Costs Law Update

Fixed Recoverable Costs Special – Issue 2

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 second newsletter in the series continues to explore some of the issues and problems that will arise with the application of the rules. The previous newsletter in the series is available here.

In this issue …

Defendant's Fixed Costs Where No Amount Specified in Claim Form

The FRC for defendants are based on the "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".

What about where the claim form does not state an exact amount (as will be the case in almost all personal injury matters)? CPR 45.6(3)(b) provides:

> "[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."

CPR 16.3 provides:

> "(1) This rule applies where the claimant is making a claim for money.
>
> (2) The claimant must, in the claim form, state –
>
> (a) the amount of money claimed;
>
> (b) that the claimant expects to recover –
>
> (i) not more than £10,000; or
>
> (ii) more than £10,000 but not more than £25,000; or
>
> (iii) more than £25,000 but not more than £100,000; or
>
> (iv) more than £100,000"

CPR 45.6(3)(c) then provides:

"[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 [the fast track] applies; or

(ii) £100,000 in a claim to which Section VII [the intermediate track] applies"

A failure to provide a realistic, or any, figure in the claim form could lead to a very large adverse costs order if the claim fails, or the claimant fails to beat a Part 36 offer, as the defendant's costs will be calculated on a figure much higher than the likely true value of the claim.

Fixed Recoverable Costs and Unreasonable Behaviour

Traditionally, a party in whose favour a costs order was made could seek those costs on the indemnity basis where the other party had behaved unreasonably during the litigation.

In FRC matters, a party could seek to escape the fixed costs regime by showing there were "exceptional circumstances", which would most commonly be unreasonable behaviour by the other side.

The extension of FRC changes all this for cases in the fast track or intermediate track.

There is now a fixed reward/penalty where a party is found to have "behaved unreasonably".

CPR 45.13(1) deals with the situation where the receiving party has behaved unreasonably:

> "Where, in a claim to which Section VI, Section VII or Section VIII of this Part applies, an order for costs is made in favour of a party whom the court considers has behaved unreasonably, the other party may apply for an order that those costs be reduced by an amount equivalent to 50% of the fixed recoverable costs which would otherwise be payable."

The successful party may therefore have their FRC reduced by 50% if they have behaved unreasonably.

CPR 45.13(2) deals with the situation where the paying party has behaved unreasonably:

> "Where, in a claim to which Section VI, Section VII or Section VIII of this Part applies, an order for costs is made against a party whom the court considers has behaved unreasonably, the other party may apply for an order that those costs be increased by an amount equivalent to 50% of the fixed recoverable costs which would otherwise be payable."

The successful party may therefore have their FRC increased by 50% if the paying party has behaved unreasonably.

CPR 45.13(3) defines "unreasonable behaviour" and the FRC being referred to:

> "(3) In this rule—
>
> (a) unreasonable behaviour is conduct for which there is no reasonable explanation; and
>
> (b) "fixed recoverable costs which would otherwise be payable" does not include –
>
> (i) VAT;
>
> (ii) any additional amounts under rules 36.17 or 36.24; or
>
> (iii) any disbursements."

It is unclear from 45.13(3) if any 50% uplift itself attracts VAT. For example:

- The FRC are £20,000 plus VAT. The uplift is £10,000. Does that £10,000 include VAT or is VAT payable by the paying party on top? In other words, does the paying party have to pay a further £10,000 or a further £12,000?
- The same applies for any reduction. The FRC are £20,000 plus VAT, that is £24,000 but reduced by £10,000 for the winning party's unreasonable conduct. Does the paying party have to pay £14,000 or is the reduction £10,000 plus VAT, that is £12,000, reducing the total payable to £12,000?

It appears the 50% sanction is intended to be an all-or-nothing one. If the court finds there was unreasonable conduct, it may increase/decrease the costs by the full 50%. If not, no adjustment may be made. There is no

scope, for example, to allow a 30% adjustment. Further, it appears that the 50% adjustment must be made to the full amount of the FRC as opposed to the costs for any particular Stage. If this is correct, it may act as a significant disincentive to judges to award the uplift/reduction.

For example, if a party has clearly behaved unreasonably but that unreasonable behaviour was only in relation to limited issues which had little or no adverse impact on the costs incurred by either party, a 50% adjustment would be hard to justify. Unfortunately, the rules do not appear to allow for a smaller adjustment.

Equally, say a party has acted impeccably throughout a claim until the last day of a three-day trial. During the final day that party behaves unreasonably. It would be understandable if the court decided to impose the sanction in respect of the FRC for the advocacy fees for the third day (Stage 11 in the intermediate track) and the FRC for the third day of attendance of a legal representative other than the trial advocate at trial (Stage 9). It would be less easy to see why the adjustment should also apply to all other stages of the case.

This, in turn, leads on to the issue of causation. The courts are well versed in the principle of adjusting a parties' costs (whether by making an issue-based order, a % based order or through the detailed assessment process) to reflect unreasonable conduct by a party. However, this is almost always on the basis that the adjustment should reflect the extent to which the unreasonable conduct has unnecessarily increased either party's costs. The new provisions in CPR 45.13 make no reference to causation. On the face of it, where a receiving party has behaved unreasonably, they may have their costs reduced by 50% even though that conduct has had no impact on the work required by either party. It will be interesting to see whether the courts interpret this in such a literal way or whether they require an element of causation to be established.

Unreasonable Behaviour - Continued

As explained above, CPR 45.13 allows the court to penalise a party who is found to have behaved unreasonably by reducing their costs by 50% if the unreasonable party is the receiving party or increasing the other party's costs by 50% if the unreasonable party is the paying party.

The rule does not, as it might, require the unreasonable behaviour to have caused unnecessary costs to the other side. This is perhaps not surprising. The 50% sanction is clearly set at such a high level not so as to compensate the innocent party but, rather, to punish the party at fault (and hopefully thereby discourage bad behaviour by other litigants).

The two elements of CPR 45.13 are drafted as entirely standalone provisions:

> "(1) Where an order for costs is made in favour of a party whom the court considers has behaved unreasonably, the other party may apply for an order that those costs be reduced by an amount equivalent to 50% of the FRC costs which would otherwise be payable.
>
> (2) Where an order for costs is made against a party whom the court considers has behaved unreasonably, the other party may apply for an order that those costs be increased by an amount equivalent to 50% of the FRC which would otherwise be payable."

We suspect that when the rule drafters were drafting this provision (to the extent to which they gave the matter any thought), they anticipated that there would only be one receiving party and one paying party in any given case, such that only CPR 45.13(1) or CPR 45.13(2) would be engaged, not both.

However, even ignoring the possibility of the court making an issue-based order, it will not be uncommon for both parties to have a costs order in their favour where the defendant succeeds on a Part 36 offer. The claimant will normally have their costs up until expiry of the relevant Part 36 period and the defendant will have their costs thereafter.

What if the claimant is also found to have behaved unreasonably during the claim? Given the wording of the rule, there appears to be nothing to prevent the defendant applying to have the claimant's costs reduced by 50% and their own costs increased by 50%.

It might be thought more logical for the decision as to whether to apply CPR 45.13(1) or CPR 45.13(2) to be based on when the unreasonable behaviour occurred. If the unreasonable behaviour were during the period the claimant is entitled to costs, then just CPR 45.13(1) would apply. If the unreasonable behaviour were during the period the defendant is entitled to costs, then just CPR 45.13(2). However, this would introduce a causative requirement to the sanction. In other words, the sanction would operate to compensate (however crudely) the innocent party, with the sanction to apply for the costs period when the unreasonable behaviour occurred. Nevertheless, for the reasons given earlier, this seems doubtful. The rule does not require there to be any link between the unreasonable behaviour and the respective parties' costs for the rule to be engaged.

Whether the courts will be minded to apply a double sanction is another matter.

Intermediate Track – Capped Costs or Fixed Costs?

Part VII of CPR 45 is headed:

> "VII **FIXED COSTS** IN 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 …"

Table 14 is headed:

> "TABLE 14: rule 45.50 – amount of **fixed costs** in the intermediate track"

The following figures are then given for Stage 1 in Table 14.

	Complexity Band			
Stage	**1**	**2**	**3**	**4**
S1 From pre-issue up to and including the date of service of the defence	£1,600 + an amount equivalent to 3% of the damages	£5,000 + an amount equivalent to 6% of the damages	£6,400 + an amount equivalent to 6% of the damages	£9,300 + an amount equivalent to 8% of the damages

You might therefore be forgiven for thinking that those figures (e.g. £9,300 + an amount equivalent to 8% of the damages for Complexity Band 4) are indeed fixed. If so, for many claims, you would be wrong.

It is necessary to cross reference 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."

The figures for Stage 1 in Table 14 are only fixed for personal injury claims. For non-personal injury claims, the figures are no more than caps.

I suspect there will be many cases where receiving parties wrongly claim, and paying parties wrongly agree, the full amount shown in Table 14.

Would it have been too difficult to put this caveat into Table 14:

	Complexity Band			
Stage	**1**	**2**	**3**	**4**
S1 From pre-issue up to and including the date of service of the defence **(such costs to be subject to assessment up to these amounts, except in a claim for personal injuries where the figures shown are fixed)**	£1,600 + an amount equivalent to 3% of the damages	£5,000 + an amount equivalent to 6% of the damages	£6,400 + an amount equivalent to 6% of the damages	£9,300 + an amount equivalent to 8% of the damages

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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