

FIXED RECOVERABLE COSTS PILOT SCHEME: IS FIXED FAIR?

- ▶ The voluntary Fixed Recoverable Costs Pilot Scheme (FRCPS) is to be introduced to test capping recoverable costs at £80,000 for claims up to £250,000 in value.
- ▶ The pilot is aimed at improving access to the newly launched Business and Property Courts.
- ▶ The suitability of the scheme for use in technical construction disputes remains to be seen.

What's it about?

The FRCPS, which was approved in principle in May 2017, is the most recent initiative to stem from Jackson LJ's ongoing review of fixed recoverable costs and evidences the continuing drive for a justice system which promotes certainty and access to justice.

The FRCPS will be used to test the use of a capped costs scheme in higher value claims and will represent the first step in a process aimed at extending the present civil fixed recoverable costs regime.

Some of the key points to note in relation to the FRCPS are as follows:

- ▶ **Voluntary:** Entry into the FRCPS is voluntary, requiring the agreement of both parties (although once involved parties do not have an unfettered right to leave).
- ▶ **Quantum:** The pilot will be available for claims up to £250,000.
- ▶ **Cap(s):** The FRCPS proposes caps for individual stages of litigation (e.g. a cap of £6,000 for disclosure and £10,000 for experts' reports), as well as a maximum overall cap of £80,000.
- ▶ **Where:** The FRCPS will run in the London Mercantile Court and the Mercantile, Chancery and Technology and Construction Courts (TCC) in Leeds and Manchester.
- ▶ **When:** The start date is yet to be confirmed however this is likely to be soon.
- ▶ **Duration:** The FRCPS will run for two years.
- ▶ **Procedure:** A streamlined court procedure will be implemented as part of the FRCPS, including streamlined disclosure, a limit of fact and expert evidence and a trial of no more than 2 days.

What does it matter?

Whilst the overarching aim of the FRCPS is to "improve access to the Business and Property Courts" (and also presumably to increase the appeal of our courts in the wake of Brexit), its suitability for use in construction disputes remains to be seen.

In an industry where cash is king, a limit on the level of costs recoverable from the losing party, in respect of disputes which are often highly technical and therefore expensive to bring, may serve to impede, rather than promote, access to justice.

The disparity between the maximum proposed caps for individual stages, and the actual costs a party will need to spend in order to prepare and present its case effectively could potentially be great. In those situations a party, even if successful, would be left with a bill for the difference which it may not be able to afford.

Fixed recoverable costs may therefore serve to make the Courts a less attractive forum for construction disputes, with parties instead becoming more reliant on adjudication or arbitration.

What now?

For now, the FRCPS is merely a pilot scheme. Depending on its uptake and success, it may be introduced permanently, representing an extension of the current fixed recoverable costs regime.

How suitable the proposed staged, and overall maximum cap on costs will be for technically complex (but lower value) construction disputes remains to be seen. However, parties considering issuing proceedings in the Manchester or Leeds TCC over the next two years should give consideration as to whether the FRCPS, and the cost certainty that comes with it, would be of benefit to them.

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