



The Fixed Recoverable Costs
(‘FRC’) Regime and a Case
Law Update - FTT Costs
and Service Charges

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The Fixed Recoverable Costs (“FRC”) Regime

What are Fixed Recoverable Costs (FRC)?

Costs, the recoverability of which is fixed. Essentially, the set amount of legal costs that a successful party can recover from their opponent. Where Fixed Recoverable Costs (“FRC”) apply, the successful party will only recover the prescribed applicable costs, unless the court orders otherwise. Accordingly, an unsuccessful party will only be required to pay a fixed sum in respect of the successful party's costs.

The FRC regime came into effect from 1 October 2023. This was as a result of the government’s response to Sir Rupert Jackson’s 2017 supplementary report (published on 31 July 2017)¹ which set out how FRC could apply to different types of claims within the civil litigation process.

The implemented changes have been substantial, particularly to the Civil Procedure Rules, Part 45 (Fixed Costs) and Practice Direction (PD) 45 (which sets out the relevant tables of recoverable costs and stages at which these might be awarded). Changes have also been made to Part 26 (Case Management – Preliminary Stage) and PD 26, as well as Part 28 (The Fast Track) and PD 28 and Part 36 (Offers to Settle).

***Broadhurst v Tan* [2016] EWCA Civ 94**

“Fixed costs are awarded whether or not they were incurred, and whether or not they represent reasonable or proportionate compensation for the effort actually expended. On the other hand, assessed costs reflect the work actually done. The court examines whether the costs were incurred, and then asks whether they were incurred reasonably and (on the standard basis) proportionately.”²

Where solicitors recover costs under the FRC regime, such costs will be held for the client and do not constitute costs for the solicitor (unless the client agrees otherwise)³.

¹ Sir Rupert Jackson’s 2017 report on FRC: Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs (July 2017).

² at para [30].

³ *Allen v Brethertons* [2018] 10 WLUK 5, para [51].

Types of cases subject to FRC

FRC applies to most civil claims with a value of up to £100,000 including:

- non-personal injury RTA claims,
- RTA personal injury claims,
- employers' liability (EL) claims, public liability (PL) claims,
- professional negligence claims,
- tracked possession claims,
- property disputes (including all commercial property disputes),
- defended debt claims; and
- business disputes.

Types of cases not subject to FRC

FRC does not apply to, for example:

- claims valued at more than £100,000.
- Part 8 claims (CPR 8.9(c) provides that a Part 8 claim shall be treated as allocated to the multi-track).
- Judicial review cases and Solicitors Act 1974 challenges.
- All technology and construction claims (TCC) claims (treated as allocated to the MT by virtue of CPR 60.6).
- Housing disrepair claims – *implementation delayed until October 2025. Such cases will continue to be allocated in the usual way.*

In relation to possession/ housing cases where FRC applied pre-01 October 2023, i.e. for commencement, entry of judgment and enforcement, these will continue (e.g. Tables 4 and 5 under PD 44).

Litigation Tracks Re-cap

Small Claims Track (CPR 27 and PD 27A)

- Simplified system for lower value claims.
- Usually for cases of:
 - A financial value of not more than £10,000.
 - Claims by residential tenants for landlords to carry out repairs or works where the works are estimated to cost no more than £1,000 and the

financial value of any other claims is not more than £1,000 (CPR 26.9(1)(b)).

- Claims relating to residential premises, and which involve harassment or unlawful eviction, will not be allocated to the small claims track.
- Recovery of costs:
 - The following costs (including those incurred in relation to an appeal) are recoverable:
 - Fixed solicitors' costs as set out in CPR 45.
 - Fixed solicitors' costs of up to £260 where proceedings include a claim for an injunction or an order for specific performance.
 - Court fees.
 - Certain travel and accommodation expenses incurred attending hearings.
 - Fixed sums for loss of earnings/holiday entitlement as a consequence of attending hearings (limited to a maximum of £95 per person per day).
 - Fixed sums for expert's fees (£750 for each expert)
 - See the table in PD 27A.

Complexity Bands

Claims issued on or after 01 October 2023 which are allocated to the fast track or intermediate track must be assigned to a 'complexity band'. This will determine the level of FRC in relation to the claim.

There is no definition in the CPR of what constitutes "less complex" or "more complex" beyond what is stated in CPR.

The complexity bands for fast track and intermediate track claims are set out in CPR 26.15 and CPR 26.16, respectively.

The court may reassign a claim to a different complexity band, but only if:

- There has been a change in circumstances since the claim was assigned to a particular complexity band.
- The change in circumstances justifies reassignment ⁴.

⁴ CPR 26.18.

Fast Track (CPR 28 and PD 28)

- For (procedurally) simpler cases than cases on the intermediate and multi tracks.
- Lower value claims which are not complex and do not require a lengthy trial (up to 1 day).
- Usually for cases where:
 - The small claims track is not the normal track.
 - Financial value of up to £25,000.
 - Trial is likely to last no more than 1 day.
 - Oral expert evidence is likely to be limited to one expert per party per field and expert evidence in only 2 fields.
 - In relation to non-monetary claims (i.e. injunctions, declarations and claims for specific performance), these will usually be allocated to the fast track if:
 - They are issued on or after 01 October 2023.
 - The small claims track is not the usual track.
 - No more than 1 day.
 - Oral expert evidence at trial is likely to be limited to one expert per party per field and expert evidence in only 2 fields.
 - The interest of justice dictates that it should be allocated to the fast-track.
 - If a claim involves a counterclaim (or other Part 20 claim), and as a result the trial will last more than 1 day, the court may not allocate it to the fast track⁵.

⁵ PD 26.9.1(e) and PD 26.16(3)(e).

- Complexity Bands (Fast Track claims) (CPR 26.15, Table 1):

Table 1

Complexity band 1	Complexity band 2	Complexity band 3	Complexity band 4
(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

- Recovery of costs (Fast Track):
 - Claims issued on or after 01 October 2023 will be subject to the FRC regime.
 - Costs will be limited according to the complexity band the claim is assigned to (Table 12, PD 45 - see below).

TABLE 12: rule 45.44 – amount of fixed costs in the fast track

	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	£2,271 + 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	

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

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
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D. Trial advocacy fees

(1) Where the value of the claim is not more than £3,000	£619	£619	£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
(5) Where the claim is listed for trial, but is removed from the list or settled— on the day of trial; or 1 day before the date listed for trial	100% of the applicable trial advocacy fee not more than			
(6) Where the claim is listed for trial, but is removed from the list or settled more than 1 day, but not more than 2 days, before the date listed for trial	75% of the applicable trial advocacy fee”.			

Intermediate Track (CPR 28 and PD 28)

- Intended to provide a quicker procedure than that of the multi-track for less complex cases which do not require detailed preparation and a lengthy trial.
- Will be the usual track for claims which are⁶:
 - (a) not suitable for the small claims track nor the fast track;
 - (b) the claim includes a claim for monetary relief, the value of which is not more than £100,000;
 - (c) the court considers that—
 - (i) if the case is managed proportionately, the trial will not last longer than three days;
 - (ii) oral expert evidence at trial is likely to be limited to two experts per party;

⁶ CPR 26.9(7).

(iii) the claim may be justly and proportionately managed under the procedure set out in Section IV of Part 28; and

(iv) there are no additional factors, which would make the claim inappropriate for the intermediate track; and

- (d) the claim is brought by one claimant against either one or two defendants, or is brought by two claimants against one defendant.
- Claims which include claims for non-monetary relief will not be allocated to the intermediate track unless it is in the interests of justice⁷.
- 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.
- Complexity Bands (Intermediate Track claims) (CPR 26.16, Table 2):

⁷ CPR 26.9(8).

Assignment within the intermediate track

26.16. The complexity band to which a claim will normally be assigned in the intermediate track is set out in Table 2.

Table 2

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			

- Recovery of costs (intermediate track):

TABLE 14: rule 45.50 – amount of fixed costs in the intermediate track

Stage	Complexity Band			
	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

<p>S3</p> <p>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</p>	<p>£4,129 + an amount equivalent to 10% of the damages</p>	<p>£7,949 + an amount equivalent to 12% of the damages</p>	<p>£9,394 + an amount equivalent to 12% of the damages</p>	<p>£13,420 + an amount equivalent to 14% of the damages</p>
<p>S4</p> <p>From the end of Stage 3 up to and including the date set by the court for inspection of documents</p>	<p>£4,749 + an amount equivalent to 12% of the damages</p>	<p>£9,704 + an amount equivalent to 14% of the damages</p>	<p>£11,356 + an amount equivalent to 14% of the damages</p>	<p>£16,517 + an amount equivalent to 16% of the damages</p>
<p>S5</p> <p>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</p>	<p>£5,368 + an amount equivalent to 12% of the damages</p>	<p>£11,356 + an amount equivalent to 16% of the damages</p>	<p>£12,388 + an amount equivalent to 16% of the damages</p>	<p>£20,647 + an amount equivalent to 18% of the damages</p>

<p>S6</p> <p>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</p>	<p>£6,091 + an amount equivalent to 15% of the damages</p>	<p>£15,485 + an amount equivalent to 16% of the damages</p>	<p>£16,517 + an amount equivalent to 16% of the damages</p>	<p>£24,776 + an amount equivalent to 18% of the damages</p>
<p>S7</p> <p>Specialist legal representative advising in writing or in conference following the filing of a defence</p>	<p>£1,445</p>	<p>£1,755</p>	<p>£2,374</p>	<p>£2,994</p>
<p>S8</p> <p>From the end of Stage 6 up to the date of the trial</p>	<p>£6,813 + an amount equivalent to 15% of the damages, less £599 if that party did not prepare the trial bundle</p>	<p>£17,550 + an amount equivalent to 20% of the damages, less £898 if that party did not prepare the trial bundle</p>	<p>£19,614 + an amount equivalent to 20% of the damages, less £1,239 if that party did not prepare the trial bundle</p>	<p>£29,938 + an amount equivalent to 22% of the damages, less £1,445 if that party did not prepare the trial bundle</p>

S9	£599	£898	£1,239	£1,445
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				
S10	£3,303	£3,613	£4,129	£5,988
Advocacy fee: day 1				
S11	£1,445	£1,755	£2,065	£2,994
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				

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

S15	£1,239	£1,445	£1,755	£2,065
Approval of settlement for child, unless the settlement is approved at trial				
S16	100% of the applicable advocacy fee in S10			
Advocacy fee—				
(a) where the claim is listed for trial, but is removed from the list or settled—				
(i) on the day of trial; or				
not more than 1 day before the date listed for trial;				
(b) where the claim is listed for trial, but is removed from the list or settled more than 1 day, but not more than 5 days, before the date listed for trial				
75% of the applicable advocacy fee in S10				

Multi-track

- Claims which do not fall into the other tracks – the most complex cases.
- Value of claims over £100,000.
- Practices and procedure are more flexible.

Recovery of costs (Multi-track)

- FRC do not apply.
- Cost management apply to most Part 7 multi-track cases⁸.

⁸ CPR 3.12-18.

A Closer Look at FRC

CPR 45

CPR 45 has the following sections:

- Section I—general provisions
- Section II—commencement, entry of judgment and enforcement
- Section III—HM Revenue and customs
- Section IV—Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents and Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims
- Section V—Pre-Action Protocol for Personal Injury Claims Below the Small Claims Limit in Road Traffic Accidents
- Section VI—fixed costs in the FT
- Section VII—fixed costs in the IT
- Section VIII—claims for noise induced hearing loss (NIHL)
- Section IX—disbursements

CPR PD 45

CPR PD 45 has the following sections:

- Section 1 – Fixed Costs Tables (1 – 16).
- Additional Costs for Work in Specified Areas (“London Weighting”).

Potentially relevant to Landlord and Tenant type cases:

- TABLE 1: rule 45.8 – pre-action and interim applications
- TABLE 3: rule 45.19 – fixed costs on entry of judgment in a claim for the recovery of money or goods
- TABLE 4: rule 45.20 – amount of fixed commencement costs in a claim for the recovery of land (including possession) or a demotion claim or prohibited conduct standard contract claim (Wales)

- TABLE 5: rule 45.21 – fixed costs on entry of judgment in a claim for the recovery of land (including possession) or a demotion claim or prohibited conduct standard contract claim (Wales)
- TABLE 6: rule 45.22 – miscellaneous fixed costs
- TABLE 7: rule 45.23 – fixed costs of enforcement
- TABLE 12: rule 45.44 – amount of fixed costs in the fast track
- TABLE 13: rule 45.46 – specialist legal advice
- TABLE 14: rule 45.50 – amount of fixed costs in the intermediate track

Key Aspects of the Litigation Process and the effect of the FRC regime

Pre-action and interim applications

Fixed costs that are recoverable for pre-action or interim applications are set out under PD 45, Table 1 and the applicant would also be entitled to the court fee for bringing the application.

The costs of an application to reallocate the claim to a different track or for the court to reconsider the complexity band to which a claim had been assigned also falls within Table 1. They are to be considered as interim applications.

VAT

VAT may be recovered in addition to the amount of fixed costs (CPR 45.2).

CPR 45.2 also provides that, where appropriate, VAT can be recovered in respect of disbursements and VAT is also recoverable in respect of the FRC of pre-action and interim applications.

London weighting

In addition to the applicable fixed costs that are recoverable, a 12.5% uplift (except on disbursements) on these fixed costs will be awarded under CPR 45.3 where the party:

- lives, works or carries on business in any area set out in CPR PD 45, Section II, and
- instructs a legal representative with conduct of the litigation who practises in those areas

CPR PD 45, Section II provides that the specified areas for London weighting to apply are:

- within London—
 - the areas served by the county court hearing centres at Barnet, Brentford, Central London, Clerkenwell and Shoreditch, Edmonton, Ilford, Mayors and City of London, Romford, Wandsworth and Willesden
- outside London—
 - the county court hearing centres at Bromley, Croydon, Dartford and Uxbridge

Litigants in person

Litigants in person (where a party is a litigant in person throughout the entire claim) are restricted to two-thirds of the FRC which would otherwise have been recoverable for claims on the FT or IT track (CPR 45.4).

Defendant's Costs

A Defendant is able to recover their FRC if they are the successful party.

The FRCs which a Defendant can recover are based on track allocation (FT or IT) and the complexity band allocation (bands 1 to 4) for the allocated track. As a result, CPR 45, Table 12 (fixed costs in the FT) or CPR 45, Table 14 (fixed costs in the IT) apply in the same way as if the Claimant was the successful party and an order for costs was made in their favour.

There are no provisions in relation to multiple Defendants.

Value of claim

The defendant's costs under the FRC regime are to be calculated on the basis of the value of the claim.

The words 'value of the claim for damages' and 'damages' under CPR PD 45, Table 12 (fixed costs in the FT) and CPR PD 45, Table 14 (fixed costs in the IT) are to be treated as references to the value of the claim (CPR 45.6(2)(a)).

CPR 45.6(3) defines 'the value of the claim' as:

- the amount specified in the claim form, without taking into account any deduction for contributory negligence, but excluding—
 - any amount not in dispute
 - interest, or
 - costs (CPR 45.6(3)(a)).
- if no amount is specified in the claim form, the maximum amount which the claimant reasonably expected to recover according to the statement of value included in the claim form under CPR 16.3 (CPR 45.6(3)(b)).
- if the claimant cannot reasonably say how much is likely to be recovered and this is stated on the claim form (CPR 45.6(3)(c)) —
 - £25,000 in a claim to which CPR 45, Section VI (fixed costs in the FT) applies, or
 - £100,000 in a claim to which CPR 45, Section VII (fixed costs in the IT) applies
- where the claim has no monetary value (CPR 45.6(3)(d))—
 - the applicable amount in CPR 45.45(1)(a)(ii) in a claim to which CPR 45, Section VI applies (fixed costs in the FT), or
 - the applicable amount in CPR 45.50(2)(b)(ii) in a claim to which CPR 45, Section VII applies (fixed costs in the IT)

CPR 45.6(3)(e) provides that where a claim includes both a claim for monetary relief and a claim which has no monetary value, the value of the claim will be the applicable amount under CPR 45.6(3)(d) plus the applicable amount in CPR 45.6(3)(a), CPR 45.6(3)(b) or CPR 45.6(3)(c).

Counterclaim

A Defendant is entitled to their applicable fixed costs for bringing a successful counterclaim (CPR 45.7). However, no costs are allowable for counterclaims where the only remedy sought by the counterclaimant is also a defence to the claim (CPR 45.7(2)).

Claims for more than fixed costs

In 'exceptional circumstances', the court may consider an application for more than FRC and can assess these, either summarily or by detailed assessment.

Exceptional circumstances

CPR 45.9(1) provides that the court will consider a claim for greater than FRC (excluding disbursements) where there are exceptional circumstances which make it appropriate to do so.

No definition of exceptional circumstances is provided but (with reference to it can be seen that there must be circumstances which take the case out of the norm, in relation to matters of the case itself.

If the court considers that there are exceptional circumstances allowing for an amount of costs which are greater than FRC, it may summarily assess the costs or make an order for those costs to be detailed assessed (CPR 45.9(2)).

Where a party is unable to show exceptional circumstances under CPR 45.9(1) or vulnerability under CPR 45.10(1) (see below), the court may make an order for FRC and disbursements only (CPR 45.12(1)).

Vulnerability

CPR 45.10(1) provides that the court will consider a claim for more than FRC (excluding disbursements) where there is a vulnerable party or witness for that party, which:

- has required additional work to be undertaken
- by reason of that additional work alone, the claim is for an amount that is at least 20% greater than the amount of FRC

There is no definition in the rules of 'vulnerability' however PD 1A, para 4 provides a list of factors which may cause a party to be considered as vulnerable.

Failure on assessment to obtain greater than fixed costs

Even where a party may be able to show exceptional circumstances enabling the court to assess the costs, the court may assess the costs at an amount which is less than 20% more than the amount of FRC. In these cases, the court will make an order for that party to be paid the lesser of the FRC and the assessed costs (CPR 45.11).

Unreasonable behaviour

"Cuts both ways"

The court can make an order for a receiving party to have their fixed costs reduced by an amount equivalent to 50% where the court considers they have behaved unreasonably (CPR 45.13(1)).

Alternatively, the court also has the power to make an order increasing the receiving party's FRC by an amount equivalent to 50% where the court considers that the other party behaved unreasonably (CPR 45.13(2)).

Unreasonable behaviour is defined as 'conduct for which there is no reasonable explanation' (CPR 45.13(3)(a)).

The awarded amount will be exclusive of VAT, any additional amounts or VAT (CPR 45.13(3)).

Reallocation of track or reassignment of complexity band

Where the court reallocates a claim to a different track and before or upon reallocation the claim was allocated to the FT or IT, the costs which may be allowed are those applicable to the track to which the claim is reallocated, as if the claim had been allocated to that track at the outset (CPR 45.14(1)).

For example, if a case was allocated to the FT but is then reallocated to the IT, the fixed costs which are recoverable will be under CPR PD 45, Table 14 (fixed costs for the IT) **for all of the claim**.

There will be no division of costs i.e. the claimant would not recover FT costs up to the date of reallocation and IT costs from the date of reallocation onwards.

But, where a fixed costs case in the FT or IT is assigned to a different complexity band, the recoverable costs will be those applicable to the complexity band which the claim is reassigned to, as if the claim had been assigned to that complexity band at the outset (CPR 45.14(2)).

Fixed costs and Part 36 offers

Costs consequences under CPR 36.23 (cost consequences of acceptance of a Part 36 offer) and CPR 36.24 (cost consequences following judgment) applies to fixed costs cases in the FT or IT (CPR 45.15).

Some Things to Consider

- **Costs shortfall**
 - Where the FRC regime applies, a successful party may face a shortfall in the costs they can recover compared to the actual costs that they have incurred in pursuing their claim.
 - Solicitors' bills are likely to attract more scrutiny from clients.

- **Track allocation**
 - Parties may seek to avoid the FRC regime by attempting to have cases allocated to a different track and/or higher complexity band at the allocation stage.

- **Claims for costs over FRC limits.**
 - Under CPR 45.9(1), the court can consider a claim for an amount of costs exceeding fixed costs (excluding disbursements) where there are 'exceptional circumstances' which make it appropriate to do so.
 - On the basis that there is no real sanction for a party who fails in such an application, such applications may be made on an increasing basis.

- **Unreasonable behaviour arguments**
 - Increased litigation on the basis that the court can make an order decreasing the receiving party's FRC by an amount equivalent to 50% where there is unreasonable behaviour on their part (CPR 45.13(1)) or can make an order for a 50% increase in FRC where there is

unreasonable behaviour on the part of the paying party (CPR 45.13(2)), there may well be increased litigation in respect of this point.

- **Contracting out—express agreement**
 - From 06 April 2024, CPR 45.1(3) to allow the paying party and the receiving party to expressly agree to contract out of the FRC regime.
 - Agreements between landlord and tenants may therefore begin to insert clauses placing the effect of this rule on a contractual basis.

Case Law Update – FTT Costs and Service Charges

1. Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 290 (LC).

Clarified that the source and structure of the FTT's power to award costs is apparent. The general principle is laid down by section 29(1) of the **Tribunals, Courts and Enforcement Act 2007**.

The costs of all proceedings are in the discretion of the FTT, which has full power to determine by whom and to what extent the costs are to be paid, subject to the restrictions imposed by the **Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**.

The FTT has no power to make an order for costs, except in the circumstances described in under **rule 13(1)** which are as follows (subject to the Overriding Objective under rule 3):

- **Rule 13(1)(a)** - wasted costs.
- **Rule 13(1)(b)** - where a person has acted unreasonable in bringing, defending or conducting proceedings (agricultural land and drainage, residential property, and leasehold cases).
- **Rule 13(1)(c)** – in land registration cases.

The vast majority of applications for Tribunal costs will be made pursuant to rule 13(1)(b) on the basis that a party has acted unreasonably.

The court in *Willow Court* interpreted unreasonable behaviour as (para 24):

“...conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome.”

2. Assethold Ltd v Lessees of Flats 1-14 Corben Mews [2023] UKUT 71 (LC)

The Upper Tribunal (“UT”) held that the First-tier Tribunal (FTT) had been correct to award a costs order against the freeholder due to its egregious conduct. The conduct

in question resulted in repeated delays and a lost hearing date, and its explanations were deemed 'inadequate or non-existent'. Further, the lessees had been unable to sell or mortgage their leases pending resolution of the proceedings and two lessees had been sued and threatened with forfeiture over unpaid service charges.

3. Thirty One Crescent Grove Ltd v Atherden [2024] All ER (D) 18 (Apr)

This case concerned an appeal from a decision of the FTT under s27A of the Landlord and Tenant Act 1985 to decide whether service charges were payable. An applicant leaseholder (also shareholder in the freeholder company), disagreed with the landlord's charges to effect decoration works to a stairwell. The leaseholder commissioned repairs to the roof instead and paid for this. He then sought to recover such costs through the service charge.

The UT held that the leaseholder's proportion of the service charge for the stairwell redecoration (as obtained by the freeholder) was payable and the sums he had expended were not recoverable as part of the service charge. The sum was not one which the landlord, by its shareholders, had agreed to incur.

5. Octagon Overseas Limited v Sandra Cantlay and others [2024] UKUT 72 (LC)

The Upper Tribunal (Lands Chamber) (the UT), in allowing on the appellant landlords (the landlords) appeal against the decision of the First-tier Tribunal (Property Chamber) (the FTT) relating to the insurance commissions and fees received by the landlords (or their agents) in their capacity as landlords of the estate, held that the FTT found that the respondent leaseholders had contributed £1,517,372 in respect of fees paid to an associated company, WMS between 2010 and 2020. It was satisfied that the landlords had failed to demonstrate that they were entitled to any more than £536,182 of that total. That was therefore the figure which the UT found to have been payable in respect of the services provided by WMS which were remunerated through the commission received from the insurer. The UT therefore allowed the landlords' appeal and in place of the FTT's finding that nothing was payable, the UT substituted a determination under s 27A of the Landlord and Tenant Act 1985, that the leaseholders were liable to pay £536,182 and not £1,517,372 for the work of WMS. Including insurance premium tax the total sum payable was £579,039 instead of £1,638,709.

6. Howe Properties (Ne) Ltd v Accent Housing Ltd [2024] All ER (D) 130 (Mar) [2024] EWCA Civ 297

The Court of Appeal, Civil Division, allowed in part the appellant landlord's appeal against the decision of the Upper Tribunal (Lands Chamber) (the UT) that the inclusion of management services fees would not be part of an annual service charge. The arguments on appeal focussed on the interpretation of the leases and

essentially tracked those made to the UT. In particular, the court held that the UT judge had wrongly assumed that costs of the types identified in cl 5(2)(a), (b), (c) or (e) should have been divided on an equal basis, and so the same had to be true of the costs identified in cl 5(2)(d) (management and maintenance). However, the UT judge's decision to the extent that the flat rate management charge was set by the appellant by reference to its costs of dealing with properties not on the estate, was not permitted by cl 5(2) of the leases, would be upheld because the aggregated sum had been defined by reference to work done on properties that were not on the estate at all, and it had been divided by a number that included some types of properties that were also not to be found on the estate.

7. Tower Hamlets Community Housing Ltd v Leaseholders of Painter House [2024] All ER (D) 130 (Feb)

The Upper Tribunal (Lands Chamber) (the UT) dismissed the appellant landlord's appeal against the First-tier Tribunal (Property Chamber) (the FTT's) refusal to vary the leases held on long-leases under which the 24 respondent leaseholders held their flats. The appellant applied to vary the leases pursuant to s 35 of the Landlord and Tenant Act 1987. Most of the respondents (22) were required by cl 7 of their leases to pay 1/38 of the service charge, comprising the landlord's expenditure listed in cl 7(5) thereof. However, the other two respondents had to pay 'a fair proportion' of the same. The appellant, who occupied the commercial units, wanted to vary the residential leases so that the respondents were required to pay 1/24 of the landlord's expenditure on the block, including the ground floor offices. The UT held that although the FTT had misconstrued s 35(4)(b) of the Act on the basis that it was wrong to decide that service charge proportions in s 35(4)(b) meant only numerical proportions as the FTT had done, it declined to exercise its discretion because it could not order a variation in respect of which either s 38(a) or (b) of the Act was met. The appellant proposed to make the respondents liable together for the whole of its costs but not actually to enforce that liability in practice, however, no reassurance that the appellant would not demand service charges that would substantially prejudice the respondents could enable the tribunal to make such a variation. The appellant had not explained why the costs of maintaining its office should be the responsibility of the respondents; the variation sought by the appellant would substantially prejudice the respondents and would be unreasonable.