Seminar Notes:
Fixed costs - Thoughts about what is to come

3rd May 2023

Fixed recoverable costs (FRC) arrive at long last on 1st October 2023.The underlying proposals were unveiled on 31st July 2017 by Sir Rupert Jackson.
The definitive Rules, signed off by the Rules Committee, will be published later this month (May 2023).

We know that fixed costs shall be applied to all fast track cases (which are those worth up to £25,000 and where trial should not exceed one day). A substantial percentage of non-small claims cases are allocated to this track. What represents a profound change is the creation of a new, intermediate track capturing most matters, presently multi - track, worth between £25,000 and £100,000.
A surprise late adjustment means that the reforms are going to take effect much faster than was expected. Subject to 2 exceptions, the new Rules will apply to all cases issued from October 1st. Personal injury claims will be subject to FRC where the cause of action accrued from that date. The critical date for disease claims is that of the letter of claim.

The changes do not touch clinical negligence cases unless both breach of duty and causation are admitted. Low value clinical claims worth up to £25,000 were outside the Jackson remit. If we do not have separate measures published in October I cannot see reforms before 2025 at the earliest. Housing claims are left alone until at least October 2025. They will be allocated to the appropriate track but will not be subject to FRC.

Mesothelioma and asbestos lung disease cases will continue to be multi- track as will claims for harm, abuse or neglect of or by children or vulnerable adults. Claims against the Police involving an intentional or reckless tort or under the Human Rights Act are equally excluded. I understand that, as recommended, a case will not be suitable for the intermediate track if the hearing is likely to take more than 3 days or would require 2 experts per side to give evidence.
The conduct of intermediate track cases will be transformed. There will be no budgeting at the beginning nor detailed assessment at the end. Standard directions will supplant bespoke ones. Both fast track and intermediate track cases will be allocated to one of four bands.

Matters will be allocated to one of 4 bands, with band one for the least complex cases such as vehicle damage. The top band is for cases involving complex issues of law or fact. I expect road traffic cases to be band 2 and employers liability to be band 3.
The MOJ has shied away from giving detailed guidance upon track allocation. A claimant will want to go high, a defendant low.

What if an allegation of fundamental dishonesty in an injury claim that might conventionally be set for band 2? Ought it to remain there or should it be catapulted into the top tier?
As one would expect, costs escalate as a matter progresses. This incentivises early settlement by a defendant. The Jackson proposals saw costs near double upon issue.

Costs will be determined by a matrix. The calculation of costs is determined by reading down the relevant band and then reading across the grid to where the settlement stage intersects. One will alight upon a box containing the formula to calculate recoverable costs.
A good Part 36 offer will cause the fixed costs to be increased by a flat 35% so at the end of trial both damages and costs will have been resolved.

In order to penalise unreasonable behaviour by a paying party, Sir Rupert recommended there be a 50% uplift in costs (which would not include disbursements, vat or a Part 36 enhancement). The forthcoming Rules will define unreasonableness as conduct for which "there is no reasonable explanation".

CPR 1 was amended in April 2021 to require that vulnerable parties and witnesses be accommodated. The forthcoming Rules will permit a receiving party to seek an uplift of 20% on costs where that additional expenditure was attributable to vulnerability. A failure to meet the 20% threshold will mean the receiving party will only recover the lesser of the fixed costs or the amount assessed by the Court.

"The indemnity principle has no application to fixed costs" wrote Sir Rupert at para 2.8 page 80 of his report. Put simply, the costs recoverable represent a price for the task, regardless of time expended or grade of fee earner. The efficient will be best rewarded.
The accurate recording of time remains crucial! Those already subject to fixed costs have found that to make ends meet it was essential to deduct a contribution from the damages recovered by their client (as considered in detail below).

Note the possibility of a defendant arguing premature issue by those seeking to evade fixed costs. A claim ought not to be issued within the Protocol period unless limitation is looming. At the time of writing the changes are over 4 months away so this is an opportune time to push on with making claims and discharging protocol obligations. Is there anything a defendant could do if a case were issued in breach of protocol? Yes! It could seek to have the action struck out as an abuse of process under CPR 3.4 (2) and a later reissued one would then be captured by the new Rules.

In **CABLE V LIVERPOOL VICTORIA INSURANCE CO LTD (2020) EWCA Civ 1015** the Court of Appeal intimated that a breach of protocol could amount to an abuse of process. This develops **JSC VTB BANK V SKURIKHIN (2020) EWCA Civ 1337** where at paragraph 51 Phillips LJ said "… proceedings can be struck down as an abuse of process where there has been no unlawful conduct, no breach of relevant procedural rules, no collateral attack on a previous decision and no dishonesty or other reprehensible conduct. "The White Book commentary is found at .3.4.17." How are you to make ends meet? It is utterly proper for a solicitor to make a deduction from damages which have been recovered on behalf of a client. Sir Rupert Jackson in his 'Review of Civil Litigation:Final Report' (page xvii) spoke of the need to see that damages were not being "substantially eaten into by legal fees". He went on to observe it beneficial "that claimants have an interest in the costs being incurred on their behalf".

Sir Rupert said expressly at [1.4] in his Review of Civil Litigation Costs: Supplemental Report: “given the multifarious kinds of litigation it is not feasible to preordain how much clients must pay to their lawyers in every individual case. Also, that would be an unacceptable interference with freedom of contract. The best that we can do is to restrict the recoverable costs”.
To put the point beyond doubt, the Court of Appeal in SIMMONS V CASTLE (2012) EWCA Civ 1288 obligingly bumped up general damages by 10% with the stated aim of giving the claimant some additional funds to apply to meeting their own costs liability.
The duty owed by a solicitor to a prospective client in all cases is brilliantly set out by Roger Mallilieu KC at page 697 of ‘Costs & Funding following the Civil Justice Reforms:Questions & Answers’. The 9th edition 2023 is issued with the White Book Service.
“A solicitor’s duty is to consider, at the outset (i.e. at the time the client first seeks to instruct the firm) what forms of funding are reasonably available to the client and to advise the client accordingly “. Appreciate that it is incumbent to advise on funding options that you would never offer “with the result that the client chooses to instruct a different firm”.

Roger concludes by saying that it is then entirely proper to specify the only terms upon which you are willing to act. A wealthy client might insist that a senior partner should exclusively handle their dispute. That is a luxury, the cost of which would never be remotely recoverable. Tell the client so. If they are content to proceed, so be it.
The last paragraph in ‘Costs and Funding’ at page 710 urges practitioners to think carefully about their client retainers e.g. ensure that the fixed costs can be wholly retained even **“in cases where the work on a conventional hourly rate basis does not reach the level of the fixed costs”** and, post BELSNER, that the client fully appreciates the limited amount of costs recoverable .
At a more general level, hard decisions will need to be taken. Is it worth taking on cases subject to FRC? What can be done to simplify processes? Who can best do the work economically?
I do not have a scintilla of doubt that these reforms will drive down costs recovery between the parties. Costs Lawyers might well take a 30% hit with the disappearance of budgeting and detailed assessment work .