

Fixed Costs Regimes

The unresolved legal and practical problems

Future extensions

The challenges

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What are fixed costs ?

- CPR 44.1 “costs the amounts of which are fixed by these rules whether or not the court has a discretion to allow some other or no amount ...”

Problems of nomenclature

- Fixed costs
- Fixed commencement costs
- Fixed judgment costs
- Fixed enforcement costs
- Fixed recoverable costs
- Portal costs
- Post-Portal fixed costs
- Predictable costs
- Predictive costs

Creating Frivolous Suits Act 1601

- 40 shilling rule
- If the debt or damages recovered did not exceed 40 shillings the judge “shall not award to the plaintiff any greater or more costs than the sum of the debt or damages so recovered ... but less at their discretions.”



In practice for more than 20 years?

- County Court scale costs until 1998
- And then...



Fixed costs today – CPR 45

- CPR 45.1(2) – claims over £25 – “unless court orders otherwise”
- Judgment in default
- Judgment on admissions
- Summary judgment under Part 24
- Defence struck out
- Certain possession claims
- Demotion claims
- Enforcement of judgments

All straightforward – main learning point may be for advocates are not aware that fixed costs apply – especially on summary judgment applications.

Fixed recoverable costs - RTAs

- CPR 45 Part II – CPR 45.9-45.29 – non-litigated RTA claims – in reality now very few cases covered by Part II – will only be relevant now to claims that are excluded from the RTA protocol
- Is your case covered by it? – 45.9
- Calculating the fixed recoverable costs – 45.11
- Recoverable disbursements – 45.12
- Exceeding fixed recoverable costs – exceptional circumstances – 45.13 – but will you get at least 20% more than fixed recoverable costs – 45.14

Portal Costs – Part 45, Section III

- RTA Protocol
- EL/PL Protocol
- Claims up to £25k – vehicle related damages excluded for purposes of valuing the claim
- Stage 1 – liability
- Stage 2 – evidence and negotiation
- Stage 3 – court proceedings and adjudication

Holiday sickness claims

- Subject to fixed recoverable costs from 7 May 2018
- Pre-Action Protocol for Resolution of Package Travel Claims

Aarhus Convention claims – CPR 45.42-45

- Maximum C can be ordered to pay where an individual £5k and £10k all other cases and maximum D can be ordered to pay is £35k
- But there are exceptions:
- **CPRE Surrey v Waverley BC** [2018] EWHC 2969 (Admin)
- Consideration of the objective and subjective tests for variation of the caps.
- Cap raised to £20k
- Appeal pending

Fixed costs and the late acceptance of a Part 36 offer

- **Hislop v Perde** [2018] EWCA Civ 1726
- claimant in a fixed-costs case whose Part 36 offer is accepted late but before trial is restricted to those fixed costs
- The fixed costs regime made mandatory by r.45.29B and r.45.29D continued to apply to those cases covered by it unless there was an express exception
- **Broadhurst v Tan** [2016] EWCA Civ 94 distinguished - there the claimant was entitled to indemnity costs where he had beaten his own Part 36 offer at trial.

Fixed costs and consent orders

- **Adeleken v Hu** [2018] 10 WLUK 668 County Court (Central London) HHJ Wulwik 18.10.18 (being appealed)
- RTA – consent order following acceptance of Part 36 offer – D to pay C’s reasonable costs on standard basis
- DDJ ruled costs be limited to those under fixed costs regime
- CJ allowed appeal – agreement to be enforced – parties had also agreed to reallocate to M/T so agreement re costs consistent with that
- **Solomon v Cromwell Group Plc** [2011] EWCA Civ 1584 distinguished
- Be careful with your consent orders

Medical agency fees

- **Beardmore v Lancashire CC** [2019] 2 WLUK 430 – County Court (Liverpool) HHJ Wood QC 4.3.19
- Allowed appeal from DJ Wright
- PL claim - tripper – had exited portal so CPR 45 Part IIIA
- Allowed recovery of medical agency fees incurred in obtaining medical records as a disbursement – issue was whether recovery of it as a disbursement was limited to RTA cases

Fixed costs – the IPEC scheme - disapplying

- **Link Up Mitaka Ltd (t/a thebigword) v Language Empire Ltd (Costs)** [2018] EWHC 2728 (IPEC) 17.10.18
- Court disappplied IPEC scale costs and assessed C's costs on indemnity basis
- D guilty of dishonest and obfuscatory conduct
- D had behaved in a manner which amounted to an abuse of process and such conduct would deprive D of benefit of protection that scale costs gave them

Fixed costs – the need for a bill

- **Allen v Brethertons LLP** [2018] 10 WLUK 5 SCCO 2.10.18
- Solicitors who had acted for the claimant in a claim for compensation following a road traffic accident had paid him the settlement sum and taken their fees without giving him a final, complete statute bill. He was entitled to an order that they should deliver such a bill to him.
- The fixed costs recovered by the solicitors from the claimant's opponent did not belong to them.

Unsuccessfully seeking to avoid fixed costs

- **Williams v Secretary of State for Business, Energy and Industrial Strategy** [2018] EWCA Civ 852
- Neither the EL/PL Protocol nor rule 45.24 provides a mechanism which automatically applies the fixed costs regime in circumstances where a claim has not been started under the Protocol and/or has not been the subject of a Part 7 claim and a judgment. However, where the Protocol should have been used, and its non-use was unreasonable, and pursuant to Part 44 conduct provisions, the claimant would usually be entitled to recover only the fixed costs and disbursements permitted by the Protocol.

Avoiding paying even fixed costs – “third party capture” - 2 contrasting decisions

- **Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd [2018] UKSC 21**
- In a case under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents, once a defendant or his insurer was notified that a claimant had retained solicitors under a CFA and that the solicitors were proceeding under the protocol, they had the requisite notice to make a subsequent payment of settlement monies direct to the claimant unconscionable, as an interference with the solicitors' interest in the fruits of the litigation. In such circumstances, the solicitors could be entitled to an equitable lien over the debt arising from the settlement agreement.

Avoiding paying even fixed costs – 2 contrasting decisions

- **Bott and Co Solicitors Ltd v Ryanair DAC** [2019] EWCA Civ 143
- **Edmondson** distinguished-followed
- Making a claim under the 2004 Regulation was largely formulaic.. Quantum did not have to be evaluated; the amount of compensation was fixed by the Regulation. Accordingly, the services provided by the firm in processing such claims could not be said to be "litigation services" unless and until the airline disputed the claim. The firm was therefore not entitled to an equitable lien over the compensation

The Capped Costs List Pilot Scheme

- New PD 51W
- In force 14.1.19 – 2 years
- Voluntary
- Claims £100-250k and up to a 2 day trial
- Fraud claims, claims with extensive disclosure, witnesses or numerous issues excluded
- Pilot Courts:
 - London Circuit Commercial Court
 - Circuit Commercial Court at Leeds and Manchester
 - TCC at Leeds and Manchester
 - Chancery Division District Registries at Leeds and Manchester

The Capped Costs List Pilot Scheme

- Costs budgeting does not apply
- Summary assessment
- Costs schedules within 21 days after conclusion of trial
- Capped Costs Table
- Normal maximum of £80k plus VAT, court fees, enforcement costs and wasted costs (!)
- Modification to Part 36 – for period when indemnity costs maximum for stage increased by 25% and overall maximum £100,000

The Capped Costs List Pilot Scheme

Work done in respect of	Maximum amount of costs
• Pre-action	£10,000
• Particulars of claim	£7,000
• Defence and counterclaim	£7,000
• Reply and defence to counterclaim	£6,000
• Case management conference	£6,000
• Disclosure	£6,000
• Witness statements	£8,000
• Experts' reports	£10,000
• Trial and judgment	£20,000
• Settlement / negotiations / mediation	£10,000
• Making or responding to an application	£3,000
• Work done post-issue which is not otherwise covered by any of the stages above	£5,000

The Capped Costs List Pilot Scheme

- What will the take up be if it is wholly voluntary?
- May well appear to insurer defendants who will know their maximum exposure on costs
- These are not fixed costs but capped costs – still have to be summarily assessed
- Feedback likely to be important in relation to introduction of either fixed or capped costs at lower end of the multi track

The Capped Costs List Pilot Scheme

- Core documents appended to Particulars of Claim
- Concise statements of case – max 20 pages
- D can object to case being in Capped Costs List – will be transferred to Ordinary List
- Various case management requirements
- General rule no disclosure – only documents in bundle of core documents
- Witness statements – 15 pages – 2 witnesses
- No experts or if necessary SJE
- Trial within 8 months of CMC

Fixed costs and clinical negligence claims

- low value clinical negligence claims
- Civil Justice Council Clinical Negligence Fixed Costs Working Group's recommendations on fixed recoverable costs in low-value clinical negligence claims awaited
- Inevitable?

Fixed costs – what else to expect



Thank you! Any questions?

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