INSIDE 18

FIXED RECOVERABLE COSTS, PART 1: TIPS AND TRICKS FOR CLAIMANTS

This is the first of two articles by Kane Simons about costs in cases which fall within the Fixed Recoverable Costs ("FRC") regime at section IIIA of CPR 45 (for cases that fall out of the Portal).

This first article provides strategies for claimant firms to maximise their costs recovery within the regime.

Later in the year, Kane will post a second article providing tips and tricks for defendant firms to minimise their clients' costs liabilities.

Always go to trial with a Part 36 offer

If it looks as if the matter is heading to trial, you should always have an offer on the table that is likely to be beaten if you succeed. The benefits are so numerous that by not making an offer, you may not be acting in your client's (or your own) best interests.

Most liability trials in low-value personal injury claims involve a significant dispute of fact or clear allegations of dishonesty. Such cases are unlikely to settle, either because the defendant is adamant that they are correct or because the defendant insurers seek a finding of fundamental dishonesty. Most quantum trials and disposals do not settle because the defendant solicitors are instructed not to offer more than a specific sum for damages. The end of 100% success fees has also removed an incentive for trials to settle shortly before trial. Liability is often reviewed at the pre-issue stage, as will quantum. After that, in low value or uncomplicated cases, defendants will generally hold their ground until counsel is instructed in the weeks or days before trial.

On that background, if liability or causation has been denied or if the defendant's quantum offer is far too low, it makes sense for claimant to make a Part 36 offer before issue. If it is accepted, this amounts to a quick win. If the offer is beaten at trial, it could mean advantageous costs consequences and additional damages.

Familiarise yourself with the four consequences of beating a Part 36 offer

The costs consequences for a claimant beating his/her own Part 36 offer are set out at CPR 36.17(4). In summary, in addition to the fixed recoverable costs, the claimant can also recover:

1. interest on the whole or part of damages (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
2. costs on the indemnity basis from the date on which the relevant period expired;
3. interest on the indemnity costs at a rate not exceeding 10% above base rate;
4. 10% increase in damages.

Although it is not a cost, you should not forget to claim the '*additional amount*' of damages pursuant to CPR 36.17(4)(d). This is the claimant's extra 10%. Also, do not forget to claim interest on the whole of the damages at the penalty interest rate. On a simple claim for damages of £5,000 where an offer expired a year ago, the total extra damages for the claimant could be

£500 for the '*additional amount*' and in excess £500 for the interest. These items can be large, and if you fail to claim them, this could amount to negligence.

Know how to approach indemnity costs

The basic principles of how to approach indemnity costs in a FRC case are set out in Broadhurst v Tan [2016] EWCA Civ 94. In Broadhurst, the Master of the Rolls explained that '*where a claimant makes a successful Part 36 offer in a section IIIA case, he will be awarded fixed costs to the last staging point provided by rule 45.29C and Table 6B. He will then be awarded costs to be assessed on the indemnity basis in addition from the date that the offer became effective.*'

In practice, this means working out what stage in Table 6B (or 6C or 6D) the case was at when the offer expired. The claimant is entitled to fixed costs up to that stage. Thereafter the costs are not fixed, although the assumption is that they will exceed the equivalent fixed amount.

I have not been able to find any judicial guidance as to how to value indemnity costs in FRC cases. In my experience, judges have taken a broad-brush approach and either awarded a lump sum in excess of the equivalent FRC amount or suggested an appropriate number of hours to have worked. In two recent cases where offers were made about a month before trial (where costs would have otherwise been £2,655 plus 20%) I have seen additional sums of £750 and £1,000 plus VAT added to costs.

Counsel are also able to claim their trial fee on an indemnity basis, for example by reference to a reasonable hourly rate.

Know how to calculate penalty interest

This is often forgotten. The claimant is entitled to interest at a rate '*not exceeding 10% above base rate*'. At current interest rates, this is 10.75%. Unfortunately, the actual interest rate awarded is at the judge's discretion and there is no real guidance from the Courts. In my experience, trial judges tend to either award the full 10.75%, 10% to make the calculations easier or 5% which represents a straightforward compromise.

The rate will be applied to the damages and indemnity costs figures from the date of the expiry of the offer until the date of judgement. At over 10% this could be a substantial amount of money, especially if the offer was made some time ago.

Until relatively recently, the courts' approach to interest has been inconsistent. In my experience the awarded rate could be anything from 2% to 10.75%. The case of OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195 emphasised that the use of interest when dealing with Part 36 offers was not simply to compensate a party, but to act as a sanction and reward. Judges are now more likely to award an interest rate towards the top of the full 10.75% rate, but inconsistency remains.

Consider the use of counsel in risky cases

In risky or complicated cases, it is often sensible for claimant solicitors to instruct counsel at an early stage. This can be mutually beneficial; counsel has extra work and you have the benefit of not having to find a barrister to represent the claimant at the last minute.

Since the introduction of the FRC it has been my experience that claimants have been reluctant to instruct counsel for conferences or pleadings on the basis that the fees are no longer recoverable as disbursements – the cost of using counsel for advice has to come out of the solicitor's pot. This can be false economy and it might be sensible, for example, to spread the risk by instructing counsel to draft proceedings or provide advice with their fee coming out of base costs.

In successful cases involving fraud or dishonesty (whether pleaded or not), it is my experience that counsel's fee for conference is almost always recovered as a reasonably incurred disbursement. Judges are sympathetic to claimants who have been wrongly accused of fraud or dishonesty and understand that counsel may not wish to take on a case on a CFA without first speaking to the client. In cases of this type, the advantages are clear; counsel can earn more, and you have a better view of the prospects of the claim and have counsel ready for trial.

Issue claims together

It is common for multiple people to be injured in a single accident, particularly where they are passengers in a vehicle. Where there is no conflict of interest between the injured parties,

they are often represented by the same solicitor.

A common practice has always been to issue the claim of a 'lead' claimant, with the outcome of the co-passengers' claims dependent on the result of the lead claimant's trial. This practice arose because traditionally, the costs were broadly comparable either way and it simplified matters considerably.

The costs position is different under the FRC. The tables at 45.29 apply to a claim which '*no longer continues under the protocol*'. Using the protocol involves serving a CNF. Only one claimant can be entered on each CNF so it has been suggested that for each claimant, there ought to be a standard full set of costs. The consequence is that if there are two or three claimants involved in a single action, costs to trial could be doubled or tripled.

This point was successfully argued in the case of Neary & Neary v Bedspace Resource Limited (2015, Chester County Court, Unreported) before HHJ Pearce. The decision makes sense if one considers that for each claimant, a Part 36 offer could be beaten or that one claim might settle and one might not. To have a single fixed fee for the whole claim would be unfair, but to impose discretionary further costs would lead to unpredictability and inconsistency. HHJ Pearce did not feel that this was a 'windfall' for the claimant.

It seems that in a desire to keep costs simple, the Rules Committee were of the view that each claimant is entitled to his or her own full set of fixed costs. Despite this being a County Court decision, I am not aware of any major challenge or appeal on this point being made in the three years since.

The principle in Neary means that in every case involving multiple claimants, a claimant solicitor can obtain multiple sets of fixed costs. Where there are multiple clients involved in a single accident it is now beneficial to issue the claims together. You will have one issue fee to pay (based on the aggregate value of the claim), but should receive multiple sets of fixed costs if successful.

The provision of extra costs and the introduction of QOCS means that cases with a lower chance of success may now become financially viable. For example, if a family of five are injured in an accident and liability is denied, it may make financial sense to run the case to trial even if the risk of success is relatively small.

As the trial advocate's fee now forms part of the FRC rather than a disbursement, counsel is also entitled to multiple trial fees where there are multiple successful claimants. Historically counsel's fee has been based upon the aggregate value of damages under what is now CPR 44.40. This aggregate method of calculating counsel's fee not apply to the FRC. This often comes as a shock to judges (and some barristers).

The provision of multiple advocate's fees can be used to a claimant solicitor's advantage. For example, counsel may be more willing to act on a CFA in a risky case if he or she can expect five trial fees when successful. It also might mean that you could afford to instruct a more senior barrister who would not normally engage in Fast Track work.

Issue your claim

Fees in FRC cases are based upon a percentage of the value of damages. That percentage leaps significantly after issue. For example, in RTA claims, the percentage rises from 10% to 20%. If it is in the client's interest and not an abuse of process or an unreasonable delay, it is more cost effective to settle a case post-issue than pre-issue. Bear in mind that this will come with potential arguments about premature issue as well as the large up-front cost of the issue fee.

Focus on allocation to the Multi-Track

The rules were initially ambiguous as to what happens when a case commences in the Portal but ends up being complicated or particularly high in value. The FRC appeared to apply to all cases that fall out the Portal but is also couched in language that implies that it should apply only to cases worth under £25,000.

The issue came before the Court of Appeal in Qader v Esure Services Ltd [2016] EWCA Civ 1109. In short, the Court solved the ambiguity by adding the line '*…and for so long as the claim is not allocated to the multi-track…*' to CPR 45.29B. The (fair) result was that high value and complex claims are not restricted to fixed costs, so long as the matter was allocated to the Multi Track.

The principles in Qader were used to amend the rules in April 2017. Now, if a claim commences within the

Portal, the only escape from fixed costs is if the matter is allocated to the Multi Track. If a case settles pre-issue, the FRC will always apply no matter the complexity or value of the case. An apparent drafting error that allowed pre-issue claims of more than £25,000 to come out of the fixed costs regime has been removed.

On some occasions, it can be disadvantageous from a costs perspective for a claimant to have a matter allocated to the Multi Track. In the FRC, costs are assessed with reference to the quantum of damages whereas traditional assessment of damages is based upon hours of work undertaken. In higher-value cases where relatively little work has been done it may make sense to keep the matter within the Fast Track and the FRC regime. Carry out a balancing exercise before completing any allocation questionnaire.

There is a risk that when there are multiple claimants in a Neary-type case, the sheer volume of claimants might lead the case to be allocated to the Multi Track. In such cases, rather than getting multiple sets of fixed costs, costs will be assessed based on hours worked. Costs on this basis may well be lower.

Do not forget low-value cases

Until recently, there have been very few injury cases worth under £1,000 that make it to a final hearing. Most claimant solicitors do not bring claims of under £1,000 as there is a risk of not getting paid. However, bear in mind the Portal has no lower limit for claims that have issued. The only proviso is that the Portal should not be used where '*if proceedings were started the small claims track would not be the normal track for that claim*' (4.1 of the Pre-Action Protocols for Low Value PI Claims).

Where a sub-£1,000 Portal claim is made, defendants need to take the matter out of the Portal as soon as possible, make an appropriate offer, seek allocation to the Small Claims Track (SCT), and invite the court to make a finding that the claim was unsuitable for the Portal. It is surprising how infrequently this is done. A failure to do so could lead to Portal or FRC costs being paid out for very minor claims. You may simply wish to take a punt and try entering some of these onto the Portal, assuming inaction on the part of the insurer. It may well be the case that in borderline cases involving three or four-week injuries, the application to reallocate to the SCT will fail, leading to FRC costs.

There are examples of cases where it is wholly appropriate for sub-£1,000 claims to enter the Portal. Most notably where liability is in dispute and there are linked higher-value claims. These may be small claims in value, but would never be allocated to the Small Claims Track as they would have to be heard alongside the linked Fast Track or Multi-Track claims. Such scenarios usually arise where children suffer minor injuries in the family car.

Battles around allocation and the SCT are likely to become more common when the SCT limit rises. We can expect a lot of case law to emerge on these issues.

File costs schedules

When proceeding to a trial in the FRC regime, you should always file at least two costs schedules. The first will set out the relevant fixed costs at CPR 45.29 along with all disbursements and invoices. Such a schedule is not mandatory but without a clear list of disbursements (with associated invoices), mistakes are often made and disbursements are often forgotten by the Court and by counsel.

The second schedule is one that commences from the date of the expiry of the claimant's Part 36 offer and includes the actual costs incurred from that date. If the offer is beaten, the court will use this schedule to calculate indemnity costs. Ideally, this schedule will cover the entire post-issue period to maximise costs recovered.

Where fraud is explicitly alleged, or the defence actively attacks the honesty of the claimant in the pleadings, it can often make sense to put in a full costs schedule. Some judges, particularly where a claimant is found to be wholly honest and the allegations without merit, want to punish a defendant for their aggression. I have seen cases where the discretion to allow higher costs under CPR 45.29J has been used in those circumstances. Wherever I have tried to recover counsel's fee for a conference in a case where the claimant's honesty is wrongly called into question I have mostly been successful.

Do not forget that the schedules will need to be filed at least 2 days before the trial pursuant to 44PD9.5(4)(a). Failure to do this could mean that the schedule is struck out and any claim for indemnity costs will fail. I have seen this happen.

It is worth noting that successful parties, along with witnesses, can claim the cost of attending court pursuant to CPR 45.29I(f) and (g). This is often neglected and can act as a significant incentive for witnesses to attend court. It is good practice to include this amount (or an estimate) in the Schedule of Costs. If it is not included, it can often be forgotten by counsel or the Court.

Don't be afraid of maths!

Despite attempts to make the FRC simple and accessible, the reality is that the arithmetic can be complicated, especially where indemnity costs and penalty interest apply.

If one enters a trial or negotiation fully prepared with the figures it is quite possible that the defendant may simply relent. I recommend using a spreadsheet so that if the interest rate or damages figures change, the total figure can be updated in real time.

Ultimately, the most important thing to do in any high-value case that commenced in the Portal is to calculate whether costs will be higher on the FRC regime or on the standard basis.

KANE SIMONS

ksimons@18sjs.com

Kane Simons is the Head of the Civil and Personal Injury Department dealing in all areas of Serious Personal Injury litigation including high value claims, road traffic (with particular interest in claims involving motorcycles and bicycles), and industrial accidents.

For further information please contact:

civil@18sjs.com

18 St John Street
Manchester
M3 4EA
T • 0161 278 1800
F • 0161 278 8220
E • clerks@18sjs.com
• @18stjohn
www.18sjs.com