

INCOMING FIXED COSTS RULES

General overview

In the commercial courts of England and Wales, it is long-established that the general principle on costs recoverability is that costs should 'follow the event', meaning that the winner in litigation will generally recover their legal costs from the losing party.

Costs awards and the amount of the award are ultimately subject to the court's wide discretion and assessment.

Irrespective of the court's overall discretion on costs, historically, it has always been typical for a successful party to be awarded their costs based on a number of factors such as:- cost budgeting, the costs agreed by the parties and/or the court's assessment.

As a rule of thumb, a recovery shortfall of approximately one-third was expected. The assessment process undertaken by the court, involving a number of well-established principles and resolving doubt in favour of the paying party, typically gave rise to this relatively large tranche of 'irrecoverable costs'.

However, from 1 October 2023, fixed recoverable costs ("FRC") will be extended across the Fast Track, and in a new Intermediate Track implemented for 'simpler' cases valued up to £100,000.

Subsequently, the amount of recoverable costs incurred in litigation (costs which are usually recovered from the losing party) will no longer depend on the amount of work carried out / the spend incurred by the successful party and will instead, be subject to fixed costs set out by reference to the Civil Procedure Rules 1998 ("the CPR").

The rationale behind the changes is to seek to create greater certainty as to recoverable costs available for parties involved in commercial litigation and will seek to implement a parameter for recoverable costs irrespective of the spend incurred by the successful party.

As a result of the reforms, there has been widespread changes to a number of parts contained to the CPR including:- substantial changes to Part 45 (Fixed Costs), a new Practice Direction ("PD"), PD 45 which sets out the relevant tables of fixed recoverable costs and how they apply. Changes have also been made to Part 26 (Case Management – Preliminary Stage) and PD 26, as well as Part 28 (The Fast Track) and PD 28. Changes have also been made to Part 36 (Offers to Settle) with other consequential changes to other parts to the CPR.

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Additionally, these changes have seen the implementation of a new track allocation band known as the intermediate track which will apply to all cases issued on/after 1 October 2023 with a claim value of £100,000 or less meaning there will now be 4 possible track allocations:-

- The Small Claims Track – claims valued at £10,000 or less;
- The Fast Track – claims valued between £10,000 - £25,000;
- The new Intermediate Track – claims valued between £25,000 - £100,000; and,
- The Multi-track – claims valued at over £100,000.

It is intended that FRC will apply to all cases (with limited exceptions) which are allocated to the Fast or Intermediate Track. Whilst not exhaustive, claims for monetary relief up to a maximum value of £100,000 will be affected including claims involving property disputes, contested debt claims and negligence.

However, as has always been the case, the court shall retain overall discretion as to costs and case management matters and this discretion allows the court to disapply the usual value thresholds pertaining to track allocation and costs overall.

In exercising its discretion on case management and costs matters, it is likely that the court will continue to apply factors such as value, complexity of the issues involved, the need for expert involvement, the number of parties involved, trial length and the conduct of the parties when exercising its discretion.

What are the FRCs?

FRC are the amount of legal costs that a successful party may seek to recover from the losing party at the different stages of the litigation, from pre-issue to final hearing / trial.

FRC are the costs that the court may award irrespective of the costs incurred to the successful party and will apply to all cases issued from 1 October 2023 with a value worth up to £100,000. The general position remains that very limited/no costs recovery is made for claims on the small claims track (£10,000 or less).

Banding of FRCs

Cases allocated to the Fast or Intermediate Track will be considered by reference to new complexity bands set out to the CPR.

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Whilst such detail is outside of the scope of this note, band 1 will apply to cases considered 'less complex' up to band 4 for 'more complex' cases allocated to the Fast or Intermediate Track.

The amount of FRC will be calculated by reference to which band the claim falls into. There are detailed tables setting out the sums recoverable at various stages from pre-action through to trial within the CPR.

Whilst the parties may agree which complexity band is to apply, ultimately, the court retains overall discretion as to the band to which the claim will be assigned.

The Intermediate Track

The proposed criteria for allocating a case to the intermediate track will be by reference to the following factors:-

- Cases not suitable for allocation to the small or fast track
- The claim for debt, damages or other monetary relief is no more than £100,000
- The Trial is not anticipated to last longer than 3-days
- Expert evidence will be limited to no more than x2 experts per side
- There are no wider factors to conclude allocation to an alternative track (i.e public importance, court resources ect)

Given the implementation of a new track, it is anticipated that cases allocated to the Intermediate Track will follow an expedited procedure which includes:-

- The Statements of Case are limited to 10-pages (i.e Particulars of Claim, Defence/Counterclaim, Defence to Counterclaim and any subsequent replies);
- The parties witness statements are to be limited to 30 pages per witness;
- Oral evidence to be time-limited and directed by reference to matters considered relevant at the Case Management Conference (CMC/CCMC)
- Limited expert evidence
- All applications to be made at the CMC/CCMC – where possible.

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Pros & Cons of FRC

One of the main aims of the proposed changes is to increase the predictability for all parties involved in litigation as to the amount of legal costs that will be paid or that will be payable – save for the court's overall discretion on both costs and case management.

It is likely therefore that the FRC regime will play an integral part in a party's considerations as to pursuing or defending claims given costs restrictions.

As far as smaller claims are concerned, how litigation is typically conducted will have to change. The recoverable costs will be fixed at a level such that recovery is broadly proportionate to the sums claimed and it is likely that early Alternative Dispute Resolution (“ADR”) measures should be considered early on to seek to mitigate the costs of proceeding through the court process to Trial.

The new procedural rules are intended to streamline the litigation process, particularly given the expedited Intermediate Track procedure with the aim of seeking to alleviate costs.

It is likely that the FRC regime and the procedural changes will focus the minds of the parties and lawyers alike to utilise best measures in seeking to ensure that only proportionate steps are taken at proportionate cost (including greater use of junior lawyers and ADR).

FRC do not affect the costs actually incurred in the litigation and subsequently, a party will have to weigh carefully the likelihood that it may be out of pocket and not fully reimbursed for the costs incurred even upon success.

Subsequently, parties should carefully consider issuing cases likely to be affected by the FRC regime prior to 1 October 2023 although parties are heeded to take stock of pre-action expectations which are a relevant factor in costs discretion.

For more information or assistance, please contact Zoe Allen on 0113 225 8811 or ZoeAllen@chadlaw.co.uk / NewEnquiries-Litigation@chadlaw.co.uk.

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