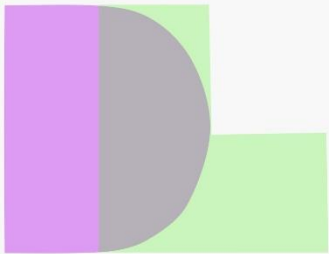


Briefing Paper

Fixed Recoverable Costs – Pre Action Stage



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Recovering costs incurred at the pre-action stage of proceedings is generally dependant on proceedings ultimately being commenced. As set out in *McGlenn v Waltham Contractors*, where proceedings are not commenced, the general position is that neither party will incur any liability for the other party's costs because the costs cannot be 'incidental to proceedings', none having been issued. However, where there are exceptional circumstances and/or where there has been unreasonable conduct such costs may be recoverable. This approach has subsequently been applied for, eg in *Citation Plc v Ellis Whittam Limited* and *Ayton v RSM Bentley Jennison*.

But the FRC does allow for recovery of pre-action costs where the parties settle before proceedings are issued and one side agrees to pay the others costs in settlement - CPR PD 45, Table 12

Part 36 can be issued before proceedings and this is a way of recovering pre-action costs

Whilst the Fast Track is for claims valued up to £25,000 and cost recovery subject to a standing capped cost regime, the new Intermediate Track (IT) captures claims up to £100,000 and is subject to the new Oct 2023 FRC Limits.

CPR 26.9(7) provides that the IT will be the normal track where it includes a claim for monetary relief, where the value of the claim is not more than £100,000 and the court considers that:

- the trial will last no more than three days if the case is managed proportionately



- oral expert evidence at trial is likely to be limited to two experts for each party

- the claim may be justly and proportionately managed under the procedure set out in the new Section IV of CPR 28, and

- there are no additional factors which make it inappropriate for the claim to be allocated to the IT

There are cited case types which are excluded from FRC extension i.e. those generally more suitable for the multi-track irrespective of value: mesothelioma, clinical negligence, abuse of/by children or vulnerable adults, trials by jury, and some Human Rights Act claims against the police: CPR 26.9(10), but defamation and JR are not listed as ones. To our knowledge an Application for FRC has not been made under the new rules for an JR or defamation case.

There are 4 band under the IT which have cost cap staging assigned to them. The highest complexity band under FRC (Level 4 allows):

Up to 29k of legal fee recovery + 22% of damages + around £10k of advocates fees.

