that:

- Acceptance of a Part 36 offer, where FRC applied, did not create a deemed order for costs under CPR 44.9.
- The detailed assessment process had no application for determining any disputed costs in fixed costs matters.
- Where there is a dispute, an application should be made to the court. This is treated as an interim application and the recoverable costs of that application are fixed. [Under the updated FRC rules, the costs of the application would be governed by CPR 45.8.]

If acceptance of a Part 36 offer in CPR 36.23 (or CPR 36.20 as was) does not create a deemed order for costs, this creates all kinds of problems. These immediately spring to mind:

- If there is no deemed order for costs, interest does not begin to run. With the extension of FRC, there are now significant amounts at stake. If there is delay or dispute over the amounts payable, the inability to recover interest could be costly. Will this start to generate applications under CPR 44.2(6)(g) seeking pre-judgment interest? Will the courts start to apply completely different considerations to the issue of pre-judgment interest when CPR 36.23 applies?
- If an interim application is the way to ask the court to determine the amounts payable:

  i. What about where a party seeks to escape fixed costs by relying on "exceptional circumstances" (CPR 45.9)? How are these costs to be assessed/determined if there is no deemed order for costs?

  ii. In non-personal injury cases suitable for the Intermediate Track which settle "from pre-issue up to and including the date of service of the defence", the costs are capped, not fixed (CPR 45.50(3)), and are therefore subject to assessment if not agreed. Does acceptance of a Part 36 offer in this situation mean the case falls within CPR 36.13, rather than CPR 36.23, such that there is a deemed order for costs?

  iii. CPR 45.10(1) allows the court to consider a claim for an amount of costs which is greater than the fixed recoverable costs where a party or witness is vulnerable, that vulnerability has required additional work to be undertaken and, by reason of that additional work alone, the claim is for an amount that is at least 20% greater than the amount of fixed recoverable costs. How are these costs to be assessed if there is no deemed order for costs?

Many of the difficulties arise from the current lack of any clear process for resolving costs disputes in matters that are subject (or potentially subject) to FRC. The Civil Procedure Rules Committee is now working on introducing such a process for determining quantum in FRC cases. It might have been sensible to set up this process before extending FRC.

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:

Simon Gibbs

Tel: 020 7096 0937
Email: simon.gibbs@gws-costs.co.uk
Address: 68 Clarendon Drive, London, SW15 1AH

Website: www.gws-costs.co.uk
Legal Costs Blog: www.gwslaw.co.uk/blog