Fixing Costs – The Extension of the Fixed Recoverable Costs Regime

The Fixed Recoverable Costs Regime ("FCR") was extended on 1 October 2023, introducing costs caps in most civil cases, including commercial and professional negligence claims.

The recovery of legal costs is an important consideration when assessing the merits of pursuing litigation and there are ongoing associated tactical considerations as to how to maximise a client's cost recovery and to seek to protect a client against adverse costs liability. Recognising the detrimental effect that cost liability can have on access to justice, the FCR seeks to disincentivise excessive litigation, whilst ensuring parties have certainty as the level of recoverable costs.

The updated FCR rules apply to cases issued after 1 October 2023, and so we are now starting to see claims served that are subject to the FCR.

Background

The FCR was introduced in most small personal injury claims in 2013, but has now been expanded to cover most civil and commercial claims valued under £100,000. These reforms follow LJ Jackson's reviews, including his Civil Litigation Costs Review in 2017. Finding that costs incurred in litigation frequently appeared disproportionate to the sums in issue, LJ Jackson proposed that the system as it was, encouraged excess spending resulting in runaway costs at the detriment not only of the paying party, but the interest of access to justice. He further concluded that the only way to avoid runaway costs is to manage them before they are incurred.

How does it work - Allocation under the FCR

The FCR sets out specific costs, which the winning party may recover based on the value and complexity of the claim at the allocation phase. In addition to the existing tracks (Small, Fast, and Multi-Track), a fourth track has been introduced under CPR 26.9(7), namely the Intermediate Track.

The principles applied when allocating claims remain broadly the same: the Court maintains discretion, but will consider the value and complexity of the claim when deciding the appropriate track. Generally, the Intermediate Track will cover matters:-

1. valued below £100,000;
2. where the trial is expected to last less than three days; and
3. no more than two experts per party are expected to give evidence at trial.

In addition to the above, the FCR sees the introduction of Complexity Bands within the Fast Track and Intermediate Track, ranging from 1- 4 with the most complex matters falling into band 4.

In the Fast Track, professional negligence claims are generally expected to fall within Complexity Band 4, though there may be exceptions. As for the Intermediate Track, the guidelines are set out in CPR 26.16 (Table 2):

Complexity Band 1	Complexity Band 2	Complexity Band 3	Complexity Band 4
Any claim where— (a) only one issue is in dispute; and (b) the trial is not expected to last longer than one day.	Any less complex claim where more than one issue is in dispute, including personal injury accident claims where liability and quantum are in dispute.	Any more complex claim where more than one issue is in dispute, but which is unsuitable for assignment to complexity band 2, including noise-induced hearing loss and other employer's liability disease claims.	Any claim which would normally be allocated to the intermediate track, but which is unsuitable for assignment to complexity bands 1 to 3, including any personal injury claim where there are serious issues of fact or law.

The guidelines on allocation within the Complexity Bands are limited, leaving a substantial amount of discretion to the judges presiding over the case management. Additional guidance can be found in CPR 26.13, which sets out general matters which the Court shall have regard to when allocating. In addition to value, this includes:

- the nature of the remedy sought;
- the likely complexity of the facts and law in issue;
- the number of parties;
- the value of any counterclaim or additional claim and the complexity of any matters relating to it;
- the amount of oral evidence to be heard;
- the importance of the claim to persons who are not parties to the proceedings;
- the views expressed by the parties; and
- the circumstances of the parties.

It is worth noting that for the purpose of assessing the value of the claim, CPR 26.13(2)(a) requires the Court to disregard any sum not in dispute. Pursuant to CPR 45.5, if Orders for costs are made in favour of two or more claimants, each claimant will be entitled to the costs of their own claim except where (i) the claim is for a remedy to which the claimants are jointly entitled, and they are joined to the proceedings to comply with Rule 19.3; or (ii) the Court orders that additional claimants are each entitled only to 25% of the principal claimant's fixed recoverable costs. In respect of the second exception, the Court may make such an order if it considers that it is in the interests of justice to do so, having regard to whether the claim of each claimant arises from the same or substantially the same facts and gives rise to the same or substantially the same issues.

Exceptional Circumstances

Inevitably, there will be circumstances where the FCR is unsuitable and the CPR leaves scope for deviating from it in circumstances where it is considered appropriate to do so. By way of example,

CPR 45.10 allows the Court to award additional costs if a party or witness is vulnerable, and this vulnerability necessitates more work than usual.

The CPR also recognises that matters may, occasionally, develop to become more complex than initially anticipated. Therefore, CPR 26.18 provides for the Court to re-allocate cases, either to a different track or a different Complexity Band in *"exceptional circumstances".* The consequence of reallocation for costs purposes is that "*the costs which may be allowed are those applicable to the track to which the claim is reallocated, as if the claim had been allocated to that track at the outset."*

Moreover, CPR 45.9(1) allows for the Court to make an Order for costs exceeding the fixed recoverable costs if it is appropriate to do so due to *"exceptional circumstances".*

It is for the Court to determine what constitutes exceptional circumstances, but guidance can be found in case law addressing the historic CPR45.29J. In the context of this provision, the Court of Appeal held in *Costin v Merron [2013] EWCA Civ 380*, LJ Leveson that: "*[Exceptional circumstances] cannot possibly mean anything other than that, for reasons which make it appropriate to order the case to fall outside the fixed costs regime, exceptionally more money has had to be expended on the case by way of costs than would otherwise have been the case."*

Calculation of Recoverable Costs

Recoverable costs will be calculated based on fixed rates under each band, plus an amount equivalent to a specified percentage of the damages awarded, depending on the stage of litigation at which settlement is reached. A series of tables in the new Practice Direction 45 set this out in detail.

An uplift of 12.5% is available under CPR 45.3 where the recovering party lives, works, or carries on business in London, *and* their legal representative practices in the same area.

The Court maintains discretion to sanction poor conduct: under CPR 45.13, the Court may either increase or reduce the recoverable costs by 50%, depending on which party's conduct has been unreasonable. Unreasonable behaviour is defined as *"conduct for which there is no reasonable explanation".*

Finally, a costs uplift remains available to claimants who make a Part 36 Offer which the defendant fails to beat: under CPR 36.24(5), this will be awarded in an amount equivalent to 35% of the difference between the fixed costs for (a) the stage applicable when the relevant period expires; and (b) the stage applicable at the date of judgment. Defendants will not benefit from an equivalent uplift.

CPB Comment and Tactical Considerations

Insurers will welcome the ability to more accurately assess the likely level of recoverable costs at the outset, thus making it easier to set aside accurate reserves. Further, the predictability of the recoverable legal costs will assist in making more informed decisions as to whether to defend or settle particular claims.

Allocation will become a key battleground. As the Court is required to disregard any sum not in dispute when considering the value for allocation purposes, it may in some cases be commercially beneficial to make some concessions prior to allocation in order to narrow the issues/sums in dispute and simplify the matter. This could have the effect of bringing a claim, which would otherwise be allocated to the Multi-Track, within the FCR or to obtain a lower Complexity Band.

The parties' actual legal costs are likely to be higher than the capped amount that they are able to recover from the "losing" party under the FCR. Solicitors should review the costs information they provide to clients to ensure it satisfactorily explains the implications of litigating within the FCR and to ensure clients understand that they might be responsible for any shortfall between costs incurred and costs recovered from the other side.

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Any questions

If you have any questions regarding the FCR, please get in touch with Dean or Lisbeth.

Dean De Cesare
Senior Associate

T: 0203 697 1912
M: 0742 535 5252
E: dean.decesare@cpblaw.com
LinkedIn

Lisbeth Poulsen
Solicitor / European Qualified Lawyer

T: 0203 697 1905
M: 07823 467563
E: lisbeth.poulsen@cpblaw.com
LinkedIn

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