FORUM OF INSURANCE LAWYERS

Informing Progress - Shaping the Future

FOIL UPDATE 15th August 2023

Costs SFT Roundtable on the Extended Fixed Recoverable Costs (FRC) Regime

This Update is a summary of the presentations from two roundtable events.

Introduction

Shirley Denyer – Technical Consultant FOIL

The FOIL Costs SFT hosted an event in early July, at DWF's offices in London on 3rd July and repeated in Manchester on 5th July, on how the new FRC rules would work in practice. With SFT members on the panel, there was an opportunity to consider and discuss the intricacies of the new regime. FOIL is a long-term supporter of FRC in principle and has been actively involved in lobbying on the detail of the new regime. Now the new rules are in place it's clear that whilst some issues have been resolved in line with FOIL's lobbying, other issues remain problematic. The events gave an opportunity to look at those across the board, from transitional arrangements, to the potential of the rules to create opportunities for gaming and costs building.

Transitional Provisions

Steven Dawson – Partner and Lead Costs Lawyer for Property Risks and Coverage team at **Keoghs LLP** and a member of the FOIL Costs SFT

Paragraph 2 of Civil Procedure (Amendment No. 2) Rules 2023 sets out the transitional provisions for the new FRC rules to come into force from 1st October 2023.

In relation to a claim for personal injuries and claims for personal injuries that include a disease claim the transitional provisions are relatively straightforward. These are set out below;

a. Where a claim includes a claim for personal injuries, other than a disease claim, the cause of action must accrue on or after 1st October 2023; or
b. Where a claim for personal injuries, which includes a disease claim, then no letter of claim has to have been sent before 1st October 2023.

However, where a matter does not include a claim for personal injuries, which for example could be for vehicle damage and credit hire then the transitional provisions create a number of problems. The transitional provisions state as follows;

"(1) …. in so far as any amendment made by these Rules applies to—

a. allocation;
b. assignment to a complexity band;
c. directions in the fast track or the intermediate track; or
d. costs,

those amendments only apply to a claim where **proceedings are issued** on or after 1st October 2023." (Emphasis added).

Therefore, for all matters where there is no personal injury element, if proceedings are not issued then the new FRC rules do not apply. Further, if proceedings are issued after the 1st October 2023, the new FRC rules do apply, irrespective of when the cause of action arose or when the letter of claim was sent.

This results in different costs provisions applying for similar matters depending on whether the matter settled pre or post issue. If this issue is not addressed, this anomaly will continue to apply for many years but there will be no such issues applying to cases involving claims for personal injuries.

This may result in a significant increase in cases being issued prior to the 1st October 2023 where there is no personal injury element, and where there is a personal injury element, which includes a disease claim, then there may be spike in letters of claim.

The problems with the transitional provisions unfortunately do not end there. Proceedings are not defined either in the transitional provisions nor the new FRC rules. There it is not clear as to whether the issue of Part 8 proceedings brings a matter within the new FRC regime.

The only reference to proceedings is within Table 12 of the New Practice Direction to Part 45. This table sets out the costs to be allowed depending on the stage at which a matter settles in Fast Track matters going forward. The table states as follows:

Stage A: If Parties reach a settlement prior to the claimant issuing proceedings under Part 7
Stage B: If proceedings are issued under Part 7, but the case settles or is discontinued before trial

There is, however, no corresponding reference to Part 7 proceedings within Table 14 which covers the new Intermediate Track costs. In any event, a Practice Direction has limited legislative force. Practice Directions merely provide guidance to matters of practice in the civil courts and therefore the reference to Part 7 proceedings in Table 12 may have limited impact, given that proceedings are not defined elsewhere.

It may be argued that Part 8 proceedings are not captured by the new FRC rules because Part 8.9(c) of CPR which provides that a Part 8 Claim "shall be treated as allocated to the multi-track".

However, this rule does not assist as the case of *Ian Kershaw v Marion Roberts (as Personal Representative of the Estate of Jane Rosalyn Jones Deceased)* confirms:

"Rule 8.9(c) does not automatically allocate Part 8 claims to the multi-track, as Miss Candlin suggests: it merely provides that such claims are "treated as allocated to the multi-track". As a matter of language, that is not the same thing as, in fact, being allocated to the multi-track by the court; and it is clear from reading the CPR as a whole that the deeming provision of Rule 8.9(c) is not intended to – and does not – allocate all Part 8 claims to the multi-track. Thus, it is still open to the court in fact to allocate a Part 8 claim to a particular track, including the multi-track."

We can see that this lack of clarity will raise a considerable number of issues and potential for satellite litigation.

It is disappointing that the transitional provisions are not clear. Had proceedings been defined and either letter of claim or cause of action also been used for matters, not including a claim for personal injury, these issues could have been avoided.

Allocation (and reallocation) to a track and a band

Paul McCarthy – Partner **Horwich Farrelly** and a member of the FOIL Costs SFT

Allocation to track

The creation of a new intermediate track will significantly increase the importance of the allocation stage of many claims due to the financial impact on the parties of allocation. The intermediate track has been created to sit between the fast and the multi tracks. For some claimant firms, allocation to the intermediate track could result in an 85% reduction in the costs they would have recovered under the current hourly rate-based costs regime. There are therefore significant financial incentives for both parties when it comes to arguments around allocation.

There are a number of factors that will dictate whether the intermediate track is the correct track for a particular claim including:
1) The claim is not suitable for the small or fast track
2) the value of the claim is less than £100,000
3) The trial is not expected to last more than three days
4) Oral expert evidence will be limited to two experts per party
5) The claim may be justly, and proportionality managed under Section IV of Part 28
6) There are no additional factors making the claim inappropriate for the intermediate track.

The most significant of those are likely to be the upper value limit and the number of experts. The challenge for defendants when it comes to value is that in many claims the allocation hearing will occur at a time when the only evidence before the court is that of the claimant. Steps to encourage early exchange of evidence are going to be key for defendants in controlling matters at the allocation stage. An upper value limit encourages claimants and their lawyers to seek to claim maximum value from the claim – claims inflation is inevitable. The limit on oral expert evidence will also encourage the addition of multiple heads of loss and the involvement of a wider array of experts. It also presents an opportunity for defendants to control costs by limited the nature and extent of their challenges to reduce the number of experts giving evidence at trial.

Assignment to complexity band

Within both the fast and intermediate track fixed costs there is the new concept of a complexity band. The bands run from band 1 (the simplest claims) to band 4 (the most complex) with the recoverable costs figures increasing the higher up the complexity banding a claim goes. Claims will be assigned a complexity band at the same time as they are allocated to track.

Frustratingly, there is currently no pre-action protocol covering this aspect of the reforms, so there is no obligation on either party to outline how they view the complexity band issue pre-action. That is likely to follow but is not expected until 2024.

Within the new rules, tables have been provided for both the fast and intermediate tracks that provide some limited guidance on the likely applicable complexity band. The guidance for fast-track claims appears significantly more prescriptive with different claim types sitting in different complexity bands. The guidance for the intermediate track is far less clear and open to significant argument. Complexity bands will be driven to some extent by the issues live in any particular claim. This is evident from the fact that the guidance tables dictate that a personal injury claim with one issue (liability or quantum) will fall in band 2 but if there are two or more issues (liability and quantum) it will fall in band 2. There remain a large number of unanswered questions around complexity band such as what other aspect of a claim (for example causation) will amount to issues for the purposes of complexity band?

The difference in costs between the bands is significant and this, coupled with the uncertainty created by the rules, will inevitably lead to a prolonged period of satellite litigation.

Re-allocation and re-assignment

There has been a significant shift in how the costs rules will function when a claim is re-allocated (or reassigned). Under the previous rule structure where a claim was reallocated the costs rules applicable to the first track would apply to the date of reallocation and the rules applicable to the new track would apply from the date of reallocation. However, under the new rules where a claim is reallocated or reassigned it will be treated as having always been on that track/band. This creates a potential opportunity for defendants to contest issues where the evidence is unclear and to then concede issues and seek re-allocation/ re-assignment when the evidence turns against them. On the revised rule this will result in some significant potential costs savings. Care needs to be given to not fall foul of the conduct provisions (which give rise to a 50% costs penalty) and defendants need to be wary of the reverse opportunity being available to claimants.

Matthew Hoe – Director of Risk & Compliance at **Taylor Rose MW** and a member of the FOIL Costs SFT

How the stages work

The Fast Track stages adapt the stage in the current CPR 45 SIIIA for claims that have exited the RTA or EL/PL Protocols. The pre-issue and trial advocacy are divided up by damages bands, albeit different ones. The post issue stage is divided into three stages covering progress of the litigation. We anticipate existing guidance in *Bird v Acorn* will apply still; stages can be leapfrogged, and you cannot go backwards in stages, even if the directions happen to take that course. The definition of

'trial' has been widened far beyond conventional trials. Court door settlements seem now not to include advocacy fees, reversing *Mendes v Hochtief*. The figures for stages are not cumulative.

The NIHL table has a similar structure, but has more banding and some accumulation as marked.

The Intermediate track is very different. It has 15 stages, but they are not sequential. S1, S3-S6 and S8 are the six stages reflecting the progress of a claim. S2, S7 and S9-S15 are a variety of bolt-on fees appearing at the point they may be incurred. *Bird v Acorn* leapfrogging seems less likely as the stages are more tightly defined by deadlines, not by the date of court actions. The position on court door settlements is ambiguous and will be subject to argument.

Offers to settle

The new Part 36 rules again adapt the current rules giving effect to SIIIA fixed costs. Settlements will not trigger any automatic right to costs or a detailed assessment, instead an application must be made on any fixed costs dispute arising. The rules are more self-contained and there are bound to be more arguments that certain provisions in Part 45 are binned by Part 36, such as powers to limit or increase on FRC. The trial provisions replace indemnity costs for claimants beating their own offers with a 35% uplift on FRC after the successful offer's relevant period. Some commentators suggest that is in place of the full package including enhanced interest and 10% of the damages (or costs as the case may be) but FOIL does not share that view, and considers it a straight swap for indemnity costs only.

Risks, opportunities, costs building and behavioural changes

Nicola Critchley – Partner **DWF**, President of FOIL and a member of the FOIL Costs SFT

Points to note

There is a risk of claims inflation with significant financial gain in moving up track and the complexity bands. For example there is a significant difference between costs recoverable in bandings 2 and 4. Any challenges to track and banding will be dealt with at the allocation hearing so we anticipate these will become fiercely contested and given that the costs of a failed challenge are fixed at either £250 plus vat (FT stages 1/3) or £333 plus vat (FT stage 4 and IT 1-4) we envisage these hearings will be a key area of focus and rife for satellite litigation.

We also anticipate exploitation of the rules in order to circumvent the FRC regime. For example:

- Injury layering to increase the claim value and the number of medical experts required to give oral evidence at trial; FT oral evidence is limited to 1 expert per party in any expert field and expert evidence in 2 expert fields. IT is oral evidence limited to 2 experts per party.
- Number of parties in the proceedings – in IT this can't be more than 3.
- In the IT length of expert's report can't exceed 20 pages and witness statements can't exceed 30 pages.
- Length of FT trial not more than 1 day and IT not more than 3 days.

There is also a risk of costs inflation in relation to disbursements. In the current FRC regime this has been a battleground between the parties. In the FT translator/interpreter fees are expressly recoverable together with "any disbursement which has been reasonably incurred" (other than a

disbursement covering work for which FRC are already allowed). On the IT, “reasonable disbursements” are recoverable so we anticipate there will be a number of challenges as to whether a particular disbursement has been "reasonably incurred".

Given the amount at stake for unreasonable behaviour either a 50% increase or reduction on FRC we anticipate that this is another area of significant challenge.

On the IT there seems to be no incentive for a claimant to enter negotiations until after a defence is filed in order to maximise costs recovery (the first stage includes post issue costs).

It will be important for paying parties to carry out a costs benefit analysis: is liability worth the fight given the costs increase? Is it better to concede heads of loss/ injury to limit value/experts?

Areas of uncertainty

How will the parties deal with banding when a claim settles pre-issue or prior to allocation?
Part 8 costs aren’t fixed although the MoJ is consulting at present on whether costs should be fixed at £300 for Part 8 costs only claims.

Similarly detailed assessment (DA) costs aren’t fixed but again the current consultation proposes a streamlined process and a cap of £500 for DA.

The tension between Part 44.5 and an express agreement under contract v CPR 45.1(3) which addresses the issues arising from the case of *Doyle v M&D Foundations.*

Where if causation is an issue, does that bring Band 4 of the FT into play- complex areas of fact or law?

How will the vulnerability rule operate in practise?

Other points to note

Fast track cases and the *Bird v Acorn* effect: there is a new definition of trial as “a final hearing” rather than the current definition “final contested hearing” so this could cover a range of post settlement hearings.

With non-PI claims, will we see an increase in litigation prior to 1st October 2023, as Steve Dawson has mentioned above, due to uncertainty as to whether the rules will be changed at some point to address the lacuna re non personal injury cases that settle post issue?

The challenge of vulnerable parties and witnesses

Paul Wainwright Partner and Head of Costs, **Clyde and Co** and a member of the FOIL Costs SFT

Vulnerability

The new fixed costs rules allow an escape, at least in part, from fixed costs if the claimant’s solicitors can 1) show the claimant is vulnerable 2) show that the vulnerability caused additional work to be undertaken 3) if the additional work is at least 20% greater than the FRC cap. The relevant rules are reproduced below:

CPR 45.10

1) The court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred to in Section VI, Section VII or Section VIII of this Part where-

a. a party or witness for the party is vulnerable;
b. that vulnerability has required additional work to be undertaken; and
c. by reason of that additional work alone, the claim is for an amount that is at least 20% greater than the amount of fixed recoverable costs. (Rule 1.6 and Practice Direction 1A make provision for how the court is to give effect to the overriding objective in relation to vulnerable parties or witnesses).

(2) If the criteria in paragraph (1) are met, the court may-
(a) summarily assess the costs; or
(b) make an order for the costs to be subject to detailed assessment.

Issues:

- it is unclear how this rule will be applied in practice. Will expert evidence be obtained to support the asserted vulnerability? If so, this may bring additional complexity and cost;
- It is also unclear how r45.10.1(c) applies in practice. What does the 20% difference equate to? The phase where the additional costs was incurred or the cumulative total?
- Claimant's solicitors may either directly assert their client is vulnerable and ask the defendant to consent, raise the issue of the vulnerability indirectly throughout the claim or simply make the required r.45.10 application at the end. The lack of clarity as to the practical application of the rule is concerning;
- As drafted the rules seem to suggest that a vulnerability alone is not a reason to 'blow the doors off' and depart from fixed costs entirely but, again, it is unclear how this will work in practice especially with vulnerabilities that are characteristics of the claimant;
- PD1E specifies the wide range of vulnerabilities but it is not an exhaustive list and is not intended to be prescriptive. This leads to my concern that:

1. Any perceived difficulty with the claimant could be treated as a vulnerability by their solicitor;
2. Lack of mobility, poor memory, impact of the accident, language difficulties could all be used as a reason;
3. Claimant's solicitors will incur costs and they will be attributed to the stated vulnerability. This will be the battleground

Accordingly, given the expanded consumer duties, the alleged vulnerability of a claimant who may also be a customer is a sensitive topic and challenging adverse behaviour in this space has to be done sensitively and consistently.

Summary

FOIL continues to lobby on FRC issues, particularly with regard to the introduction of a new shortened assessment process, as proposed by Sir Rupert Jackson, to deal with the costs and disbursements that will still need to be assessed, and to press for the extension of FRC to Part 8 costs only claims. We will continue to lobby on the details of the FRC regime as it beds down. If you have FRC issues you would like to raise with FOIL please contact Shirley Denyer on info@foil.org.uk