Fixed recoverable costs: one year on

October 2024

The 1st of October 2024 is the first anniversary of one of the biggest changes to the costs rules of civil proceedings in a decade. Whereas previous fixed cost regimes only applied to limited areas of personal injury claims up to £25,000 in value, the changes that were introduced in October 2023 apply to almost all types of civil claims of up to £100,000.

Whilst the new FRC regime is still in its infancy, it is an opportune time to consider the impact of the reforms, any trends seen and whether some of the predicted effects have been realised.

Due to the delayed implementation of FRC in injury claims we have seen fewer cases than in other areas so the trends/patterns we have seen are anecdotal only. What we have seen is largely as we predicted, with:

- Letters of claim arguing for the highest complexity banding unless liability is admitted at the first opportunity (which is not strictly part of the rules).
- Letters of claim more clearly proposing ADR, presumably to set up arguments of unreasonable behaviour if ignored.
- Claimant firms taking a lighter touch approach to these cases, so as not to eat into the fixed costs recoverable.
- There was an influx of disease claims prior to October 2023 to escape the regime.
- From the noise induced hearing loss cases we have received since implementation, there has been mixed compliance with the new requirements for the letters of claim under the Disease pre-action protocol. Some firms are simply ignoring the requirements to fully set out the position on limitation and employment history and enclose an audiogram.

Our experience in all areas is that practitioners are still finding their feet with the rule changes, and it is too early to draw firm conclusions over trends, but some other anecdotal trends we have seen include:

Contacts

Gavin Reese
Partner
General Liability and Medical
+44 7802 961815 (UK)
gavin.reese@rpc.co.uk

Chris Gower
Senior Associate
General Liability and Medical
+44 7926 697640 (UK)
chris.gower@rpc.co.uk

- Claimant firms are naturally seeking to maximise their costs where possible, either by limiting time spent or issuing more promptly once evidence is finalised if settlement is not forthcoming.
- There is less reliance on counsel in fast-track claims, due to limited ability to recover these costs, but that some junior counsel are agreeing to limit their fees to that recoverable under FRC.
- There is more confidence in litigating cases under the fast track than the intermediate track. This is likely to be because assignment in the intermediate track is much less clear as banding is determined by complexity and the number of matters in issue rather than the type of claim, as in the fast track. There is a significant difference in the amount of costs recoverable between band 1 and the higher bands in the intermediate track so the risk of being assigned to the lowest band may be leading to reticence.
- Less reasonable claimants are arguing that fast track Band 4 apply in nearly all cases under the "nonetheless complex" catch all. This is not unexpected under our adversarial system, and it validates our prediction that the rules do not actually encourage cooperation between the parties.
- Interestingly, where there have been disputes over whether a claim is fast track band 1 or band 3, some opponents have offered to agree band 2 even though fast track banding is determined by the type of case rather than complexity (with band 2 not appropriate for these cases). This approach is not consistent with the rules but demonstrates some of the commercial proposals being made in these unchartered waters.
- There have been tactical admissions of part of a claim, to seek to bring the value in dispute into the fast track or even small claims track.

It will likely be several years until a clearer picture is seen but some of the behaviours and arguments we have seen are as predicted. Banding is likely to be a key battleground and we are yet to see how the Courts will interpret the rules and whether there will be consistency between the Courts on assignment to bands.

This is also not the end of the reforms. The CPR will be updated from 1 October 2024 to introduce a new process and procedure for FRC determination (don't call it assessment!) plus some other more minor amendments to the rules. As well as being additional changes that practitioners will need to grapple with, the fact that these additions were not included in the original rules supports the view that, despite their wide-ranging effect, the rules are not as precise as they should have been. Implementing a one size fits all system to the gamut of civil litigation was a mammoth and difficult task, and the resulting rules are imperfect. Our main prediction continues to be that we are destined for many years of satellite litigation over interpretation of these rules.

We are still seeing arguments now over the interpretation of the previous 2013 fixed costs rules and those were much less wide ranging than the new regime. We expect that it will be many years until parties have clarity on how these rules apply.