

Extending Fixed Recoverable Costs: a note on the new rules

General overview

1. From 1 October 2023, fixed recoverable costs (FRC) will be extended across the fast track¹, and in a new intermediate track for simpler cases valued up to £100,000 damages. Following a consultation on Sir Rupert Jackson's 2017 report,² the MoJ set out the way forward in September 2021.³ The new rules to implement this extension have now been approved and laid before Parliament: [The Civil Procedure \(Amendment No. 2\) Rules 2023 \(legislation.gov.uk\)](#). This note highlights the main features of the new arrangements, including further policy developments since September 2021. For example, and as set out in more detail below, there have been developments on QOCS (as already published), vulnerability, and it has been decided to delay the application of FRC for housing claims for two years.
2. There have been substantial changes to Part 45 (Fixed Costs), which has been largely re-written. A new Practice Direction (PD) 45 sets out the relevant tables of costs. Changes have been made to Part 26 (Case Management – Preliminary Stage) and PD 26, as well as Part 28 (The Fast Track) and PD 28; changes have also been made to Part 36 (Offers to Settle). Consequential changes have also been made to other Parts.
3. In the **fast track**, there will be four complexity bands (1 to 4 in ascending order of complexity) with associated grids of costs for the stages of a claim (see Table 12 in PD 45).

The new intermediate track

4. There will be a separate **intermediate track**, as recommended by Sir Rupert. The MoJ 2021 consultation response had envisaged intermediate cases being part of an expanded fast track. Instead, however, the fast track will remain as it is, and less complex multi-track cases under £100,000 damages will be allocated to a separate intermediate track.
5. In the intermediate track, there will be four complexity bands (1 to 4 in ascending order of complexity) with associated grids of costs for the stages of a claim (see Table 14 in PD 45). The stages of intermediate track claims have been revised from those proposed by Sir Rupert, to provide greater clarity and better reflect the stages of cases, particularly because the costs for each stage include costs for earlier stages. As with the fast track, the figures of FRC costs for the intermediate track in the 2017 Jackson report (which were fixed at July 2016) have been uprated for inflation using the January 2023 SPPI.

¹ The fast track is the normal track for claims up to a value of £25,000 where the trial is likely to last for no longer than one day and oral expert evidence is limited to one expert per party in any expert field, and expert evidence is limited to two expert fields.

² Sir Rupert Jackson's 2017 report on FRC: <[fixed-recoverable-costs-supplemental-report-online-2-1.pdf \(judiciary.uk\)](#)>. MoJ consulted on this report in 2019: <[Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's proposals \(justice.gov.uk\)](#)>.

³ MoJ's 2021 consultation response on extending FRC: <[Extending Fixed Recoverable Costs in Civil Cases: The Government Response \(justice.gov.uk\)](#)>.

6. The normal bands for different types of case are set out in the rules (at **rule 26.15** and **rule 26.16**). There will be new standard directions for the intermediate track.
7. Much thought has been given over the years since Sir Rupert's review started as to the degree of specificity given as to which cases fall within which complexity band, without fettering the discretion in individual cases. The additional explanation of the normal bands for different cases is intended to provide helpful clarity without being overly prescriptive.
8. In drafting the new rules, a generic approach has been taken so far as possible such that all categories of case are covered by the same rules. An exception to this is noise induced hearing loss (NIHL) claims, which were addressed separately by Sir Rupert in his 2017 FRC report.⁴ As set out in the Government's 2021 FRC consultation response, at Chapter 5, paragraph 4.4, the Government does not wish to provide further guidance regarding specific categories of case where possible, as this would risk being unnecessarily restrictive and prevent the extended FRC regime from operating as intended.
9. It is worth emphasising that judges will retain the discretion to allocate more complex cases valued at under £100,000 to the multi-track, so that complex cases will not be inappropriately captured by the extended FRC regime in any event. As set out by Sir Rupert, the new intermediate track will capture cases which can be tried in three days or less, with no more than two expert witnesses giving oral evidence on each side: more complex cases will be allocated to the multi-track.

Transitionals: which cases are subject to FRC from October 2023

10. The new FRC will apply to claims where proceedings are issued on or after 1 October 2023, save for personal injury. The new FRC will apply to personal injury claims where the cause of action accrues on or after 1 October 2023; and will only apply to disease claims where the letter of claim has not been sent to the defendant before 1 October 2023. The FRC tables have been uprated for inflation since they were set out by Sir Rupert in 2017. These FRC tables will be adjusted for inflation in future, as set out below. It should be noted that a claim will be subject to the table of costs that is in place on the date when a claim is issued for the duration of that case.
11. Exceptions to FRC are set out below.

Future review and inflation

12. The figures of FRC costs in the 2017 Jackson report (which were fixed at July 2016 and on which MoJ consulted in 2019), have been uprated for inflation using the January 2023 Services Producer Price Index (SPPI). As part of this process, the figures have been rounded so that the extended FRC regime starts off with a clearer set of figures.
13. The MoJ propose to review the tables of costs and the extended FRC regime more generally in 3 years' time, as proposed by Sir Rupert. More details about the nature and scope of the review will be set out nearer the time, but it is proposed to include uprating for inflation in line with the SPPI. Decisions on the rounding of figures in future will need to be taken at the time.

⁴ See Jackson, 2017, Chapter 5, 4.2, for Jackson's endorsement of a separate FRC scheme for NIHL claims.

MoJ consultations

14. In May 2022, MoJ consulted on the following two issues:

Qualified One-way Costs Shifting (QOCS)

15. Changes have been made to the QOCS regime in personal injury cases in Part 44 of the CPR. This issue arises from the Supreme Court case of *Ho* in 2021 and involves the scope of set-off. Having carefully considered the points raised by respondents to the consultation, the Government has implemented the rule changes on QOCS as set out in the consultation with a further amendment regarding 'agreements to pay or settle a claim for' at CPR rule 44.14(1). The Government considers that this will help to achieve the objectives of the consultation paper and ensure that the scope of set-off is appropriately addressed.
16. The QOCS changes were made as part of the Statutory Instrument, Civil Procedure (Amendment) Rules 2023, and have taken effect from April 2023. The MoJ's response to the consultation is published here: [About us - Civil Procedure Rule Committee - GOV.UK \(www.gov.uk\)](#).

Vulnerability

17. MoJ consulted on vulnerability provisions that would be implemented as part of the wider extension of FRC in Part 45 of the CPR. Having carefully considered the points raised by respondents, the Government has implemented the rule changes on vulnerability as set out in the consultation without further amend. These rule changes are included at rule 45.10 of the revised Part 45. To ensure consistency, the Government considers that the new vulnerability provision should, going forward, be applied to claims which, but for our reforms, would have been subject to the existing FRC regimes for personal injury cases in the current Part 45. The Government does not propose to make any changes to the arrangements for disbursements for vulnerability in FRC cases.
18. The vulnerability changes will take effect from 1 October 2023. The MoJ's response to the consultation is published here: [About us - Civil Procedure Rule Committee - GOV.UK \(www.gov.uk\)](#).

Exceptions from FRC

19. FRC will apply to all cases in the fast track and the new intermediate track, with the following exceptions. Most of these exceptions were identified in Sir Rupert's report and the MoJ consultation and response, but the decision to delay the implementation of housing claims was announced by MoJ in February 2023.
20. **Housing claims:** The implementation of FRC for all relevant housing claims will be delayed for two years from October 2023 pending further work, given various recent developments in the housing sector including proposed legislation. The specific wording of the housing exclusion is at **rule 45.1**. These cases will be allocated to the appropriate track (generally the fast track), as now, but will not be subject to FRC for the duration of the delay.
21. Sir Rupert recommended that mesothelioma and other asbestos related lung disease claims should be excluded from FRC and allocated to the multi-track. He also identified

a number of claims that would be 'generally unsuitable' for the intermediate track because of their complexity. As set out in **rule 26.9(10)** of the new rules, the following case types will be **allocated to the multi-track** rather than the new intermediate track, and will thereby be excluded from FRC:

- A mesothelioma claim or asbestos lung disease claim;
- One which includes a claim for clinical negligence, unless (i) the claim is one which would normally be allocated to the intermediate track; and (ii) both breach of duty and causation have been admitted;
- A claim for damages in relation to harm, abuse or neglect of or by children or vulnerable adults;
- A claim that the court could order to be tried by jury if satisfied there is in issue a matter set out in section 66(3) of the County Courts Act 1984 or section 69(1) of the Senior Courts Act 1981;
- Claims against the police involving an intentional or reckless tort, or relief or remedy in relation to the Human Rights Act 1998. This exclusion does not apply to a road accident claim arising from negligent police driving, an employer's liability claim, or any claim for an accidental fall on police premises.

FRC in low value Clinical Negligence claims

22. As detailed in the paragraph above, in respect of rule 26.9(10), the Government's proposals on introducing FRC for clinical negligence cases up to £25,000 are being taken forward separately by the Department of Health and Social Care (DHSC) and are not being introduced as part of this package of reforms. Following a Civil Justice Council report in October 2019, DHSC consulted on a new scheme in 2022. DHSC will set out the way forward in due course.

Application of FRC in different types of claim

23. **FRC in claims for or including non-monetary relief (NMR):** Most FRC claims will be for damages, and the tables of FRC recognise this by incorporating a percentage of damages recovered. Sir Rupert recognised that not all claims are for damages; his 2017 report noted the need for the court to assign a value to non-monetary relief in claims for, or including, non-monetary relief.⁵ It has now been agreed that there will be fixed assigned values for individual bands, and that, in mixed claims (involving both monetary and non-monetary relief), FRC will be calculated in part by reference to the damages awarded, and also the assigned value for non-monetary relief, taken together.
24. Accordingly, the non-monetary relief values will be fixed for the fast track as follows: Band 1 = N/A (as non-monetary relief will not arise in these cases); Band 2 = £10,000; Band 3 = £15,000; Band 4 = £20,000; and for the intermediate track as follows: Band 1 = £25,000; Band 2 = £50,000; Band 3 = £75,000; Band 4 = £100,000. This is covered at rule 45.45(1)(a)(ii) and rule 45.50(2)(b)(ii) of the revised draft of Part 45. In claims including monetary *and* non-monetary relief, the amount of FRC will be calculated by reference to both the damages awarded and the assigned value for non-monetary relief. While Sir Rupert's intention was that the intermediate track should generally only be for monetary claims, he recognised that 'in exceptional circumstances a claim for

⁵ See Jackson 2017, 5.5.4, Table 5.2.

non-monetary relief may be assigned to the new FRC regime' in the intermediate track in order to (i) limit adverse costs risks or (ii) to save the parties from 'ruinous litigation' (see his 2017 report at 7.1.5 and 7.3.8).

25. FRC where there is more than one claimant represented by the same lawyer:

Under **rule 45.5**, each claimant will be entitled to the costs of their own claim except: (i) where the claim is for a remedy to which the claimants are jointly entitled, and they are joined to the proceedings to comply with **rule 19.3**; or (ii) where the court orders that additional claimants are each entitled only to 25% of the principal claimant's FRC. In respect of the second exception, the court may make such an order if it considers that it is in the interests of justice to do so, having 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. The court shall consider making such an order at allocation or assignment (see **rule 26.7(9)**).

26. FRC for counterclaims: Two sets of FRC may be calculated when a party is successful in both defending a claim and in bringing a counterclaim. Rule 45.7 provides that if in any case to which Section VI or Section VII applies, (a) the defendant brings a counterclaim and (b) the court makes an order for the costs, the rules shall apply as if the counterclaim were a claim. However, there are exceptions: first, the costs of the counterclaim will not be allowable where the only remedy sought by the counterclaim is a defence to the claim; and secondly, where in a claim to which the Pre-Action Protocol for Personal Injury Claims in Road Traffic Accidents applies there is a counterclaim which does not include a claim for personal injuries, any order for costs shall be for a sum equivalent to one half of the applicable Type A and Type B costs in Table 10.

27. FRC where there is a preliminary issue trial: Sir Rupert noted that the costs of any preliminary issue trial should be recovered separately (see his 2017 report at 5.5.14). He went on to discourage the use of preliminary issue trials in the fast track. The entitlement to costs in cases involving a preliminary issue trial is addressed in **rule 45.48** for the fast track and **rule 45.51** for the intermediate track. There are various scenarios in which a claimant or defendant wins at a preliminary issue trial and overall. The various costs entitlements are illustrated in the table at Annex A. It should be noted that while it may be unlikely for a claim to continue if the defendant has succeeded on a preliminary issue, these scenarios are included for completeness.

28. Part 36 offers: the arrangements for Part 36 offers to settle in low value personal injury cases already subject to FRC have been updated to cover all FRC claims.

29. Noise Induced Hearing Loss (NIHL): The rules which will implement the provisions for NIHL claims set out in the MoJ consultation response on FRC are included in section VIII of Part 45. The Pre-Action Protocol for Disease and Illness Claims and the Pre-action Protocol for Low Value Personal Injury Claims (Employers' Liability and Public Liability) Claims (PAPs) will be amended accordingly. There will also be new standard directions.

Other provisions

30. HMCTS court forms will be amended as appropriate for implementation in October 2023.

31. **HMRC Commencement Fees:** The Tables of HMRC fixed commencement costs and fixed costs on entry of judgment, which were previously Tables 7 and 8 of Part 45 are now to be found at Tables 8 and 9 in Part 45. Table 7 has been simplified.
32. **Aarhus Convention Claims:** What was Section VII of Part 45 (which is concerned with costs limits in Aarhus Convention claims) has been moved from Part 45 to Section IX in Part 46 (Costs special cases). While subject to minor amendments, the effect of these provisions remains the same.
33. For completeness, it should be noted that scale **costs in the Intellectual Property and Enterprise Court**, which formed Section IV of Part 45, now forms Section VII of Part 46 (Costs special cases). The provisions remain the same.

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COSTS ENTITLEMENT FOLLOWING PRELIMINARY ISSUE TRIALS

OUTCOMES	COSTS ORDER ON PRELIMINARY ISSUE	FINAL COSTS ORDER WHERE CLAIM CONTINUES	HOW COSTS ENTITLEMENT IS CALCULATED
Claimant successful on preliminary issue, claim continues and claimant successful overall	Claimant awarded costs	Claimant awarded costs	Claimant has an entitlement under both r.45.48(1) and r.45.48(2)(a)
Claimant successful on preliminary issue, claim continues and claimant successful overall	Costs reserved	Claimant awarded costs	Under CPR PD44 para 4.2 costs reserved become costs in the case and therefore costs reserved become the claimant's. As such the claimant has a costs order for both preliminary issue and final determination. Accordingly, claimant has an entitlement under both r.45.48(1) and r.45.48(2)(a)
Claimant successful on preliminary issue, claim continues and defendant successful overall	Claimant awarded costs	Defendant awarded costs	Claimant has an entitlement under r.45.48(1) and defendant has an entitlement under r.45.48(2)(b)
Claimant successful on preliminary issue, claim continues and defendant successful overall	Costs reserved	Defendant awarded costs	Under CPR PD44 para 4.2 costs reserved become costs in the case and therefore costs reserved become the defendant's. As such the defendant has a costs order for both preliminary issue and final determination. Accordingly, defendant has an entitlement under both r.45.48(1) and r.45.48(2)(a)
Defendant successful on preliminary issue. Claim concluded	Defendant awarded costs	N/A as order on preliminary issue is the final costs order	Defendant has an entitlement under r.45.48(1)
Defendant successful on preliminary issue, claim continues and defendant successful overall	Defendant awarded costs	Defendant awarded costs	Defendant has an entitlement under both r.45.48(1) and r.45.48(2)(a)

Defendant successful on preliminary issue, claim continues and defendant successful overall	Costs reserved	Defendant awarded costs	Under CPR PD44 para 4.2 costs reserved become costs in the case and therefore costs reserved become the defendant's. As such the defendant has a costs order for both preliminary issue and final determination. Accordingly, defendant has an entitlement under both r.45.48(1) and r.45.48(2)(a)
Defendant successful on preliminary issue, claim continues and claimant successful overall	Defendant awarded costs	Claimant awarded costs	Defendant has an entitlement under r.45.48(1) and claimant has an entitlement under r.45.48(2)(b)
Defendant successful on preliminary issue, claim continues and claimant successful overall	Costs reserved	Claimant awarded costs	Under CPR PD44 para 4.2 costs reserved become costs in the case and therefore costs reserved become the claimant's. As such the claimant has a costs order for both preliminary issue and final determination. Accordingly, claimant has an entitlement under both r.45.48(1) and r.45.48(2)(a)

This table has been prepared under the FT provision at r.45.48. However, the outcomes will be the same in the IT under the mirror provision at r.45.51