


Fixed Recoverable Costs – controlling claims

30 November 2023  Tim Johnson

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The new fixed recoverable costs (“**FRC**”) regime came into force in England and Wales **PFAS exclusions updated** on 1 October 2023. Simply put, FRC limits the amount of costs that can be recovered by the successful party in applicable civil litigation to a fixed figure. The regime applies to all civil cases in the fast track and also creates a new intermediate track for claims valued between £25,000 to £100,000.

The intermediate track contains four complexity bands, ranging from a Band 1 example of a single issue case with the trial expected to last no more than one day, to a Band 4 example of a personal injury claim with serious factual or legal issues.

When determining track allocation, it is not just the value of the claim that is considered, but other matters such as the complexity of the facts, the nature of the remedy and the number of parties and their circumstances. The decisions are therefore specific to the case and are subject to judicial discretion.

With parties encouraged to settle, claimants that obtain a judgment against the defendant that is at least as advantageous as any formal settlement offer they have made (known as a Part 36 offer), are entitled to a cost uplift of 35% of the difference between the fixed costs for the litigation stage when the offer could have been accepted and the applicable fixed costs at the date of judgment.

Only in exceptional circumstances or where a party or witness is vulnerable and, therefore additional work is required, may the costs exceed the fixed amounts. However, there is currently a lack of guidance in the rules as to what falls within these exceptions and there are penalties for failed attempts to meet the test, as costs may be given at a lesser amount than before. Costs may also be altered where a party has behaved unreasonably, defined as conduct for which there is no reasonable explanation. Where the successful party has behaved unreasonably, their costs may be reduced on application of the other party, whilst unreasonable parties with an order against them may be required to pay further costs.

Considerations for insurers:

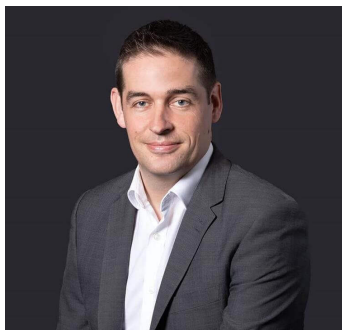
Under the new regime, recoverable costs are likely to be significantly reduced even where a claim is successful. Additionally, claimants (and their lawyers) are likely to change their litigation tactics to maximise the consequences of FRC. For example, in some cases it may suit the claimant to allow proceedings to drag out to the next stage when higher fixed costs kicks in, in order to exert additional pressure on the defendant. This may have an impact on what were previously routine case management decisions, such as whether to agree an extension for certain litigation directions. Equally, as there is likely to be a larger difference between the amount of costs incurred and the costs recoverable from the opponent, some claimants will be keen to settle claims as early as possible, as they will be liable to pay any such shortfall to their lawyers, which could materially erode any damages award or settlement. In some cases this will give defendants an opportunity to reach an early deal on advantageous terms.

In light of these factors, case and claims management decisions are likely to take on greater importance. Insurers should consider reviewing their control of defence language to ensure they have all of the rights they need to adequately control the defence of claims and take advantage, where possible, of the FRC regime.

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