

# Fair payment



Toby Boutle and James Pavey consider how landlords in possession claims can avoid the pitfalls of the fixed costs regime

## THE FIXED COSTS RECOVERABLE IN

residential possession claims under Civil Procedure Rules r45.2A are far from generous. An award of fixed costs will invariably mean that a successful landlord is left with a significant costs liability. Practitioners therefore need to be astute to avoid the fixed costs regime where possible.

### The true costs of possession claims: a disparity

Excluding court fees, the fixed costs recoverable in residential possession proceedings will normally be as low as £126.75 (r45.4A). Applying the Guideline Rates for Summary Assessment of solicitors' hourly rates, that represents less than 55 minutes of chargeable work for a legal executive in Bristol or under 35 minutes for a solicitor in a West End London firm who is more than four years qualified.

Plainly, the fixed costs are nowhere near the true costs of the litigation from the initial client-meeting and pre-action correspondence with the tenant, through service of the section 8 notice and then drafting and issuing the claim, to attending court – and often waiting in a long list. The tenant, who may have been wilfully holding over and refusing to pay rent for months, walks away with a legal

bill of £126.75. The nominally successful landlord's costs bill may be many times that.

This is all the more problematic for landlords, as this is not an area of law where it is wise to act in person. As all practitioners in the field know, it is littered with (often wholly unnecessary) technicalities, where a non-prejudicial defect in a notice may well leave a landlord with no alternative but to incur the expense of starting the claim all over again from the beginning.

### Where fixed costs apply

Against this background, it makes obvious sense to avoid the fixed costs regime where possible. District judges (and on occasion those representing the landlord) often appear to assume that fixed costs apply in possession proceedings more widely than is, in fact, the case.

The CPR provide for only three situations (see box 1) where the landlord is limited to recovering fixed costs against the defendant tenant:

- Any claim where the defendant gives up possession and pays the amount claimed, including the fixed commencement costs (r45.1(2)(c)).
- Where one of the grounds for possession is arrears of rent and the defendant has

either (i) not denied liability or delivered a defence or (ii) has delivered a defence, but one limited to proposals for paying rent only (r45.1(2)(d)).

- An accelerated possession claim under CPR Part 55, Section II, where the defendant has neither denied liability nor delivered a defence or counterclaim (r45.1(2)(e)).

### Avoiding fixed costs

The first and last cases are fairly straightforward and will not normally involve attendance at court. It is the second situation which is more troublesome. However, those acting for landlords can take practical steps to avoid falling within the fixed costs regime.

#### (1) Proceed under s21 Housing Act 1988

Fixed costs do not apply to claims brought under s21 Housing Act (HA) 1988, other than

## Fixed costs in possession proceedings: Civil Procedure Rules

45.1(1) This Section sets out the amounts which, unless the court orders otherwise, are to be allowed in respect of solicitors' charges in the cases to which this Section applies.

45.1(2) This Section applies where –  
(c) the claim is for the recovery of land, including a possession claim under Part 55, whether or not the claim includes a claim for a sum of money and the defendant gives up possession, pays the amount claimed, if any, and the

fixed commencement costs stated in the claim form;  
(d) the claim is for the recovery of land, including a possession claim under Part 55, where one of the grounds for possession is arrears of rent, for which the court gave a fixed date for the hearing when it issued the claim and judgment is given for the possession of land (whether or not the order for possession is suspended on terms) and the defendant –  
(i) has neither delivered a defence, or

counterclaim, nor otherwise denied liability; or  
(ii) has delivered a defence which is limited to specifying his proposals for the payment of arrears of rent;  
(e) the claim is a possession claim under Section II of Part 55 (accelerated possession claims of land let on an assured shorthold tenancy) and a possession order is made where the defendant has neither delivered a defence, or counterclaim, nor otherwise denied liability[.]



accelerated possession proceedings under CPR Part 55, section II. These are claims for possession brought at the end of a fixed term (s21(1)) or where there is a periodic tenancy (s21(4)).

Where rent arrears are claimed, it is not possible to use the accelerated possession procedure (see CPR r 55.12(1)(b)). Making a claim for arrears of rent together with a claim for possession pursuant to s21 does not bring the claim within the fixed costs regime. This is because the rent due is not being relied on as a ground of possession; indeed, it cannot possibly be relied on as such a ground, as no s8 HA 1988 notice will have been served. This is perhaps surprising, when such a claim is likely to be as straightforward as a rent arrears claim under s8.

Where a tenant with rent arrears has a periodic tenancy or a fixed term which will shortly expire, it is better from a costs perspective to seek possession under s21, rather than relying upon Grounds 8, 10 and 11 in Part I of Schedule 2 HA 1988. The disadvantage, however, is that the notice period required will be shorter for a s8 notice (see s8(4B)). This will often be a more important consideration when faced with an impecunious tenant.

## (2) Seek possession on another ground

Where possession is sought on a mandatory ground other than non-payment of rent, it may be unwise to rely on non-payment of rent as a further ground of possession. One of the most irrational features of the drafting of r45.1 is that, by seeking an additional rem-

## Practical points

- Assess priority: recovery of landlord's costs (s21 notice) or speed (s8 notice).
- seeking possession under s21, do not plead arrears of rent as an alternative ground.
- File and serve Schedule of Costs 24 hours before hearing. Note CPR r6.7 on deemed service.
- The advocate should be properly briefed as to why and how costs incurred: eg, proving unregistered title.
- As a fallback, remember that r45.1 provides that fixed costs apply in specified circumstances *unless the court orders otherwise*. Ask it to exercise its discretion.

edy, a claim which was otherwise outside the fixed costs regime may be brought within it.

It is instinctive for practitioners faced with a viable alternative claim to plead it. However, at least from a costs perspective, they should avoid where possible ticking the 'arrears of rent' box on page 2 of the Part 55 Claim Form (Form N5). It is also worth noting that making a money claim as part of possession proceedings does not bring the claim within the fixed costs regime, so long as it is not one of grounds for possession.

### At the hearing

Even where the fixed costs regime does not apply, from our experience advocates may well be faced with a sceptical district judge, working from the starting point that it does. In these circumstances, it is particularly important that a Schedule of Costs for summary assessment is filed and served 24 hours in advance in accordance with the Costs Practice Direction, s13.5(4). It is then essential that the advocate is properly briefed to explain the costs incurred.

Where a district judge accepts that a case falls outside the fixed costs regime, an advocate may well still be faced with the view that the amount of fixed costs should be the starting point in the exercise of the court's costs discretion. Of course, the court's discretion on costs is broad. Yet such an approach should be resisted as being wrong in principle. If the fixed costs regime does not apply, it is simply not a relevant factor to be weighed in the balance.

Finally, even where the case does fall within r45.1, it is important to remember that the court still has a discretion to depart from the fixed costs: the fixed costs regime applies 'unless the court orders otherwise' (r45.1(1)). If there is any chance to persuade the court that fixed costs should not apply, then take it. So if the case is unusual in any way that has led to additional costs being incurred (for example, if the land is unregistered such that

proving the landlord's title involves much more work) that should be explained.

### Reform of CPR r45.1

The form of words used in the current provisions was introduced by the Civil Procedure (Amendment No. 5) Rules 2001 (SI 4015 of 2001) at r42. Previously, Appendix B to the County Court Rules had provided that fixed costs applied where a possession order was made, but that order had been 'suspended on payment of arrears of rent, whether claimed or not'. The reasoning behind the amendment is not at all clear. The relevant minutes of the Civil Procedure Rule Committee do not shed any light on the subject; they merely record approval of the amendment. According to the Department for Constitutional Affairs, no other pre-legislative material is available.

The motives for extending the fixed costs regime were in the spirit of Lord Woolf's reforms. The intention was clearly to save expense and ensure possession cases are dealt with proportionately. It certainly saves time in a crowded possession list.

The current regime, however, does require reform. It elevates speed and simplicity above the need to deal with cases justly. The inconsistencies mentioned above need to be ironed out. Most importantly, the sums awarded ought to be less unrealistic. As the indemnity principle does not apply where costs are fixed, the fixed costs of course should be at the lower end of what is likely to be reasonable to avoid the landlord receiving an unwarranted windfall. There is, though, no discernable public policy reason why landlords should be penalised by such unrealistically low, almost nominal, fixed payments of costs.

A copy of this article has been sent to the Civil Procedure Rule Committee for its members to consider.

Toby Boutle is a tenant at specialist Chancery set Ten Old Square. James Pavey is a property litigation solicitor and partner at Knights Solicitors