

Fixed Costs: recent battles and the wars to come

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Introduction

- In the vast majority of case fixed costs (FC) work well.
- Simultaneously, however, they have from their inception been a recipe for a stream of technical satellite litigation.
- Cs, understandably, always seek ways to escape them.
- Ds, equally understandably, always resist such escape attempts.
- The rules have been subject to frequent revisions to reflect this.
- The result is a perpetual exercise of whack-a-mole in the context of ever more byzantine provisions.

Introduction

- Per *Cook on Costs* (2023) in respect of the old rules:

The length of the wording is a reflection of the drafters' intention to cover every eventuality. If you imagine for a moment, a cartoon where a wooden box contains two creatures who are experts at escaping from such boxes. Along comes the hero of the cartoon who is charged with keeping these creatures in the box. There then exists a scene where the hero is constantly nailing more and more pieces of wood on to the original box in order to plug gaps being created by the two creatures. Soon the box looks nothing like the original creation and is probably odds on to survive anything short of a nuclear explosion.

- This phenomenon is likely if anything to increase with the new rules.

Introduction

- The new, massively expanded FC regime, is liable to generate an even greater volume of satellite litigation for three reasons.
- Firstly, the stakes are much higher reflecting the increase in the top limit from 25K to 100K.
- Secondly, the massively increased volume of FC claims (by reference both to value and to type of claim) is by itself likely to be a significant driver of disputes.
- Thirdly, the expanded rules add yet further levels of complexity.

Introduction

- For example, given the difficulties generated by the interaction between Pt 36 and Pt 45, the scope for problems arising from the need now also to read across into Pt 26 as well is obvious.
- Moreover, even viewed in isolation the new Pt 45 is sprawling and labyrinthine.
- It contains 10 separate parts and 66 rules. Many of these individual rules are themselves long and complex.
- The accompanying PD contains 17 different fixed costs tables. Again, many of these are less than user friendly.

Introduction

- This talk will look back at recent decisions and ahead to likely future ones (the two are linked, the former giving pointers to the latter).
- Strictly my brief was to address “*current judicial thinking*” on FC.
- However, I have to disappoint somewhat here:
 - (1) (Deputy) Costs Judges deal with DAs. FC by definition are not subject to DA. We therefore have relatively little exposure to them.
 - (2) More fundamentally, this presupposes that there is in fact identifiable consistent of judicial thinking on FC. There is not.

(1) Interaction between FC and Pt 36

- This has been a constant source of argument. It continues to be so.
- Case in point, last week's decision in *Attersley v UK Insurance Ltd* [2026] EWCA Civ 217 concerned a tension between two rules:
 - (1) **r36.20** (now **r36.23**), which provides that in an ex-Protocol case, if an offer is accepted out of time C gets the FC they would have got had it been accepted in time.
 - (2) **r45.29B** (now **r45.50**) which provides that FC do not apply to claims allocated to the MT.

(1) Interaction between FC and Pt 36

- In *Attersley* the claim started within but then swiftly exited the RTA Protocol.
- D made a Pt 36 offer for 45K post-issue but pre-allocation (albeit when it was clear that the claim would have been allocated to the MT).
- If C had accepted the offer in time she would have been limited to FC.
- She in fact accepted 16 months late, after allocation to the MT.
- She then argued that the MT allocation displaced FC.

(1) Interaction between FC and Pt 36

- D argued that it was plainly wrong for C to receive higher conventionally assessed costs as a reward for late acceptance.
- HHJ Dudderidge found for D. Stacey J on appeal (sitting with CJ Brown as an assessor) found for C.
- The C/A found for D.
- This at least provides a definitive answer to this particular question.
- Other questions however remain.

(1) Interaction between FC and Pt 36

- The C/A identified that it was unclear what the result should be if C accepted a Pt 36 offer made/expiring post-MT allocation.
- On a plain reading of the rules C would be limited to FC. However, that would appear a surprising and unfair result.
- The C/A suggested that the Rules Committee should look at this gap in the FC rules. Unless and until it does so, there remains ground for dispute.
- Moreover, reverting to the actual dispute in *Attersley*, the fact that such a common scenario divided judicial opinion and required C/A determination 16 years after the relevant rules were introduced illustrates the almost endless capacity for FC to throw up ambiguity and argument.

(1) Interaction between FC and Pt 36

- Fixed costs are displaced when C obtains a judgment more advantageous than their Pt 36 offer; *Broadhurst v Tan* [2016] EWCA Civ 94; [2016] 1 W.L.R. 1928.
- In *Smithstone v Tranmoor Primary School* [2026] EWCA Civ 13; [2026] 4 WLR 8 the CA restored the tactical advantage for Cs in making split liability offers.
- C (a minor) made a 90/10 liability offer. The case settled for £2,650 with no admission of liability.
- The court approved the settlement.

(1) Interaction between FC and Pt 36

- The C/A held:
 - (1) The approved settlement order was a judgment for the purposes of Pt 36.
 - (2) A 90/10 offer was a valid one, *Mundy v TUI UK Ltd* [2023] EWHC 385 (Ch) overruled.
 - (3) If the judgment had been more advantageous FC would have been displaced.
 - (4) However, in fact the money settlement with no admission of liability was not more advantageous so C was limited to FC.
- The first of these rulings (followed *in R (on the application of PM) v Director of Public Prosecutions* [2026] EWHC 419 (SCCO)) may be open to question.

(1) Interaction between FC and Pt 36

- D's mere late acceptance of C's Pt 36 offer does not displace FC; *Hislop v Perde* [2018] EWCA Civ 1726; [2019] 1 W.L.R 201.
- It is not clear why settlement being embodied in an order should generate a different outcome (although *Thomas v SSHD* [2025] EWHC 3274 (KB) likewise held that it did).
- Neither *Hislop* nor another authority that only a judgment at trial qualifies (*Jolly v Harsco Infrastructure Services Ltd* [2012] EWHC 3086 (QB); [2013] 1 Costs L.R. 115) appear to have been cited in *Smithstone* or in *Thomas*.
- So there remains scope for argument, and in any event for tactical manoeuvring. There is likely to be a resurgence of split liability offers.

(2) Normal track

- By **CPR 45.43 and 45.49**, FC are limited to claims "*which would normally be for [or are] allocated to the fast track/intermediate track*".
- The need to identify the normal track for unallocated claims is likely to be a ripe source of contention.
- See *Collins v Chief Constable of Thames Valley Police* [2026] EWHC 117 (SCCO), where C sued D for destroying his guns (settled for 32.5K).
- C successfully relied on **CPR 26.9(10)(e)(i)** (claims for intentional torts against the police must be allocated to the MT), CJ Whalan rejecting D's argument that the claim was in reality for negligence.

(3) Contracting out

- **CPR 45.1(3)** provides that FC will not apply if “*the paying party and the receiving party have each expressly agreed*” to disapply them.
- This creates ongoing scope for disputes when offers are sloppily worded.
- However, the need for express agreement creates a high bar for disapplication.
- Thus in *Collins*, the fact that the D’s offer letter offered to pay C’s costs in accordance with **r36.13** (which provides for standard basis assessment) was insufficient.

(4) Transitional provisions

- *Collins* also resolved a dispute about transitional provisions.
- The new FC apply only to proceedings issued on or after 1/10/23.
- C's argument that they did not apply because his substantive claim was never issued, failed. CJ Whalan held that issuing Pt 8 costs only proceedings qualified.
- Further changes to/expansion of the FC rules is likely to throw up further such points.

(5) Gaps in the tables

- Whilst the tables aim to be comprehensive, they do not succeed.
- There will thus be disputes when cases fall into the gaps.
- In *Khan v Aviva Insurance Ltd* [2026] EWCC 2 D unsuccessfully applied to transfer the claim from Pt 8 to Pt 7.
- HHJ Owen held that the costs of the application fell outside the FC. C was therefore entitled to conventionally assessed costs.

(6) Multiple Ds and LiPs

- The tables are primarily designed for the classic one C vs one D, both legally represented scenario.
- Their application outside this classic scenario is far from straightforward.
- In *MIL Collections Ltd v My Shop 4 Ltd* [2025] EWCC 38, DJ Field held that (1) each successful D was entitled to their own FC; (2) a LIP D was also entitled to a proportion of the applicable sum, typically two-thirds of the FC.
- This is unlikely to be the final word on this topic.

(7) Exceptional Circumstances

- This escape clause remains at **CPR 45.9**.
- Precisely when it applies however remains unclear.
- *Ferri v Gill* [2019] EWHC 952 (QB); [2019] Costs LR 367 establishes that it is a high bar, but that begs as many questions as it answers.
- Beyond that, there are slew of not very consistent first instance decisions.
- Pending clearer authority, this will continue to generate frequent disputes argued and decided on a case by case basis.

(8) Failing to use the Protocol

- However, at least there is *some* appellate guidance on exceptional circumstances.
- In respect of a possibly even more frequent point, failing to use a Protocol because of alleged overvaluation at the outset, there is none.
- Again, there is a slew of first instance decisions with little by way of consistent pattern apparent.
- Appellate guidance would be beneficial, especially re the 100K MT limit.
- Pending this, the practical point is that this issue tends to turn on whether or not C has good contemporaneous records justifying the valuation.

(9) Other disputes which are bound to arise

- There are several other eminently foreseeable points of future controversy:
 - (1) Assignment/banding e.g. what is “*an issue*”? When is an issue “*in dispute*”? What level of complexity renders a claim unsuitable for band 2/3? What is a “*serious issue*” of fact or law for band 4? (Is this to be contrasted with a frivolous issue of fact or law?)
 - (2) Vulnerability under **CPR 45.10**.
 - (3) Unreasonable behaviour under **CPR 45.13**.
 - (4) Reallocation/reassignment.

(9) Other disputes which are bound to arise

- It is also foreseeable that other unforeseeable disputes will arise with the new FC as much if not more as with the old; the litigation equivalent of Donald Rumsfeld's infamous "*known unknowns*".
- Some of these disputes (be they foreseeable or unforeseeable) will eventually be resolved by definitive appellate decision as with acceptance and *Attersley*.
- Others will just rumble on generating endless first instance arguments as with the approach to valuation to escape FC.
- Others will fall in between as with exceptional circumstances and *Ferri*.
- The only predictable thing is that there will be a lot of them.

(10) In the pipeline

- Nor will the fun stop there.
- Long delayed FC for clin neg claims is likely to happen sooner rather than later (<https://publications.parliament.uk/pa/cm5901/cmselect/cmpublic/1234/report.html>)
- A stocktake of the main FC regime has just closed with changes almost inevitable as a result (<https://assets.publishing.service.gov.uk/media/6908bdb45e080b1224898185/frc-stocktake-consultation-document.pdf>).
- So more rules, more complexity, more transitional provisions, more disputes.
- For costs counsel at least, FC truly are the gift that keeps on giving.

(11) Finally - the dog that will not bark in the night

- For all the problems FC throw up, there is one from which they are immune.
- *Mazur* has no relevance whatsoever to FC.
- FC are the same whether the work is undertaken by Jonathan Sumption or the office cat.
- So, for all the potential neuralgia of FC arguments, they are an area of costs where that particular headache cannot occur.

If all else fails, blame it on Sir Rupert

“If we introduce fixed costs for everything, will all my fellow judges stop hating me for introducing budgeting?”

