Last chance saloon

Dominic Regan advises on what action to take ahead of October's fixed costs extension

The introduction of fixed costs is imminent. However, there is still just time to take evasive action. This article gives some hard-nosed practical advice about what you should do at once.

Fixed costs have long been a fixture in personal injury fast track cases, and extend to the entirety of that track. My emphasis here is on the new intermediate track to which many matters worth between £25,000 and £100,000 will be heading. There are some specific exceptions on account of the subject matter of the claim, and a more general exclusion if the trial is likely to exceed three days or involve more than two experts a side giving oral evidence.

The general rule is that the new regime will apply where proceedings are *issued* on or after 1 October, regardless of how long ago the cause of action accrued. Thus, the measures are retrospective. Do appreciate that it is not enough to fire the necessaries off to court before 1 October. The case must be issued. A delegate at a recent talk that I delivered told me that he encountered real delay from the court when seeking to issue. The earlier you move the better.

For personal injury claims, the rules will only apply where the cause of action accrued on or after Sunday 1 October 2023. This concession is extremely important because it provides a gentle adjustment. The unfortunate claimant injured in an accident on 30 September 2023 will enjoy budgeting and the prospect of recovering costs at large, if justified, rather than being subject to the new unforgiving arithmetical formula.

An injury case that includes a disease claim will be within the new rules unless a letter of claim had been sent before 1 October.

Rob Adam, senior litigation partner at Greene & Greene in Bury St Edmunds, does no injury work at all. Business and private client disputes are his forte. He and his clients will be in at the deep end. He has already undertaken a file trawl to identify those unissued matters that are likely satisfy the Intermediate band criteria. Each case is then reviewed. Is it sufficiently strong to issue, subject of course to the instructions of the client?

An excellent observation made to me by costs expert Kerry Underwood is that unissued claims where much time has already been expended are the ones screaming to be issued. Beat the deadline and one has the opportunity to contend for as full a recovery as possible, on the standard basis. The disparity between costs incurred and those allowable under fixed costs will be greatest here.

Many have yet to appreciate that conventional factors to determine costs are annihilated in the new costs environment. As between the parties, forget grades of fee-earner, hourly rates, units of time and office location (save that there is a London weighting allowance of 12.5%).

So simply, the figures represent a price for performing the task. Out

goes budgeting at the beginning and detailed assessment at the end. The indemnity principle drops away (but the accurate recording of time remains crucial if one is going to ask your client to contribute; a sensitive issue dealt with below).

Costs lawyers will suffer a significant loss of income. The best cases for them are excluded matters such as mesothelioma claims, and obviously anything worth north of £100,000.

Lee Evans at NWL Costs Lawyers recommends that clients prepare themselves by taking a sample of, say, 10 recent matters that have settled. Look at what costs were recovered. Then, turn to Table 14 in the 2023 Practice Direction which sets out the new CPR Rule 45.50, the amount of fixed costs. Compare the resulting figures with what has been achieved in the recent past. One will then have a clear idea of the impact of the reforms. I predict it will be sobering.

CLIENT CARE

Client care letters and retainers will need to be revisited and revised. This will be of the utmost importance in unissued, non-injury cases, because the changes are retrospective. Issue before October and carry on as normal. Otherwise, the client must be made aware of the limited recovery from the other side.

It was only in October last year that the master of the rolls said at paragraph 84 of *Belsner v CAM* [2022] EWCA Civ 1387: 'Had [the claimant] also been told of the level of the fixed recoverable costs, she would have been able to compare the likely recoverable costs with the amount she was being asked to agree to pay the solicitors. As the client submitted to us, she would then have known that she was assuming a liability to pay the solicitors five times the costs she would be getting back from the defendant. I do not think that the solicitors can be said to have complied with either [8.7] or [8.6] of the code without providing that information.

'For these reasons, the solicitors neither ensured that the client received the best possible information about the likely overall cost of the case, nor did they ensure that she was in a position to make an informed decision about whether she needed the service they were offering on the terms they were suggesting.'

Belsner was a road traffic case where the range of recoverable fixed costs was extremely narrow. Given that in the new track there are four bands of work, each with a costs outcome dependent upon which of up to 15 stages of activity are engaged, the possibilities are far greater. It strikes me that sending the four-page matrix of possibilities to the client would give them the information which *Belsner* thought fundamental. One could narrow down the possibilities by indicating to the client which band their case was likely destined for, and then later advising them as soon as band allocation had been determined by the court.

Published with the White Book is an invaluable handbook, 'Costs and Funding'. The last paragraph in the new 2023 edition, in a superb chapter by Roger Mallilieu KC, at page 710 urges practitioners to think carefully about their client retainers, and in particular to ensure that the fixed costs can be wholly retained even 'in cases where the work on a conventional hourly rate basis does not reach the level of the fixed costs'.

The lesson we learn from fixed costs in injury matters is that in order to make ends meet, practitioners have looked to their clients to make a contribution from damages recovered to top up the limited payment from the paying party. The informed consent of your client to deductions from damages is vital after *Herbert v HH Law* (2019) EWCA Civ 527. There is nothing wrong with this. Indeed, Sir Rupert Jackson in his 2009 Report indicated that it was good for the client to have 'skin in the game', for it would encourage them to maintain a healthy interest in their own bill of costs. Crystal clear guidance on the mechanism of deductions should be given at the outset.

Barrister and costs expert Andrew Hogan has repeatedly spoken about the failure of some claimants to make Part 36 offers at all (which is disgraceful) or to make realistic offers which they then proceed to meet or beat at trial. Mr Justice Pepperall who is responsible for the White Book commentary on Part 36 is working on an update that will take account of the changes embodied in the new CPR 36.24 (5). A receiving party that has made a good, unaccepted offer will get a 35% uplift on fixed costs from the stage applicable when the relevant period expires, through to the stage applicable at the date of judgment. Currently, they would receive the 10% Jackson uplift and indemnity costs from the end of the relevant period. Andrew McAulay, costs partner at Clarion Solicitors, has crunched the numbers and believes that the 35% additional payment would only give the client a recovery equal to a standard basis sum today. Nevertheless, 35% extra is welcome. Serious thought should be directed at pitching serious, viable offers in all matters.

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What of those who issue in the nick of time, but arguably prematurely? Protocols are to be honoured. Should a claimant issue with indecent haste in September, having only just intimated a claim, there is the possibility of having the action struck out as an abuse of process.

In *Cable v Liverpool Victoria Insurance Co Ltd* (2020) EWCA Civ 1015, the Court of Appeal intimated that a breach of protocol could amount to an abuse of process. This develops *JSC VTB Bank v Skurikhin* (2020) EWCA Civ 1337, where at paragraph 51 Phillips LJ said: '… proceedings can be struck down as an abuse of process where there has been no unlawful conduct, no breach of relevant procedural rules, no collateral attack on a previous decision and no dishonesty or other reprehensible conduct.' The White Book commentary is found at .3.4.17, page 107 onwards.

The claimant would be free to issue again, but by then the Rule change they had sought to evade would be in force.

At a more general level, hard decisions will need to be taken. Is it worth taking on cases subject to FRC? What can be done to simplify processes? Who can best do the work economically? These questions should be addressed now. We are drinking in the last chance saloon.

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