

CIVIL JUSTICE COUNCIL'S COSTS WORKING GROUP'S JUNE 2022 CONSULTATION PAPER

A Response to the Fourth Area, the Consequences of the Extension of Fixed Recoverable Costs

Introduction

The Civil Justice Council, Costs Working Group's June 2022 consultation paper seeks to focus on the following four areas:

- 1) Costs Budgeting;
- 2) Guideline Hourly Rates;
- 3) Costs under pre-action protocols/portals and the digital justice system;
- 4) Consequences of the extension of Fixed Recoverable Costs (FRC).

This written response is on behalf of Kain Knight Costs Lawyers (Kain Knight) and is specifically in response to the fourth area, '**Consequences of the extension of FRC.**'

Summary of Kain Knight's Response

It is the opinion of Kain Knight that the consequences of the extension to FRC are that access to justice will be severely, and negatively impacted in two ways:

- (i) Claimants will routinely have to contribute up to (if not more than) 50% of any damages received in successful claims (and particularly where those claims are for damages of a £25,000 or less value);
- (ii) In claims where the remedies sought are non-monetary (such as housing disrepair where claims are often made for specific performance) there are no financial damages for Claimants to be able to contribute to their legal fees and legal representatives specialising in those areas are at significant risk of being unable to conduct claims profitably for the FRC contribution alone. As a consequence, those firms may be forced to leave the market leaving some of the most vulnerable Claimants without legal representation.

Reasons why the consequence of extending FRC will negatively impact access to justice

The following propositions are relevant:

1. The 'indemnity principle' generally operates in relation to claims for costs in civil cases.¹

¹ This is the common law principle by which paying parties cannot be ordered to pay receiving parties more, by way of costs, than the receiving parties are themselves liable to pay.

2. The general principle that an unsuccessful party will be ordered to pay the costs of a successful party also operates in relation to claims for costs made in civil claims.²
3. A costs liability between a solicitor and his client (a solicitor/client costs liability) is a liability on the indemnity basis³ and between a successful solicitor's client and his unsuccessful opponent (a between-the-parties costs liability) is a liability generally on the standard basis (save where, for example, conduct or CPR.r.36 engages the indemnity basis).
4. Accordingly, costs agreed/assessed between-the-parties are generally less than costs agreed/assessed between solicitor/client.
5. The effect of this is that:
 - (i) Between-the-parties costs are generally only ever, and are no more than, a contribution towards a successful Claimant's solicitor/client costs; and
 - (ii) A successful Claimant will usually be liable to his solicitor for, and be required to pay to his solicitor, the shortfall/difference between the agreed/assessed solicitor/client costs and the agreed/assessed between-the-parties costs (the solicitor/client shortfall).
6. The solicitor/client shortfall became a much more common event with the abolition of the between-the-parties recoverability of additional liabilities (success fees and after-the-event insurance premiums) save in limited circumstances, with the implementation of LASPO on 1 April 2013.
7. Post 1 April 2013, solicitors continued to charge success fees, but upon them not being payable between-the-parties, their clients had to pay them on a solicitor/client basis.⁴
8. The solicitor/client shortfall became even more stark with the implementation of FRC in road traffic accidents (RTAs), employers' liability (EL) and public liability (PL) claims in 2013.⁵
9. This is because solicitors have continued to charge their clients 'conventional costs'⁶ and the between-the-parties contribution to those costs has been at a much lower FRC basis level thereby creating a much greater solicitor/client shortfall.

² CPR.r.44.2(2)(a)

³ CPR.r.46.9(3)

⁴ In Chapter 10 (Conditional Fee Agreements), § 5.3 of Sir Rupert Jackson's 'Review of Civil Litigation Costs: Final Report (December 2009), at page 112, Sir Rupert concluded that "*in order to assist personal injury claimants in meeting the success fees out of damages*", "[the] *level of general damages for pain, suffering and the loss of amenity be increased by 10% across the board*" (and success fees be capped at 25% of damages, and "*the reward for making a successful claimant's offer under CPR Part 36 ... be enhanced*").

⁵ See the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013, the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims and its interplay with CPR.r.45 Sections III and IIIA

⁶ The term the Court of Appeal gave to costs calculated on a time spent/hourly rate in Ho v Adekun [2019] EWCA Civ 1988 (19 November 2019) [1]

10. This is clear from the significant increase in solicitor/client detailed assessments proceedings brought pursuant to the Solicitors Act 1974⁷ and the creation of law firms to specifically encourage former clients to challenge solicitor/client shortfalls.⁸
11. Implementing further, and wider, FRC regimes will plainly, significantly increase the number of situations whereby solicitors will be forced to charge their clients the solicitor/client shortfall between the solicitor/client conventional costs and the between-the-parties FRC contribution.
12. The FRC regimes were never intended to regulate costs between solicitor and client. Sir Rupert Jackson himself made this clear⁹ and so the FRC will rarely, if ever, reflect the actual work needed to be done by solicitors to carry out the work they are instructed to do, nor was it ever intended to.
13. Accordingly, for firms of solicitors, who are businesses, to remain profitable, they must continue to charge their client costs on a conventional basis and with success fees (to compensate the firms for the costs not recovered in those cases that lose).
14. Furthermore, the costs of operating a law firm (along with the operation of most businesses) have increased due to the pressures on the economy. Therefore, it is expected that solicitors' charges to their clients on the conventional basis will continue to increase thereby driving up further the solicitor/client shortfall. This has been reflected, in part with the increase to the solicitors' Guideline Hourly Rates in 2021.
15. Yet further, it is expected that some firms will cherry pick their cases to pursue only those that are almost always guaranteed to succeed leaving many other genuine potential Claimants without access to justice.
16. But with the proposed extension to FRC, the between-the-parties contribution will almost always be lower than any conventional costs contribution and so naturally will increase the solicitor/client shortfall which will usually be paid by way of a deduction from the client's compensation.
17. We expect that it will be necessary for clients to have to pay up to, if not more than 50% of any compensation they receive to cover the solicitor/client shortfall in respect of unrecovered profit costs and the irrecoverable success fee.
18. This figure has been obtained by analysing our own current average costs agreed/assessed data for cases that will (if the reforms are implemented as they are stated they will be and the FRC being as they are proposed they will be) fall under scope of the FRC proposals and cross-referencing that with the current, proposed

⁷ See cases like **Herbert v H H Law Ltd [2019] EWCA Civ 527 (03 April 2019)** & **Cam Legal Services v Belsner (CA-2021-000398)**, **SGI Legal LLP v Karatysz (CA-2021-001621)** and **Edwards & Raubenheimer v Slater And Gordon UK Ltd [2022] EWHC 1091 (QB) (11 May 2022)** and it is acknowledged in 'Belsner' that there are well over a thousand litigated Solicitors Act 1974 detailed assessment proceedings stayed pending its outcome with many more not yet litigated.

⁸ See firms such as Checkmylegalfees.com t/a Clear Legal Ltd and JG Solicitors

⁹ See Review of Civil Litigation Costs: Supplemental Report 2017, chapter 1, §1.4, page 11), where he stated: '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.'

fixed costs for each stage. No doubt firms will disclose their own actual data in this regard.

19. Witness evidence filed in Cam Legal Ltd v Belsner demonstrates that the sums being deducted from Claimants' damages by their solicitors has, and continues to, increase beyond 25%.
20. In the types of claims which are the subject of the proposed FRC extension, justice does, we submit, mean (amongst other factors) that a successful Claimant should receive a substantial amount (if not all) of their damages which is, after all, to compensate them for losses.
21. To 'lose' substantial amounts of that compensation (due to the necessary dynamic and interplay between solicitor/client conventional costs and the between-the-parties FRC contribution), such as is proposed by the government, is arguably unjust, particularly where those benefiting from the savings made by FRC are the insurance industry and government departments who find themselves often the true paying parties in most claims of this nature and conversely at the consumers' expense and to their detriment.
22. The access to justice issue becomes even more glaring where claims are made for remedies where no financial damages are awarded. A common example of this is in housing disrepair claims (an area that falls within the focus of the proposed FRC regime extension) where claims can be complex and where the remedy sought by a tenant from a landlord is for specific performance to complete, for example, repairs to a rented property.
23. Such issues have already been recognised in the government's September 2021 'Response.'¹⁰ Respondents have said that "*...the value of housing claims can be low, but they can be complex and of profound importance to the client, many of whom are highly vulnerable, especially when a claim may result in a client losing their home.*"
24. Introducing FRC in housing claims, where there are no damages for solicitors to ensure the solicitor/client shortfall is paid and therefore the true costs of running such cases are paid, increases the risk, in a very real sense, of solicitors leaving the market, leaving vulnerable individuals exposed and housing associations escaping justice being done for their tenants.

Conclusion

25. In conclusion, the main consequences of implementing the proposed, extended FRC regimes are twofold and go to the core of reducing access to justice:
 - (i) In claims where financial damages are sought, Claimants are likely to lose significantly greater proportions of their compensation thereby severely impacting the justice of succeeding in such claims; and
 - (ii) In claims where no financial damages are sought, solicitors will struggle to make such businesses workable financially by being unable to recover the

¹⁰ See Chapters 4.11-4.15 'Housing claims'

solicitor/client shortfall forcing them to potentially leave the market thereby negatively impacting those proposed Claimants' access to justice.

26. It is hoped that, given Lord Justice Colin Birss' comments at the Civil Justice Council's Conference on 13 July 2022, that we understand were that "*Access to Justice is front and central to any reform for the CJC and CPRC, and so any submission related to access to justice issues will be seriously considered*" that this response brings to the fore what are likely to be very real, negative consequences to one's access to justice and that the contents of this response will be seriously considered and taken into account when finalising the implementation of any reforms.

12 October 2022

Kain Knight Costs Lawyers