



39 Essex Chambers
#39Events

The New Intermediate Track and Fixed Costs

Scarlett Milligan
Christopher Moss



! DISCLAIMER !

39essex.com

BARRISTERS . ARBITRATORS . MEDIATORS

LONDON . MANCHESTER . SINGAPORE . KUALA LUMPUR

39 Essex
CHAMBERS

BACKGROUND

- Following Sir Rupert Jackson's 2017 Review of Civil Litigation Costs and various rounds of consultation
- Civil Procedure (Amendment No. 2) Rules 2023 introduced
- Broad Scope - A new intermediate track and corresponding fixed recoverable costs for less complex claims valued at more than £25,000, but not more than £100,000.
- Fixed recoverable costs will apply to all cases in the fast track and the new intermediate track, with some limited exceptions
- Main new/amended CPR provisions – r26, 28, 36, 45
- Intention – efficient case management, providing greater costs certainty and proportionality, and improving access to justice
- **NEW** – Civil Procedure (Amendment) Rules 2024 came into effect 6 April 2024 and Civil Procedure (Amendment No.3) Rules 2024 came into effect on 1 October 2024 – both make important changes

WHEN WILL THE NEW RULES APPLY?

The new rules came into effect on 1st October 2023 and apply to cases as follows:

<u>Type of Case</u>	<u>Point from which new Rules apply</u>
Claims for personal injuries, other than a disease claim	Where the cause of action accrues on or after 1 st October 2023
Claims for personal injuries which include a disease claim	Where no letter of claim has been sent before 1 st October 2023
All other claims	Where proceedings are issued on or after 1 st October 2023

Tips on the new fast and intermediate tracks



ALLOCATION – FAST TRACK OR INTERMEDIATE TRACK?

- FT vs IT (26.9)
 - 26.9(5) FT: normal track for claims between £10,000 - £25,000
 - 26.9(6) FT: Trial not likely more than one day, oral expert evidence likely to be limited to one per party in any field and expert evidence in two expert fields
 - 26.9(7) IT: normal track for claims between £25,000 - £100,000, trial not likely to last longer than 3 days, oral expert evidence likely to be limited to two experts per party, claim brought by one claimant against one/two defendants or two claimants against one defendant, no additional factors make the IT inappropriate
 - 26.9(8) IT: Where the relief includes non-monetary relief, only if it is in the interests of justice
 - 26.9(9) IT: Provided it is not a class of case excluded - "if the court considers IT allocation is in the interests of justice"

CASES THAT CANNOT BE ALLOCATED TO THE FAST/INTERMEDIATE TRACK

- CPR 26.9(10):
 - (a) Mesothelioma/asbestos lung disease
 - (b) Clinical negligence unless the claim is one which would normally be allocated to the intermediate track and liability admitted (breach, causation and loss – including injury in pre-action letter) at a pre-action stage and no limitation argument
 - (c) Claims for harm, abuse or neglect of or by children or vulnerable adults
 - (d) Claims which could be heard by a jury
 - (e) Claims against the police for an intentional or reckless tort OR for breaches of HRA 1998
 - (f): A claim against a public authority for trespass against the person unless it would not be in the interests of justice
- These must be allocated to the multi-track

ALLOCATION – WHICH COMPLEXITY BAND? (26.15 FT, 26.16 IT)

- The complexity bands are defined in a way that is “intended to provide helpful clarity without being overly prescriptive” - Civil Procedure Rules Committee May 2023
- This means that there is likely to be room for debate on the banding of a case. Different band = potentially very different costs recovery
- All to say: it is worth putting the effort in to support your arguments on track and band allocation
- Re-allocation:
 - Can only reallocate from IT post-directions where there are “exceptional reasons” (26.18(3)).
 - Reallocation of band if justified by a change of circumstances (26.18(3)).
 - Apply early – *Tibbles v SIG PLC* [2012] EWCA Civ 518
 - (45.14) – costs are then assessed as if the claim had been allocated to that track/band at the outset

ASSIGNMENT WITHIN THE FAST TRACK

<u>Complexity band 1</u>	<u>Complexity band 2</u>	<u>Complexity band 3</u>	<u>Complexity band 4</u>
(a) road traffic accident related, non-personal injury claims; and	(a) road traffic accident related, personal injury claims which are or should have been started under the RTA Protocol; and	(a) road traffic accident related, personal injury claims to which the RTA Protocol does not apply;	(a) employer's liability disease claims (other than a claim for noise induced hearing loss);
(b) defended debt claims	(b) personal injury claims to which the Pre-action Protocol for Resolution of Package Travel Claims apply	(b) employer's liability (accident) and public liability personal injury claims;	(b) complex possession and housing disrepair claims;
		(c) possession claims;	(c) property and building disputes;
		(d) housing disrepair claims; and	(d) professional negligence claims; and
		(e) other money claims	(e) any claim which would normally be allocated to the fast track, but is nonetheless complex

ASSIGNMENT WITHIN THE INTERMEDIATE TRACK

Complexity band 1	Complexity band 2	Complexity band 3	Complexity band 4
Any claim where — (a) only one issue is in dispute; and	Any less complex claim where more than one issue is in dispute, including personal injury accident claims where liability and quantum are in dispute.	Any more complex claim where more than one issue is in dispute, but which is unsuitable for assignment to complexity band 2, including noise induced hearing loss and other employer's liability disease claims	Any claim which would normally be allocated to the intermediate track, but which is unsuitable for assignment to complexity bands 1 to 3, including any personal injury claim where there are serious issues of fact or law.
(b) the trial is not expected to last longer than one day, including –			
(i) personal injury claims where liability or quantum is in dispute			
(ii) road traffic accident related, non-personal injury claims; and			
(iii) defended debt claims			

CASE MANAGEMENT – THE TRIAL DATE IS SACROSANCT

- PD 28 (5.4)
 - (1) Only in exceptional cases will the court allow a failure to comply with directions to lead to the postponement of the trial
 - (4) Where it appears that one or more issues are or can be made ready for trial at the time fixed while others cannot, the court may direct that the trial will proceed on the issues which are or will then be ready, and order that no costs will be allowed for any later trial of the remaining issues or that those costs will be paid by the party in default.
 - (6) Postponement of trial a last resort – Court may order a party and their legal representative to attend court at a hearing where such an order is to be sought
- FT specific time limit
 - PD 28 (10) - The latest proposed date for the trial or the end of the trial period must be not later than 30 weeks from the date the directions order is made.

CASE MANAGEMENT – DIRECTIONS THROUGH TO TRIAL, FURTHER HEARINGS TO BE AVOIDED

- After allocation directions to trial shall be set unless a CMC (not mandatory) is fixed - CPR 28.2 (FT&IT)
- Permission required to vary any order/date if doing so would impact the date of the CMC, PT checklists, PTR, trial/trial period - CPR 28.3
- Directions hearings only where court considers “necessary or desirable” and if required due to party default the court “will usually impose a sanction” - PD28 2.2
- Ahead of directions hearing, parties must consider all directions required and make other applications in advance - PD28 2.4. “Courts will make arrangements to ensure that applications and other hearings are listed promptly to avoid delay in the conduct of cases” PD28 2.7
- Where a party needs to apply for a direction which is not included in the timetable, “they must do so as soon as possible so as to minimise the need to change that timetable.” PD28 2.6

TAILORED DIRECTIONS AND DISCLOSURE

- **PD28 3.2** - Directions will be tailored to the needs of the case and the extent to which case preparation has already taken place, having particular regard to pre-action compliance
- **CPR 28.2(3)** – for non-PI FT and IT claims, the court should consider the disclosure ‘menu’:
 - a) an order **dispensing with disclosure**;
 - b) an order that a party disclose the documents **on which it relies**, and at the same time request any specific disclosure it requires from any other party;
 - c) an order that directs, where practicable, the disclosure to be given by each party on an **issue-by-issue basis**;
 - d) an order that each party disclose any documents which it is reasonable to suppose may contain information which enables that party to **advance its own case or to damage that of any other party**, or which leads to an enquiry which has either of those consequences;
 - e) an order that a party give **standard disclosure**;
 - f) any other order in relation to disclosure that the **court considers appropriate**.

LIMITS ON EXPERT AND WITNESS EVIDENCE

- **CPR 28.14(3)** - in the intermediate track, unless the Court orders otherwise:
 - Expert reports shall not exceed 20 pages including the expert's description of the issues and their opinion (excluding CV, photos, plans, and academic or technical articles)
 - Total length of all the permitted witness statements and summaries of a party shall not exceed 30 pages
- No such rule for FT or MT.
- Consider the likely amount of evidence as early as you can
- If likely to exceed limits, try to take action sooner rather than later: PD28 5.1 provides for any party to apply for an order to enforce compliance with a direction or to impose a sanction for breach. Better to ask for permission rather than forgiveness!

PRELIMINARY ISSUES AND SPLIT TRIALS

- Don't forget the court's power to consider preliminary issues and order split trials under CPR 3.1
- Split trials expressly permitted in respect of FT: PD26 16(3)(d)
- Likely to be the same in respect of IT
- May mitigate any preparation / cost recovery difficulties, particularly in more complicated cases
- Separate costs recovery is provided for in CPR 45.48 (Fast Track) and CPR 45.51 (Intermediate Track)

Key takeaways on the new tracks

Any questions?

Tips on the new fixed costs regime



APPLICATION OF FRC

- CPR Part 45 Sections VI (FT) and VII (IT)
- Base position is that FRC applies to all claims in FT or IT.
- Exceptions:
 - 45.1(4) – FRC do not apply to a claim or counterclaim which relates, in whole or in part, to a claim or counterclaim for possession, disrepair or unlawful eviction related to a residential property – save where the claim or counterclaim in respect of the residential property or dwelling arises from a boundary dispute.
 - 45.1(6) – FRC do not apply where a party is a protected party

NAVIGATING PART 45 – SECTION VI: FAST TRACK FIXED COSTS

- Practice Direction 45 now contains all the fixed costs tables
- Table 12 is the relevant table for fast track fixed costs
- Three main determinants:
 - complexity band;
 - amount of damages;
 - stage of proceedings
- But do read Part 45 for additional provisions and amounts!
 - CPR 45.46 – specialist legal advice (Table 13 PD45);
 - CPR 45.47 – advice under the protocol (£150)
- Note – from 6 April 2024 consultation, all costs in Tables 12, 14 and 15 were updated by 3.2% (9 months of SPPI inflation)

COMPLEXITY BAND

	1	2	3	4
A. IF PARTIES REACH A SETTLEMENT PRIOR TO THE CLAIMANT ISSUING PROCEEDINGS UNDER PART 7				
(1) Where damages are not more than £5,000	£ Nil	The greater of £681 or £124 + an amount equivalent to 20% of the damages	£1,136 + an amount equivalent to 17.5% of the damages	In each case— £2,684 + an amount equivalent to 15% of the damages + £526 per extra defendant
(2) Where damages are more than £5,000, but not more than £10,000	£ Nil	£1,342 + an amount equivalent to 15% of damages over £5,000	£2,274 + an amount equivalent to 12.5% of damages over £5,000	
(3) Where damages are more than £10,000	£599	£2,374 + an amount equivalent to 10% of damages over £10,000	£3,097 + an amount equivalent to 10% of damages over £10,000	

COMPLEXITY BAND

	1	2	3	4
B. IF PROCEEDINGS ARE ISSUED UNDER PART 7, BUT THE CASE SETTLES OR IS DISCONTINUED BEFORE TRIAL				
(1) On or after the date that the court issues the claim, but before the date that the court allocates the claim under Part 26	£2,168	£1,445 + an amount equivalent to 20% of the damages	£3,303 + an amount equivalent to 20% of the damages	£3,097 + an amount equivalent to 40% of the damages + £785 per extra defendant
(2) On or after the date that the court allocates the claim under Part 26, but before the date that the court lists the claim for trial	£2,581	£2,374 + an amount equivalent to 20% of the damages	£4,129 + an amount equivalent to 25% of the damages	£6,607 + an amount equivalent to 40% of the damages + £785 per extra defendant
(3) On or after the date that the court lists the claim for trial but before trial	£3,923	£3,303 + an amount equivalent to 20% of the damages	£5,265 + an amount equivalent to 30% of the damages	£8,155 + an amount equivalent to 40% of the damages + £785 per extra defendant

COMPLEXITY BAND

1

2

3

4

C. IF THE CLAIM IS DISPOSED OF AT TRIAL

£3,923

£3,303 + an amount equivalent to 20% of the damages agreed or awarded

£5,265 + an amount equivalent to 30% of the damages agreed or awarded

£8,155 + an amount equivalent to 40% of the damages agreed or awarded + £785 per extra defendant

D. TRIAL ADVOCACY FEES

(1) Where the value of the claim is not more than £3,000

£619

£519

£619

£1,652

(2) Where the value of the claim is more than £3,000, but not more than £10,000

£877

£877

£877

£1,652

(3) Where the value of the claim is more than £10,000, but not more than £15,000

£1,342

£1,342

£1,342

£2,168

(4) Where the value of the claim is more than £15,000

£2,168

£2,168

£2,168

£2,994

CPR 45.59: FAST TRACK DISBURSEMENTS

- **Non-protocol claims**: CPR 45.59(b): any disbursement “reasonably incurred”
- **Protocol claims**: CPR 45.59(a)
 - Cost of obtaining medical records
 - Expert reports as provided for in protocol
 - Expert fee for attending trial if permission give
 - RTA protocol docs: engineer’s report; DVLA/MID searches
 - Cost of police report in RTA cases (whether protocol or not)
 - Court fees
 - Telephone hearing costs
 - Interpreter/translator fees
 - Travel/staying from home expenses
 - Loss of earnings – capped by Table 16
 - £10k and under = £95 per person per day
 - £10k + = £130 per person per day
 - “any other disbursement reasonably incurred due to a particular feature of the dispute or any requirement of these Rules”
- CPR 45.62 – Sums recoverable stipulated for **soft tissue and whiplash claims**

NAVIGATING PART 45 – SECTION VII: INTERMEDIATE TRACK FIXED COSTS

- Table 14 is the relevant table for IT fixed costs
- Costs awarded per each stage (1-15), determined by reference to complexity bands
- **CPR 45.60** - Disbursements in Section VII: any disbursement “reasonably incurred”, provided not already covered in fixed costs
- Cumulative, but not all are automatic: **CPR 45.50(4)** – S2, S7 and S14 only permitted where legal advice or drafting obtained from specialist legal rep / trial advocate and their use is justified

COMPLEXITY BAND				
STAGE	1	2	3	4
S1				
From pre-issue up to and including the date of service of the defence	£1,652 + an amount equivalent to 3% of the damages	£5,162 + an amount equivalent to 6% of the damages	£6,607 + an amount equivalent to 6% of the damages	£9,601 + an amount equivalent to 8% of the damages
S2				
Specialist legal representative providing post-issue advice in writing or in conference or drafting a statement of case	£2,065	£2,065	(a) £2,374; or (b) £3,613 if counsel is also instructed to draft a defence to a counterclaim	(a) £2,374; or (b) £3,613 if counsel is also instructed to draft a defence to a counterclaim
S3				
From the date of service of the defence up to the earlier of the date set for CMC or the order giving directions under 28.2	£4,129+ an amount equivalent to 10% of the damages	£7,949 + an amount equivalent to 12% of the damages	£9,394 + an amount equivalent to 12% of the damages	£13,420 + an amount equivalent to 14% of the damages
S4				
From the end of Stage 3 up to and including the date set by the court for inspection of documents	£4,749 + an amount equivalent to 12% of the damages	£9,704 + an amount equivalent to 14% of the damages	£11,365 + an amount equivalent to 14% of the damages	£16,517 + an amount equivalent to 16% of the damages

COMPLEXITY BAND				
STAGE	1	2	3	4
S5				
From the end of Stage 4 up to and including the later of the dates set by the court for service of witness statements or expert reports	£5,368 + an amount equivalent to 12% of the damages	£11,365 + an amount equivalent to 16% of the damages	£12,388 + an amount equivalent to 16% of the damages	£20,647 + an amount equivalent to 18% of the damages
S6				
From the end of Stage 5 up to and including the date set for the pre-trial review or up to 14 days before the trial date, whichever is earlier	£6,091 + an amount equivalent to 15% of the damages	£15,485 + an amount equivalent to 16% of the damages	£16,517 + an amount equivalent to 16% of the damages	£24,776 + an amount equivalent to 18% of the damages
S7				
Specialist legal representative advising in writing or in conference following the filing of a defence	£1,445	£1,755	£2,374	£2,994

COMPLEXITY BAND				
STAGE	1	2	3	4
S8				
From the end of Stage 6 up to the date of trial	£6,813 + an amount equivalent to 15% of the damages, less £599 if that party did not prepare the trial bundle	£17,550 + an amount equivalent to 20% of the damages, less £898 if that party did not prepare the trial bundle	£19,614 + an amount equivalent to 20% of the damages, less £1,239 if that party did not prepare the trial bundle	£29,938 + an amount equivalent to 22% of the damages, less £1,445 if that party did not prepare the trial bundle
S9				
Attendance of a legal representative (other than the trial advocate) at trial per day, less an amount equivalent to 50% per day where, on any day, the trial lasts no more than half a day	£599	£898	£1,239	£1,445
S10				
Advocacy fee: day 1	£3,303	£3,613	£4,129	£5,988
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	£1,445	£1,755	£2,065	£2,994

COMPLEXITY BAND				
STAGE	1	2	3	4
S12				
Handing down of a reserved judgment and consequential matters, where dealt with separately from the trial	£599	£599	£599	£599
S13				
Alternative Dispute Resolution: additional fee payable once only where a mediation or joint settlement meeting takes place	£1,239	£1,239	£1,239	£1,239
S14				
Alternative Dispute Resolution: additional fee payable once only for specialist legal representative attendance at a mediation or joint settlement meeting covered by S13	£1,445	£1,755	£2,065	£2,374
S15				
Approval of settlement for child, unless the settlement is approved at trial	£1,239	£1,445	£1,755	£2,065

TWEAKS TO AMOUNTS OF FIXED COSTS

- **CPR 45.3 – London Weighting**
 - 12.5% uplift on fixed costs, excluding disbursements, if the Claimant lives, works or carries on business in the areas on 45PD.17 and instructs a legal representative with conduct of the litigation who practices in any of those areas
 - Familiar to FT users – example of fast track 'plus' nature of IT
- **CPR 45.4 – Litigants in person**
 - Entitled to costs for their work not exceeding 2/3^{rds} of the relevant FRC – other than disbursements
 - Costs are to be calculated with reference to CPR46.5 – if they can prove financial loss, the sum for the time reasonably spent doing the work, if not, the rate at PD46 3.4 - (currently £19p/h).
 - Also note – 46.5(5) – LiP not entitled to witness allowance in addition to their costs
- **CPR 45.5 – Costs where there is more than one claimant**

GETTING THE MOST OUT OF FIXED COSTS INQUEST COSTS

- In cases to which fixed costs do not apply, the recoverability of inquests as part of the costs of the civil claim is possible, subject to considerations of whether the costs were relevant to the civil claim, and were reasonably and proportionately incurred – *Fullick v Commissioner of Police for the Metropolis* [2019] EWHC 1941 (QB)
- ***New April addition*** R45.1(10) FRC does not apply to costs incurred in or in connection with inquest proceedings
- R45.15A – Fixed costs and disbursements per Table 15A (inclusive of advocate's costs) for restoration proceedings

GETTING THE MOST OUT OF FIXED COSTS MULTIPLE CLAIMANTS, PART 36

- **CPR 45.5** – Costs where there is more than one claimant
 - Where multiple claimants have the same legal representative with conduct of the litigation: FRC for C1 as usual, for C2 onwards you get 25% of the allowable FRC for each claimant
 - Legal representative – r2.3(1)
 - Multiple legal representatives = multiple FRCs?
 - Key question do they each have “conduct of the litigation”
- **36.24** - No longer entitled to indemnity costs from the end of the relevant period
- **CPR 36.24(5)**: the Claimant is entitled to an amount equivalent to 35% of the difference between the fixed costs for
 - (a) the stage applicable when the relevant period expires; and
 - (b) the stage applicable at the date of judgment

GETTING ~~THE MOST~~ OUT OF FIXED COSTS

- 45.9(1) – “Exceptional circumstances”
- 45.10 – Vulnerability
 - BUT – 45.11 - If criteria in 45.9 or 45.10 are met but the assessed costs are less than 20% greater than the amount of FRC then you recover the lesser of the FRC or the assessed costs. May also be penalised in costs of the costs – 45.12
- CPR 45.13(1) – unreasonable behaviour – 50% reduction / uplift
 - CPR 45.13(3)(b) – reduction/uplift just to the FRC, not to VAT, Part 36 uplifts, or disbursements

GETTING ~~THE MOST~~ OUT OF FIXED COSTS

- **Contracting Out – April 2024 amendment**
- **CPR 45.1(3)(b)** – Parties can expressly agree rule 45 (fixed costs) does not apply – preserving position from *Doyle v M&D Foundations & Building Services Limited* [2022] EWCA CIV 927
- In *Doyle*, sufficient that Order stated the Defendant was to pay the Claimant's costs "such costs to be the subject of the detailed assessment if not agreed"
- **45.1(3)(b)** requires the parties to "have each expressly agreed that [Part 45] should not apply"

TAKEAWAYS ON FRC

Key thing:

- Know your entitlements and aim to get as many uplifts without deductions or removals
 - Litigation snakes and ladders
- Take the time to create a spreadsheet for costs recovery
- It may be a while before you encounter the new rules in practice **BUT** the old rules have already been removed from Gov.UK – you can, either:
 - [Access the pre-1st October 2023 rules using the WayBack Machine](#)
 - Download some of the old rules from the White Book – the old Part 45 is available as a discrete option
- ***New October amendment*** Also note r45.63-66 – disputes on amounts of fixed costs – cost for a hearing on this is as set out in Table 1 + court fee

THE END



Scarlett.Milligan@39essex.com

Christopher.Moss@39essex.com

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD. 39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services. 39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39essex.com

BARRISTERS . ARBITRATORS . MEDIATORS

LONDON . MANCHESTER . SINGAPORE . KUALA LUMPUR

