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Understanding the New Fixed Costs Regime: Cross-border claims

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The Civil Procedure (Amendment No. 2) Rules 2023 (SI 2023 No. 572 L. 6)

- New Part 45 and Part 26. Came into force on 1 October 2023.
- Rule 2 provides transitional provisions. Amendments on allocation, complexity assignment, directions on the new tracks, and costs apply:
 - By default, for proceedings *issued* after 1/10/23;
 - For PI claims except disease, where *causes of action accrue after* 1/10/23;
 - For PI disease claims, where *no letter of claim sent* before 1/10/23.
- Old Part 45 for legacy cases now removed from gov.uk. Now found under '45x' in White Book.



The New Part 26 Allocation and Assignment

- Rule 26.14: when a claim is allocated to the FT or IT, the court must assign it to a complexity band.
- Allowable costs will be commensurate with the complexity of the claim.
- Rule 26.7 gives the process for allocation and assignment. Same as the old system – DQs, reps from parties, if doubt – case management hearing.
- 26.7(7) – multiple claimants – Court can order at allocation/assignment stage whether or not Cs each get their own fixed costs or whether the costs are calculated together under rule 45.4.
- 26.18 allows for re-allocation and re-assignment only if a) there has been a change in circumstances and (b) the court decides that the change in circumstance justifies reassignment. (new rule 26.18(3))

Fast Track: Allocation

- Fundamentally the same as before. CPR 26.9(5), (6), (13).
- Value: >£10,000, <£25,000.
- One day trial.
- One expert per party giving oral evidence
- No more than two expert fields.
- General consideration of: complexity, remedy, number of parties, counter-/additional claims, amount of oral evidence, importance to non-parties, parties' views, parties' circumstances, justice.

Fast Track: Assignment

- Complexity bands are set out in Table 1 CPR 26.15.
- **Band 1:** RTA non-PI; Defended debt claims;
- **Band 2:** RTA Protocol PI; PTR Protocol PI;
- **Band 3:** RTA non-Protocol PI; EL/PL PI; Possession; Housing Disrepair; Other Money Claims
- **Band 4:** EL disease (NIHL excluded); Complex Possession/Housing; Property/Building Disputes; Prof Neg; Everything Else Complex.



Cross-Border Claims

- Foreign RTAs with PI. Do not fall under the Protocol -> Band 3.
- PTR Gastric Illness. Fall under the PTR Protocol -> Band 2.
- PTR non-gastric injury. Although technically contractual injury claims, likely equivalent to PL claim -> Band 3.
- PTR non-injury (compensation etc.). 'Other money' claim -> Band 3.
- Non-PTR injury with foreign law. EL/PL claims are not restricted to Protocol claims in Table 1 -> Band 3.
- Likely a good argument, however, in any given case involving complex issues of foreign law that the 'complex' FT case criterion is met -> Band 4.



Fixed Costs Part 45

- Now entirely dependent on allocation. Gone are the days of Protocol dependency:

CPR 45.43.—(1) This Section applies to any claim which would normally be or is allocated to the fast track.

- Therefore covers full range of cross-border work *if* the case is allocated under Part 26 to the FT.
- CPR 45.44 - Fixed Recoverable Costs are set out in PD45 Table 12. Fixed Recoverable Disbursements are in Section IX.



Fixed Costs

Practice Direction 45: Table 12

- Four sections: A-C set out how the costs vary depend on the stage at which the claim completes. Section D sets out trial advocacy fees.
- Subdivisions within sections A (claims which settle before issue) and D (trial advocacy fees) further refine the amount of costs depending on the value of the claim.
- Subdivisions within section B further refine costs depending on when, post-issue the claim settles.
- Section C sets out non-advocacy trial fees.



Amount of FT costs – claims which settle before issue Table 12, Section A

- Vary from £nil (*sic!*) for a Band 1 claim with damages of less than £5k, to £3k + 10% of damages over £10,000 for a Band 3 claim.
- All Band 4 claims regardless of value attract £2,684 plus 15% of damages, plus £526 per extra defendant.



Amount of FT costs – claims which are issued but settle/discontinue before trial Table 12, Section B

- Essentially three substages:
 - Issue to allocation
 - Allocation to Listing
 - Listing to Trial
- Vary from £2,168 for a Band 1 claim which concludes before allocation up to £8,155 + 40% of damages (plus £785 per extra defendant) for a Band 4 claim which concludes after it has been listed for trial.



Amount of FT costs – non-advocacy trial costs Table 12, Section C

- No subdivisions: simple variation by band.
- Band 1: £3,923.
- Band 2: £3,303 + 20% of damages (agreed or awarded).
- Band 3: £5,265 + 30% of damages (agreed or awarded).
- Band 4: £8,155 + 40% of damages (plus £785/extra D).



Amount of FT costs: trial advocacy fees Table 12, Section D

- Four subdivisions by value (<£3k, £3k to £10k, £10k to £15k and >£15k).
- Vary from £619 for a Band 1 claim with damages of £3k to £2,994 for a Band 4 claim with damages of >£15k.



Specialist legal advice

- Rule 45.46: *‘Where a claim would normally be assigned to complexity band 4, under rule 26.15 in addition to the costs allowable in Table 12, the fixed costs may include an amount in accordance with Table 13.’*

Table 13:

- Post-issue advice (in writing or conference): £1,000.
- (Drafting) statement of case: £500.
- In addition to the Table 12 costs.
- Must be *‘justified’*.
- A presumption that there will be one advice (writing or conference), but the court can award a further sum if that additional advice is justified.



Fast Track - Disbursements

- CPR 45.59.
- 45.59(a) points at disbursements for Protocol cases: medical records, medical reports, non-medical expert reports, telephone hearing provider costs, engineer's reports, database searches.
- N.B. PTR Gastric Illness Protocol not included, and non-Protocol RTA/PL/EL cases not referenced.
- Instead 45.59(b): *'any disbursement which has been reasonably incurred, other than a disbursement covering work for which costs are already allowed in Section VI.'*

Multiple Claimants and Fixed Costs

- **General Rule:** Each Claimant is entitled to the costs of their own claim in accordance with the applicable rules (**CPR 45.5(1)**), except:
- Where the claim is for a remedy to which the claimants are jointly entitled, and they are joined to the party to comply with **CPR 19.3 (CPR 45.5(2))**; or
- Claimants with separate claims have the same legal representative, and the court has ordered that 45.5(4) applies.
- No guidance within Part 45 on when Court should make such an order. The guidance is in Part 26: CPR 26.7(7)(b): *‘when considering whether it is in the interests of justice to make such an order, it shall have regard to whether the claim of each claimant arises from the same or substantially the same facts and gives rise to the same or substantially the same issues.’*
- In 45.5(4) cases, the additional claimant is entitled to only 25% of the principal claimant’s FRC.



Fixed Costs: London Weighting

45.3.—(1) *Where fixed costs are payable under Section IV, Section VI, Section VII or Section VIII of this Part and the receiving party—*

(a) lives, works or carries on business in any area set out in Section II of Practice Direction 45; and

(b) instructs a legal representative with conduct of the litigation who practises in any of those areas,

the fixed costs shall include, in addition to the costs allowable in the relevant Section, an amount equal to 12.5% of those fixed costs ('London weighting').

(2) In this rule 'fixed costs' excludes any disbursements.

Fixed Costs: Vulnerability

CPR 45.10

Court will consider an amount of costs which is greater than FRC where:

- (a) the party or witness is vulnerable,
- (b) that vulnerability has required additional work to be done 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 FRC

CPR PD1A(4): provision for how the court is to give effect to the overriding objective in relation to vulnerable parties or witnesses.



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The Intermediate Track



Introduction

Applies to cases between £25,000.00 - £100,000.00

Applies to personal injury claims where the cause of action accrues on or after 1st October 2023.



The Claim

Letter of Claim	Letter of Response: Liability Denied
Astrid goes on a package holiday to Cape Verde	The waterskiing activity was not part of the package contract.
Astrid dies in a waterskiing accident	There was no breach of local standards
Her estate and dependents bring a claim against the package tour operator.	Causation is not admitted.
Claim value is estimated at £70,000.00	



Does it fall within the exceptions?

CPR 26.9(10) provides that FRC do not apply, *inter alia*, to:

1. Clinical negligence claims, unless breach and causation are admitted.
2. Harm, abuse or neglect of or by children or vulnerable adults.



Other exceptions

CPR 45.1(6) provides that FRC does not apply to protected parties.

CPR 45.1(1) provides that FRC does not apply to costs incurred or in respect of inquest proceedings.



Which track?

CPR 26.9(7) and **CPR 26.13** provide that the intermediate track is the normal track where:

1. Claim is unsuitable for the small or fast track.
2. Claim is limited to £100,000.00
3. If managed proportionately, (1) won't go over three days, (2) oral expert evidence will be limited to two experts, (3) can be just and proportionately managed under Section IV of CPR 45, (4) no additional factors that make it unsuitable.
4. Maximum of three parties in the litigation.

Which complexity band?: CPR PD45 Table 14; CPR 26.14

Band	Description
Complexity Band 1	Any claim where (a) only one issue is in dispute, (b) the trial is not expected to last longer than one day, including (i) PI claims where liability or quantum is in dispute, (ii) non-PI RTA Claims.
Complexity Band 2	Any less complex claim where more than one issue is in dispute, including PI accident claims where liability and quantum are in dispute.
Complexity Band 3	Any more complex claim where more than one issue is in dispute, but which is unsuitable for assignment to CB2, including disease claims.
Complexity Band 4	Claims which are unsuitable to CB1 – 3, including any claim where there is a serious issue of fact or law.



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4. Maximum of three parties in the litigation.

Useful tip: CPR PD 26 para 3

If a party wishes to give further information relevant to allocation/assignment/case management, it shall be given when they file their DQs.

Court will only take this information into account if all parties have (a) agreed that it is correct, (b) should be put before the court and (c) the document containing the information has been sent to all the parties.



Can you challenge allocation/assignment?

Yes but...

1. Allocation can only be challenged if exceptional (CPR 26.18(2)).
2. Complexity band can be challenged if there is a change in circumstance.

Fixed Costs for Intermediate Track, Complexity Band 3

Stage	Complexity Band 3
S1: From pre-issue up to and including the date of service of the Defence.	£6,607.00 + 6% of damages
S2: Specialist legal representative providing post-issue advice in writing or in conference or drafting a statement of case	£2,324.00 or £3,613.00 if counsel drafts the defence/counterclaim
S3: From date of service of the defence up to the earlier of the date set for CMC or the order giving directions under r 28.2.	£9,394.00 + 12% of damages
S4: End of S3 up to and including the date set by the court for inspection of documents	£11,356.00 + 12% of damages
S5: End of S4 up to and including dates set by the court for service of witness statement or expert reports.	£12,388.00 + 12% of damages
S6: End of S5 up to and including the date set for the pre-trial review	£16,517.00 + 16% of damages

Fixed Costs for Intermediate Track, Complexity Band 3

Stage	Complexity Band 3
S7: Specialist legal advice advising in writing/conference following the filing of the defence	£2,374.00
S8: End of Stage 6 to the date of trial	£19,641.00 + 20% of damages - £1,239.00 if the party did not prepare the trial bundle
S9: Attendance of a legal advocate (other than the trial advocate) at trial per day, less an amount equivalent to 50% per day where trial lasts no more than half a day.	£1,239.00
S10: Advocacy Fee (Day 1)	£4,129.00
S11: Advocacy Fees for subsequent days, less an amount equivalent to 50% per day where, on any subsequent day, the trial lasts no more than half a day.	£2,065.00

Fixed Costs for Intermediate Track, Complexity Band 3

Stage	Complexity Band 3
S12: Handing down of reserved judgment + consequential, where dealt with separately from trial	£599.00
S13: ADR: additional fee payable only once where a mediation or JSM takes place	£1,239.00
S14: ADR: additional fee payable only once for specialist legal representative attendance at a mediation or JSM covered by S. 13	£2,065.00
S15: Approval of settlement for child, unless it is approved at trial	£1,755.00
S16(a): Claim is listed for trial, but is removed from the list/settled on the date or the day before trial	100% of the advocacy fee
S16(b) Claim is listed for trial, but is removed from the list/settled not more than five days before trial	75% of the advocacy fee

Claimant succeed at trial (awarded £50,000.00, two-day trial)

**S8 + S9 + S10 + S11: £19,641.00 + £10,000.00 +
(£1,239.00 x 2) + £4,129.00 + £2,065.00 = £38,313.00**

VAT is recoverable (CPR 45.2): £45,975.60

London Weighting: 12.5% uplift if the receiving party:

1. Lives, works, or carries on business in Section II of PD 45 (London)
2. Instructs a legal representative with conduct of the litigation who practises in any of those areas.

Interim Applications and Disbursements

Table 1, PD14

Most interim applications: £333.00

Applications for summary judgment, interim payment or an interim injunction: £750.00

Disbursements: Section IX, CPR 45

Court may allow any disbursement which has been reasonably incurred, other than a disbursement covering work for which costs are already allowed in Section VII
(CPR r 45.60)

Part 36 and Fixed Recoverable Costs

Astrid's estate makes a Part 36 offer of £35,000.00 one day after the CMC, Defendant accepts the offer.

Look to the applicable staging:

**S4: £11,356.00 + 14% of the damages =
£16,256.00 (exclusive of VAT).**



Defendant does not accept C's P36 of £35,000.00; C beats their offer at trial

C is entitled to an uplift of 35% on the difference between

1. The stage when the relevant acceptance period expired (not added to disbursements, VAT, interest or any additional amount).
2. The stage applicable as at the date of judgment

Unclear whether C is entitled to receive the additional benefits of P36 (i.e. interest on damages, interest on costs, additional 10% etc.)...

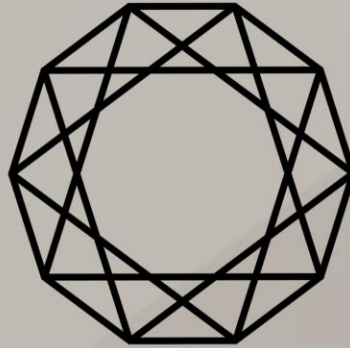


Tips

Greater risk of solicitor-client disputes. Importance of informed consent.

Risk of Claimants delaying tactically in reaching settlement.

Tactical admissions may be used by Defendants.



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