

Fixed Costs Regimes

The unresolved legal and practical problems

Future extensions

The challenges

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15 May 2019

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

Fixed costs and solicitors' business models

- **Nicky Herbert v H H Law Limited** [2019] EWCA Civ 527
- Limiting recovery from client to fixed costs but adding 100% success fee regardless of any assessment of risk would not be allowed without clear evidence of informed client consent
- **Bott and Co Solicitors Ltd v Ryanair** [2019] EWCA Civ 143 – no entitlement to a lien where services provided by solicitor did not involve the conduct of litigation unlike the fixed costs payable under the RTA Protocol – see **Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd** [2018] UKSC 21, [2018] 1 W.L.R. 2052

Medical agency fees

- **Beardmore v Lancashire CC** [2019] 2 WLUK 430 –CC
- 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
- **British Airways Plc v Prosser** [2019] EWCA Civ 547
- EL claim
- MRO owned by solicitors – issue was not whether medical agency fees as such were recoverable (accepted they were) but whether and to what extent VAT on the same was recoverable

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

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.

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.
- **Parsa v D.S.Smith plc** [2019] 3 WLUK 719 – followed Hislop

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.

Fixed costs and exceptional circumstances

- 45.29J.— Claims for an amount of costs exceeding fixed recoverable costs
- (1) If it considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred to in rules 45.29B to 45.29H.
- **Ferri v Gill** [2019] EWHC 952 (QB) (17.4.19)
 - Required a strict, not a “low bar”, approach
 - **Hislop v Perde** [2019] 1 WLR 201 CofA decision followed

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

Thank you! Any questions?

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