No escape

Dominic Regan examines plans for an extension of the fixed costs regime

Fixed costs for fast track cases worth up to £100,000 are coming. Their arrival will see some significant departures. Out will go the indemnity principle, costs management and detailed assessment. What will all this mean for litigators, litigants and the civil process?

It was in the last century that Lord Woolf proposed that recoverable costs be fixed. While his key recommendations were implemented with the introduction of the Civil Procedure Rules in 1999, nothing was done to impose fixed costs.

Sir Rupert Jackson in his momentous 2010 Report again proposed reform, and between 2010 and 2013, the Ministry of Justice brought in fixed recoverable costs (FRC) for low-value road traffic, employers' liability and public liability claims. Ever cautious, Jackson wanted to see that the concept worked before rolling it out more generally.

In January 2016 he gave a talk that I attended. The title, 'Fixed Costs – The time has come' rather gave the game away. Sir Rupert took soundings and delivered detailed proposals on 31 July 2017.

On 6 September this year, the government at last produced its response. Intriguingly, it has accepted, bar a modest tinkering, almost everything proposed! Frankly, after a cursory skim it could have given the go ahead four years ago.

Many matters worth between £25,000 and £100,000 will be captured by FRC. However, child sexual abuse cases, clinical negligence claims, actions against the police, intellectual property and mesothelioma / asbestos cases will be excluded from the reforms. 'Complex personal injury cases' will not be caught. Our senior costs judge, at a talk on 23 September, was of the view that there would be much argument as to what satisfied this exclusion. No guidance has been proffered by the ministry.

The government is determined to cap costs in low-value clinical negligence cases worth up to £25,000. Such matters are 'of huge concern to the individuals on both sides', said the July 2017 Report. It recommended a bespoke process backed up by a grid of FRC. The elephant in the room is that it is the cost of expert evidence that so often is crippling. We should see proposals emerge in 2022.

Reverting to the forthcoming changes, there will be a general exclusion carved out for matters where the trial would exceed three days, or require more than two experts to give oral evidence for each party.

TIMING OF REFORMS

It is an absolute done deal that the reforms will be introduced. Timing is a concern of interest. The brief for Jackson was to deliver proposals, not draft rules. Our senior costs judge, in an interview last December, declared that the production of legislation would be complex and time-consuming. I suggest that a realistic implementation date would be October 2022 at the earliest, and we might well be waiting until 2023.

That date is extremely important. New rules will only apply to cases where the cause of action accrued on or after the date when the statutory instrument comes into force. Thus, the current rules have much life in them and could, depending upon the nature of the claim, still be applicable many years on. The immediate impact will be muted.

HOW IT WILL WORK

Much has been said about the stifling impact of a pre-ordained costs regime. 'Controlling litigation costs (while ensuring proper remuneration for lawyers) is a vital part of promoting access to justice. If the costs are too high, people cannot afford lawyers. If the costs are too low, there will not be any lawyers doing the work', said the July 2017 Report at paragraph 12 of the executive summary. Sir Rupert identified the balancing act that was required.

Recoverable costs will be determined by the band to which the case is allocated. Costs escalate as one moves up.

Band 1 will capture credit hire, 'bent metal' cases and simple debt disputes. The perceived simplicity here will generate the lowest level of costs.

Band 4 represents the most complex cases adjudged nevertheless to be fit for fixed costs. Commercial disputes and professional negligence claims, as for example might be pursued against a surveyor or architect, will be allocated here.

Bands 2 and 3 will be the home for public liability and employer's liability actions, as well as anything else the court thinks should not be in the band 1 basement. The ministry has declared that holiday sickness claims will be allocated to band 2.

A separate band will apply to noise induced hearing loss.

Years ago, solicitor Kerry Underwood identified the potential benefits of this model, which he has described as 'very successful'. The indemnity principle is disapplied. Recoverable costs are calculated by reference to a matrix. The efficient are recognised and rewarded because they will secure the same amount in costs as those who delay and dither.

One eminent litigation partner has told me that the certainty of quantifying costs at an early stage is brilliant for projecting cashflow. That certainty will be shared by the parties. Each will know at the outset their maximum exposure if they fail, and equally what they will recover if successful. That knowledge could embolden an otherwise hesitant claimant to proceed, hence the access to justice argument which Jackson fervently believes in.

The ministry has decided not to give any guidance as to track allocation. Given that costs escalate significantly as one ascends through the tracks, it is obvious that legal spats will ensue. A claimant will want to go high, while a defendant will be keen to nail matters to the lowest track. An unsuccessful band challenge will incur a costs liability of £150.

Nicholas Bacon QC has already identified, with a keen judicial eye, the problem of personal injury cases. Fundamental dishonesty is regularly alleged by defendants in the fond hope, not commonly achieved, that the entire claim will be dismissed. Should what would otherwise be a band 2 case be catapulted up to the top tier? It appears that the current thinking is that this issue will 'work itself out'. My experience is that it takes years for problem areas to achieve resolution. Think about qualified one-way costs shifting, for example.

Another invitation for a legal bunfight is unreasonable conduct. Where this is made out against the paying party, the fixed costs will be bumped up by a stiff 50%. The temptation to argue the issue will be nigh irresistible for many. A good Part 36 meanwhile will bring a 35% uplift on costs.

Where solicitors act for more than one claimant in a case arising from the same set of facts, there will be an uplift on FRC of 25% for each additional claimant.

A final percentage to note: London weighting of 12.5% uplift for a party that lives in the London area and instructs a legal representative who practices in the London area will be applied to the FRC. Should the defendant succeed, one will calculate costs based on the value of the claim, as valued in the particulars of claim.

So, at the conclusion of a trial, the parties will go home with everything put to bed. Damages and costs will have been determined. No more waiting months for an assessment. District judges are ecstatic at the eventual reduction in their workload.

The bar has already criticised the lack of protection for the fees of counsel. Only in the top tier of Band 4 work are their fees to be ringfenced. The MoJ has passed the buck by pointing out that this was the recommendation of Jackson. The junior bar will be vulnerable on fee income.

All existing fast track cases, worth up to £25,000, will be subject to FRC.

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Many will remember that Sir Rupert wanted cases in the £25,000-£100,000 range to be put into a new track to be called the intermediate track. A cunning MoJ has decided against this. All matters will be in an enhanced fast track. Barrister Andrew Hogan has spotted that this means District Judges would be competent to hear all matters within the extended regime up to £100,000.

I am old enough to remember doom and misery predicted as a consequence of the Woolf Reforms back in April 1999. Howls of protest could be heard on 1 April 2013 when 109 Jackson reforms kicked in. As soon as the government published details of fixed recoverable costs last month, protests emerged. The harsh reality is that these figures are going to be imposed.

Ben Williams QC recently uttered a reminder that Jackson fully expected clients to make some contribution to their own costs, hence the general damages 10% uplift under *Simmons v Castle* (2013) 1 AER 334 in injury matters. There is nothing wrong with seeking something to make ends meet.

'The holy grail pursued by every civil justice reformer is a system in which the actual costs of each party are a modest fraction of the sum in issue, and the winner recovers those modest costs from the loser,' wrote Sir Rupert. Only time will tell if these changes are going to come anywhere near satisfying that elusive goal.

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