In a fix

Andrew Hogan on why October's extended fixed recoverable costs will fuel satellite litigation

On 31 March 2023, the Civil Procedure Rule Committee agreed a set of draft changes to the Civil Procedure Rules, to introduce the long-heralded expansion of fixed recoverable costs (FRC) beyond their current preserve of fast track personal injury claims to mainstream litigation, for money claims of up to £100,000. The proposed changes include amendments to part 26, part 28, part 36 and most significantly part 45 CPR, with their associated practice directions.

As a philosophical point, it can be observed that there is no objectively right or wrong answer as to whether the concept of recoverable fixed costs per se will increase or facilitate access to justice. It all depends on the detail. However, the draft scheme proposed raises fundamental issues as to whether it will increase access to justice both in terms of its concept, and in terms of the detail of the changes to the rules and practice directions which underpin them.

INITIAL CONSIDERATIONS

I would suggest that when considering any scheme of rules, before delving into the detail, the context of the rules should be considered – and in particular, the relationship between recoverable costs in litigation and the funding of the legal profession.

A legal profession needs to be paid for; and it can only be paid for by (1) the state through funding (2) a claimant seeking redress by paying fees or (3) the wrongdoer by an award of costs. But state funding is scarce, and most claimants will not have funds to pay their own lawyers. These days much civil litigation is funded on a conditional fee basis, with the costs recoverable from the wrongdoer on settlement or at trial.

Assuming that awards of costs by the court at the current time are reasonable and proportionate, reductions in recoverable costs in principle will simply transfer the burden of funding litigation onto claimants. Costs awards against the losing litigant preserve both the 'polluter pays' principle, and ensure that the losing party can decide to settle or fight litigation on an informed basis, and not go bankrupt if they wrongly decide to fight.

Awards of cost also create a 'moral hazard' that aids efficiency in the civil justice system. Fear of an award of costs forces litigants to engage in good litigation behaviour and to settle their cases, and removing or reducing that fear will cause cases to elongate or go to trial, due to a changed perception of cost benefit analysis; adding further strain to an already overloaded civil justice system.

Fixed recoverable costs also have an inherent bias towards tilting the field of litigation against those who bring claims, and in favour of those who defend them. That bias could be addressed by making awards of fixed costs at a generous level, but they are rarely generous.

The independence and health of the legal profession is of constitutional importance. A short-funded or failing legal profession is not in society's interests, because lawyers will not be able to take on work that is uneconomic.

Work that is uneconomic will include work where a winning claimant is unable to make a contribution to her own costs, either because damages awards are small, or the relief sought is non-monetary in nature, or the lawyers are dealing with complex low-value litigation, with unsophisticated clients and more time needs to be spent on the case.

This leads to the stark conclusion that without a properly funded legal profession, in a mature legal system with complex law, citizens will not have effective access to justice to enforce their legal rights – with the adverse consequence that the laws made by parliament are more likely to be disregarded or flouted, due to a lack of effective enforcement.

CONCERNS ABOUT THE 2023 PROPOSALS

There is a real danger that these proposals may have adverse consequences for a number of reasons. The first is that both solicitors and counsel will have to revise their workflows, to try to ensure that work is done efficiently within the parameters of fixed costs. But the problem is that the court system and its rules are largely an analogue paper-based system that does not lend itself to efficiency in pricing, or permit processes to be accurately costed, commensurate with a scheme of fixed recoverable costs. Not all lawyers will have a large enough caseload to 'average' the work they do, on the cases they win.

Moreover, the removal of assessed costs may have an adverse effect on the costs system, as it removes the moral hazard that the potential for a large and stinging costs award will have, to encourage cases to settle. The District Bench's lists are choked with road traffic small claims, because there are no costs penalties on running them to a hearing.

The third phenomenon is to note that these scales of costs only apply on an inter partes basis. A client can be charged more. But that in turn is likely to lead to more solicitor-own client disputes, as clients challenge the retainer arrangements they have made, or the bills of costs they receive.

This trend is already demonstrable in personal injury claims, where deductions from damages in low-value RTA claims have given rise to the *Belsner* litigation. In effect, the 'polluter pays' principle is watered down, and the victim is more likely to have to contribute to their own costs, from their own resources.

THE TEXT OF THE PROPOSED RULES

Some of the concepts in the rules are flawed, and I believe will lead to a surge in satellite costs disputes, based on the woolly concepts involved and poorly structured rules. A few points will suffice to illustrate some of the problems.

First, the proposed judicial discretion to both allocate to track, and assign a complexity band, means that parties will fight very hard to secure the most advantageous track and band: the costs of an application to reallocate or reassign are de minimis, being limited to the fixed costs in the new table 1 of Practice Direction 45: £250 or £333. This gives the parties every incentive to choke the courts with allocation / assignment hearings.

Second, as the key factor in the judicial discretion on allocation and assignment is the value of the claim, with the more valuable a claim is, the further it moves down and to the right of the costs tables in Practice Direction 45, the more likely this is to lead to 'claims inflation', with cases being pleaded out to the utmost to try to secure a favourable ruling, rather than the narrowing of issues.

Third, the new rule 45.1(2)-(3) CPR with their sweeping wording may have sought to remove from the scope of part 45 the conduct provisions under part 44 CPR, yet at the same time by introducing the concept of a partial costs order into part 45 itself, has inconsistently introduced a judicial discretion under rule 44.2(6)(a); leading to endless arguments about whether a full or partial order should be made.

Fourth, the new rule 36.24(5) CPR implements a weakening of part 36 penalties. The current position that applies at trial is that a claimant who beats their own part 36 offer is entitled to an award of indemnity costs for the time spent after the expiry of the relevant period. That can mean a hybrid award of fixed costs / indemnity costs during the currency of a case. The proposals weaken part 36 by abolishing this consequence. The potential to be awarded indemnity costs will be swept away and replaced with a fixed percentage uplift on the fixed recoverable costs of 35% on the difference between the staged amounts.

Fifth, a further exception which has the potential to create a fair amount of satellite litigation is that a party can apply for an uplift of 50% on their fixed recoverable costs when there has been unreasonable behaviour by the opponent to litigation, per the new rule 45.13 CPR. But what will constitute unreasonable behaviour? There is no ready answer. The rule simply defines it as conduct for which there is no reasonable explanation. This will be satellite litigation without end.

Lastly, from time to time, a party who can be described as 'vulnerable' will make a claim and will find that her entitlement to costs is fixed under part 45 CPR, even though more work will need to be undertaken on her claim, or her disbursements may be higher.

Thus, the Civil Justice Council report which presaged the amendments, Vulnerable Witnesses and Parties within Civil Proceedings, expressly considered the application of rule 45.29J in this context and said: 'The council believes that the Ministry of Justice should consider whether there should be a provision within every fixed or scale costs regime for a discretion to consider a claim for an amount of costs which is greater than the fixed recoverable costs to cater for the consequences of specific, identified measures which have been necessary to cater for vulnerability.'

However, it should be noted that there is a requirement to exceed a margin of 20% on fixed costs, for the court to 'tinker' with costs entitlements. The uncertainty in (1) determining who is vulnerable and (2) whether there should be an uplift on costs adds a needless complication to an already complex set of proposed rules.

Come October 2023, for these and other reasons, I suspect a veritable storm of satellite litigation will descend on a hard-pressed civil justice system, and county courts that are already creaking at the seams.

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