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Escaping Fixed Costs
A Discussion Paper

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Introduction

1. In principle there is nothing wrong with a concept of fixed costs. Fixed costs should, for the losing litigant, preserve both the "polluter pays" principle and ensure that the losing party can decide to settle or fight litigation on an informed basis, and not go bankrupt if they wrongly decide to fight.

2. It is also hoped that a predictable scheme of fixed costs might kick start the BTE market, which historically has functioned as a clearing house for the referral of claims, rather than a provider of useful insurance products.

3. They could also encourage efficiency on the part of those bringing the claims and, more prosaically, they could be said to represent what is already happening in practice in lower value claims.

4. The mischief is always the amount at which costs are fixed at. Paying parties would dearly love to see £65 per hour as one of the assumptions used in fixing costs, noting that if it's good enough for Legally Aided cases then it's good enough for a wider application too.

5. Further, one notes from recent history that amounts which are prescribed by way of fixed costs tend to rust into position for years, irrespective of what is happening in the wider economy, such as inflation.

6. A wider consideration will also indicate that there are other potential consequences whose importance should not be glossed over. One of these is to note that since the end of Legal Aid in personal injury and clinical negligence cases, the legal profession has been heavily dependent on the costs recovered from the insurance industry and other compensating bodies.

7. The independence and health of the legal profession is of constitutional importance. A short funded or failing legal profession is not in society's interests.

8. Unless the law can be applied and accessed in the Courts by the citizens who have rights under it, then Parliament can make whatever laws it likes but their implementation is likely to be disregarded or flouted.

9. It is with these thoughts in mind, we turn to the current proposals.

The story so far

10. In 2019 the government consulted on the extension of fixed costs. A response was published to that consultation in September 2021 entitled **"Extending Fixed Recoverable Costs in Civil Cases: The Government Response".**

11. The paper notes that the proposals exclude clinical negligence cases due to the work commissioned from the Civil Justice Council and the capped costs pilot in business and property cases. Further on, the paper also notes it excludes the Home Office's consideration of extending fixed recoverable costs to immigration and asylum tribunal judicial reviews.

12. It should also be noted that the government does not intend to introduce an intermediate track: instead, intermediate cases will be assigned to an extended Fast Track.

13. The paper notes that in relation to the fixed costs proposed by Sir Rupert Jackson that the figures have been devised with "rigour":

3.6 The proposed figures for FRC were devised by Sir Rupert based on data submitted by Taylor Rose (a firm of solicitors and costs lawyers) that was analysed by Professor Paul Fenn.11 Sir Rupert then consulted with his team of fourteen assessors, drawing on a breadth of views and experience (from both claimant and defendant perspectives), and brought his own considerable expertise to bear in finalising the figures. As such, we consider that the figures have been devised with appropriate rigour. As we set out later in this response (see Chapter 5, paragraph 20.1), these figures will be uprated for inflation before implementation, as Sir Rupert originally intended.

Table 1: Fixed recoverable costs in the Fast Track

Stage	Complexity Band 1	Complexity Band 2	Complexity Band 3	Complexity Band 4
Pre-issue £1001-£5000		The greater of £572 or £104 +20% of damages	£988 +17.5% of damages	£2250 +15% of damages + £440 per extra defendant
Pre-issue £5001-£10,000		£1144 + 15% of damages over £5000	£1929 +12.5% of damages over £5000	"
Pre-issue £10,001-£25000	£500	£2007 +10% of damages over £10,000	£2600 + 10% of damages over £10,000	"
Post issue, pre-allocation.	£1850	£1206 +20% of damages	£2735 +20% of damages	£2575 +40% of damages +£660 per extra defendant
Post allocation, pre-listing	£2200	£1955 +20% of damages	£3484 +25% of damages	£5525 +40% of damages +£660 per extra defendant
Post listing, pre-trial	£3250	£2761 +20% of damages	£4451 +30% of damages	£6800+40% of damages +£660 per extra defendant
Trial advocacy fee	a.£500 b.£710 c.£1070 d.£1705	a.£500 b.£710 c.£1070 d.£1705	a.£500 b.£710 c.£1070 d.£1705	a.£1380 b.£1380 c.£1800 d.£2500

A different table of fixed costs would apply to NIHL claims than to the four bands noted earlier.

14. Moving to the most ambitious of the proposals, the extension of fixed costs for cases worth up to £100,000 such cases are to be dealt with on an expanded Fast Track. In effect the terminology has changed, but fixed costs will now apply on cases worth up to £100,000 that would hitherto have been on the multi-track. These cases will have a further categorisation of four bands with differing scales of costs:

- Band 1: the simplest claims that are just over the current fast track limit, where there is only one issue and the trial will likely take a day or less, e.g., debt claims or credit hire claims.
- Band 2: along with Band 3 will be the 'normal' band for intermediate cases, with the more complex claims going into Band 3.
- Band 3: along with Band 2 will be the 'normal' band for intermediate cases, with the less complex claims going into Band 2.
- Band 4: the most complex, with claims such as business disputes and ELD claims where the trial is likely to last three days and there are serious issues of fact/law to be considered

15. The scales of costs which would apply are set out in tabular form:

Table 2: FRC for NIHL claims

Stage	1 Defendant	2 Defendant	3 Defendant
Pre-litigation			
2A	£2500	£3000	£3500
2B	£3000	£3500	£4000
3A	£3500	£4000	£4500
3B	£4000	£4500	£5000
Post-litigation			
L1	£1650	£1980	£2310
L2	£1656	£1987	£2318
L3	£1881	£2257	£2633
Max possible (£B+L1+L2+L3)	£9187	£10,724	£12261

Table 3: Fixed recoverable costs for intermediate cases on the Fast Track

Stage (S)	Band 1	Band 2	Band 3	Band 4
S1 Pre-issue or pre-defence investigations	£1400 +3% of damages	£4350 + 6% of damages	£5550 +6% of damages	£8000 +8% of damages
S2 Counsel/specialist lawyer drafting statements of case and/or advising (if instructed)	£1750	£1750	£2000	£2000
S3 Up to and including CMC	£3500 +10% of damages	£6650 +12% of damages	£7850+12% of damages	£11,000 +14% of damages
S4 Up to the end of disclosure and inspection	£4000 +12% of damages	£8100 +14% of damages	£9300 +14% of damages	£14,200+ 16% of damages
S5 Up to service of witness statements and expert reports	£4500+12% of damages	£9500 +16% of damages	£10,700 +16% of damages	£17,400 +18% of damages
S6 Up to PTR alternatively 14 days before trial	£5100 +15% of damages	£12,750 +16% of damages	£13,950 +15% of damages	£21,050 +18% of damages
7 Counsel/specialist lawyer advising in writing or in conference (if instructed)	£1250	£1500	£2000	£2500
S8 Up to trial	£5700 +15% of damages	£15,000 +20% of damages	£16,200 +20% of damages	£24,700 +22% of damages
S9 Attendance of solicitor at trial per day	£500	£750	£1000	£1250
S10 Advocacy fee: day 1	£2750	£3000	£3500	£5000
S11 Advocacy fee: subsequent days	£1250	£1500	£1750	£2500
S12 Hand down of judgment and consequential matters	£500	£500	£500	£500
S13 ADR: counsel/specialist lawyer at mediation or JSM	£1000	£1000	£1000	£1000
S14: ADR solicitor at JSM or mediation	£1000	£1000	£1000	£1000
S15 Approval of settlement for child or protected party	£1000	£1250	£1500	£1750
Total (a) £30,000 (b) £50,000 (c) £100,000 damages	(a)£19150 (b) £22150 (c) £29,650	(a)£33,250 (b)£37,250 (c)£47,250	(a)£39,450 (b)£43,450 (c) £53,450	(a)£53,050 (b) £57,450 (c)£68,450

16. Thus, for a case worth about £100,000 with up to 3 days of trial, with all steps completed and all costs incurred, the fixed costs element for solicitors and counsel should total at most £68,450 on the original figures not uprated for inflation.

17. One area on which there is little illumination, is how cases will be allocated between these various categories. On how cases will be allocated between bands:

4.3 As we outline in paragraphs 4.4 and 13.2–3 of Chapter 5, the Government does not consider it appropriate, at present, to give further guidance on band allocation for the fast track and for intermediate cases. Rather, it is for the parties and judges to come to sensible conclusions on banding in light of the criteria set out. Despite general calls from respondents, from both claimant and defendant perspectives, for further detail, neither Sir Rupert nor respondents to the consultation were able to outline what this might constitute. Further clarity will emerge over time in the light of experience. Should it become clear that the Government can give further guidance, then we will do so.

18. The government (and Jackson) have also effectively re-invented the wheel, by bringing back scales of costs applicable to cases of a type and value, where the sum of costs is found by adding up allowances for constituent parts. This is an approach that a costs draftsman in late Victorian England would readily have recognised, being congruent with the old scales of costs that applied under the Rules of the Supreme Court. The current emphasis on hourly rates and time spent, is a system of awarding costs that is less than 70 years old.

19. Nor can it be said that the prescription of fixed costs is necessarily a bad thing: what always matters in such proposals, is the level at which fixed costs are set, and whether the amount of the fixed costs can square with an expense of time calculation that enables a solicitor to make a reasonable profit. If it means that there could be more litigation, due to certainty about the level of costs involved, that will benefit the legal profession, though is probably not a consequence that the government has at the forefront of its considerations.

20. What will flow from the implementation of these proposals, are two phenomena. The first is that both solicitors and counsel will have to revise their workflows, to try to ensure that work is done efficiently. Counsel's fees are ring-fenced only in Fast Track Band 4 and NIHL claims; if the proposals are adopted as recommended, fixed fees will be allowed for post-issue advice or conference and settling a defence or defence and counterclaim. Opinions that go on for folio after folio, might therefore have to be dispensed with for a short email advice. Skeleton arguments might need to be forgone. Trial bundles might have to be limited to 150 pages. Probably with no discernible effect on the quality of justice.

21. The second phenomena is to note that these scales of costs only apply on an inter partes basis. A client can be charged more. But that in turn is likely to lead to more solicitor-own client disputes, as clients challenge the retainer arrangements they have made, or the bills of costs they receive. This trend is already demonstrable in personal injury claims, where deductions from damages in low value RTA claims have given rise to the Belsner litigation

Implementation

22. The Civil Procedure Rules Committee Minutes for 1st July 2022 note the following:
20. The drafting exercise is substantial and the Sub-Committee has been meeting regularly since March, when the first drafts became available, and will continue to meet, over the summer in order to provide further reports and drafting in the autumn with the aim to secure final approval in December for implementation in April 2023.

21. The work thus far has highlighted some drafting issues. The existing structure of Part 45 is not ideal for the lay reader (mainly in Part 45, but other Parts too). It has evolved in stages over time, with new elements being added on in a rather piecemeal way which has unfortunate consequences in terms of clarity of drafting. But the Sub-Committee is very conscious that the current FRC rules (most Fast Track Personal Injury claims) cover hundreds of thousands of cases per annum and are generally well understood by PI users. As such, tinkering, risks wider and unintended consequences.

22. *Consideration as to whether starting afresh would make the rules more accessible has been undertaken, but reluctantly the Sub-Committee concluded it is not the ideal approach, and a better method would be to keep the current structure, but try to make navigation of the rules easier for the much wider range of user following the extension of FRC across the fast track. - 4 –*

23. One of the consequences of the historic piecemeal drafting is that issues such as VAT and London weighting are apparently dealt with inconsistently (see for example Section I of the current Part 45, which makes no provision for recovery of VAT and Section IIIA, rule 45.29C(3) which does). This is not ideal, but it is recognised that (i) the current rules seem to work (or, at least, there is no suggestion that they do not), and (ii) making changes for the sake of consistency would have substantial implications (by increasing or reducing the costs that are otherwise recoverable by 20%) and could involve a substantial amount of additional work including possibly a further consultation. The CPRC was asked to NOTE that, in the Sub-Committee's view, pragmatism should take precedence over consistency of drafting, such that they will do the best they can, but that it may not amount to full consistency. However, the intention is to propose solutions to simplify the drafting, by colocating references to specific issues to avoid repetition where practicable and remove or at least significantly modify Section II, which will have limited effect once the new rules are in place.

Application

23. So, faced with the broad implementation of fixed recoverable costs on most civil claims up to £100,000 in value, what can be done to avoid being bound by the limitations on costs in the rules? We put forward 7 points for consideration:

Route 1: Contracting out before a dispute

24. The first and most obvious point is that the parties can contract of the application of fixed costs, in advance of any dispute arising between them. Perhaps the most obvious example is in property litigation, where there will commonly be a clause in a lease, or a mortgage, permitting one party (or potentially both) to recover their costs on an indemnity basis.

25. In addition, other types of contracts, such as insurance contracts commonly make provision for dispute resolution clauses, such as an arbitration procedure to apply, and any case which is dealt with under the Arbitration Act 1996, will necessarily fall outside the scope of part 45 CPR, as a broader measure of costs will be recoverable.

26. In consumer contracts, regard should be had to the Consumer Rights Act 2015 and in particular schedule 2,

whereby the specimen unfair clause at clause 20, notes that requiring a consumer exclusively to take disputes to arbitration might be an unfair term, but there is no such prohibition on putting in a clause which offers both parties the rights to recover their (unfixed) legal costs. However, whether such a clause is ever inserted, would probably hinge on whether the drafter of the terms thought their client was more or less likely to be paying the costs.

Route 2: Contracting out after a dispute

27. There have been several cases on the ability of parties to contract out of a fixed costs regime, particularly when striking terms of settlement. The case of H**o v Adelekun [2019] EWCA Civ 1988** and the more recent case of **Doyle v M & D Foundations & Building Services Limited [2022] EWCA Civ 927.**

28. There is no bar on contracting out of a fixed costs regime: however, consideration will need to be given quite carefully as to how this is to be done so that there is no ambiguity. In essence if the settlement is agreed on a contractual basis, then the normal rules of contractual interpretation apply: what would the disinterested objective observer think the parties had agreed, knowing the background matrix of fact?

29. If the settlement is embodied in a consent Order, a similar approach will also apply where the Court of Appeal noted in the **Doyle** case:

25. The approach to interpreting a court order was summarised in Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd [2017] EWCA Civ 1525 by Flaux LJ (with whom Gross and Lewison LJJ agreed), drawing in particular on the judgment of Lord Clarke of Stone-cum-Ebony JSC in the Supreme Court in JSC BTA Bank v Ablyazov (No. 10) [2015] 1WLR 4754. Whilst Flaux LJ was considering the interpretation of an injunction, the following general approach to court orders was identified at [41(3)]:

"The words of the Order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context and with regard to the object of the Order."

Route 3: What is included/excluded from the fixed costs

30. In addition, although the detail of the rules remains unknown, there can be clear issues as to what is included/excluded from the scope of fixed costs by reference to current problems: medical agency fees, and interpreters fees being a couple of examples.

31. The inclusion or otherwise of medical agency fees within the fixed costs regime continues to be a particular source of dispute in the lower courts, whether by reason of an apparent distinction between entitlement to such fees on medical records in EL/PL claims and RTA claims, or on medical reports simpliciter. With no binding authority on the point, such disputes are set to continue.

32. Fees for interpreters are set to be addressed in the context of "limited exceptions…for specific vulnerabilities", although it remains unclear whether this will be effected through the allowance of particular disbursements or as part of the additional costs we refer to below.

Route 4: Part 36 offers

33. It should be noted that the current position that applies at trial is that a claimant who beats their own part 36 offer, is entitled to an award of indemnity costs for the time spent after the expiry of the relevant period. That can mean a hybrid award of fixed costs/indemnity costs during the currency of a case.

34. The potential to be awarded indemnity costs will be swept away and replaced with a fixed percentage uplift on the fixed recoverable costs. The 2021 paper notes:

5.8 Part 36 offers: The Government will implement an uplift of 35% of FRC; this would apply to the stage during which and those after the relevant period under a Part 36 offer expires.
35. It follows that the finetuning of a case and its offers can have a benefit: the benefit will be muted because, so few cases go to trial.

36. This also begs the question – what of a defendant's costs? How will the proposed uplift fit with the existing CPR 45.29F(2); will the Defendant also be entitled to an uplift, or is this a Claimant-only benefit?

Route 5: Unreasonable behaviour during litigation

37. A further exception which has the potential to create a fair amount of satellite litigation, is that a party can apply for an uplift on their fixed recoverable costs when there has been unreasonable behaviour by the opponent to litigation. This can be 50% on the fixed recoverable costs.

5.9 Unreasonable behaviour: We have concluded that the appropriate penalty for unreasonable behaviour during litigation is a percentage uplift on FRC of 50%.

38. What however will constitute unreasonable behaviour? There is no ready answer. The consultation document from 2019 itself simply notes:

8.8 The courts can order that the costs be assessed on the indemnity basis (rather than the standard basis) where unreasonable litigation conduct on the part of one party causes the other party to incur additional expense. Sir Rupert recommends that where costs are subject to FRC, the court should be able to either award a fixed percentage uplift on costs (as for Part 36 offers, above), or to make an order for indemnity costs in cases of unreasonable litigation conduct. In exercising this power, the court should have regard to the seriousness of the conduct in question.

39. It may be that reference in the paper to **Dammermann v Lanyon Bowdler [2017] EWCA Civ 269** provides some insight. This was a case addressing "unreasonable behaviour" within the meaning of CPR 27.14(2)(g) in which reference was made to the well-known test in **Ridehalgh v Horsfield [1994] Ch 205**, but it remains to be seen whether the test will indeed be whether the conduct "permitted of a reasonable explanation."

Route 6: Exceptional circumstances

40. Rule 45.29J allows a party to apply for an award of costs, greater than fixed costs in exceptional circumstances. Practically however, most county court judges will not countenance such an award: circumstances in which awards are

made, have included cases where fraud/fundamental dishonesty has been wrongly alleged. However, generally, fixed costs seem to be reserved for the Angels, rather than for litigants.

41. The leading case is probably **Ferri v Gill [2019] EWHC 952**, which establishes that the "exceptional circumstances" test must be applied strictly, and that it is wrong to set a low bar for exceptionality. Secondly, that in considering whether a case is exceptional, the Court must compare it to the whole basket of cases covered by section IIIA of CPR 45, which includes cases that have exited the Portal because of value or complexity.

42. This case is arguably ripe for reconsideration: it might be thought that it is unduly restrictive in its approach, as it applies a gloss to what should be unvarnished words of a rule, applied on a case-by-case basis.

Route 7: Vulnerability

43. In 2020, the Civil Justice Council published a report called Vulnerable Witnesses and Parties Civil Justice Council Report which set out how the civil courts needed to move to ensure that vulnerable parties and witnesses in civil proceedings become fully engaged with the process. This report has already partially been implemented, by some reforms to the Civil Procedure Rules. The reforms apply both to case management provisions, and to costs.

44. The law has moved through amendment to the Civil Procedure Rules 1998 to specifically provide for adjustments to case management processes and additional costs recovery in the context of a vulnerable party. A case involving a vulnerable party is one contemplated by rule 1.6 CPR and Practice Direction 1A, which came into force on 6th April 2021.

45. From time to time, a party who can be described as "vulnerable" will make a claim and will find that her entitlement to costs is fixed under part 45 CPR, notwithstanding the fact that more work will need to be undertaken on her claim, or her disbursements may be higher, because for example, a medical expert may have had to make a home visit to carry out a medical examination as noted above. How is this dealt with currently?

46. No amendment was made to the rules on fixed costs under part 45 CPR: because no such amendment was necessary, as the court already has power under rule 45.29J to make an increased allowance in fixed costs cases, where additional costs are incurred by reason of the vulnerability of a witness or party.

47. Thus, the Civil Justice Council report which presaged the amendments, Vulnerable Witnesses and Parties within Civil Proceedings expressly considered the application of rule 45.29J in this context and stated:

In respect of cases falling within Sections II and IIIA (claims which no longer continue under the RTA or EL/PL pre-action protocols and claims to which the pre-action for the resolution of package claims applies), CPR 45.13 and CPR r.45.29J respectively, provide that if a court considers that there are exceptional circumstances making it appropriate to do so, it will consider a claim for an amount of costs which is greater than the fixed costs referred to in CPR 45.11 or CPR 45.29B to 45.29H.However, there is no similar provision in Section III (pre-action protocols for low value personal injury claims in road traffic accidents, employers' liability and public liability, or in respect of fast track trial costs (the only permitted increase being an additional amount in respect of improper behaviour under CPR 45.39(8)).

The Council believes that the Ministry of Justice should consider whether there should be a provision within every fixed or scale costs regime for a discretion to consider a claim for an amount of costs which is greater than the fixed recoverable costs to cater for the consequences of specific, identified measures which have been necessary to cater for vulnerability.

48. Although the requirement of exceptionality is a high bar, cases involving vulnerable parties will necessarily be examples of the exception, rather than the rule, will usually require a higher expenditure in costs and for a vulnerable party to obtain access to justice will warrant the exercise of the discretion in a vulnerable claimant's favour. However, it should be noted that there is a requirement to exceed a margin of 20% on fixed costs, for the court to "tinker" with costs entitlements.

49. The consultation paper proposes to expand this approach to apply more generally in relation to the new expanded regime of fixed recoverable costs by developing the new rules accordingly. This aspect of the proposed rule changes on fixed recoverable costs is to be welcomed as it deals with the scenario of ensuring that where costs are necessarily greater than the prescribed figures, by reason of the fact that someone is vulnerable, then a solicitor will not be held to the prescribed figures, but can ask for an additional amount of costs to reflect the additional work they have done, by reason of someone's vulnerable status.

50. The possibility envisaged is that a 25% uplift on FRC will be permitted on judicial certification in cases brought by those who "[have] difficulty in giving instructions" as the result of verified mental impairment. The spectre of such cases being allocated to the wrong band by reason of apparent complexity due to these issues could be dealt with by addressing the point in the DQ.

51. It should also be noted that, in the context of the present regime, vulnerability can give rise its own escape in circumstances in which the claim is brought *"for damages in relation to harm, abuse or neglect of or by children or vulnerable adults"* (para 4.3(8) of the EL/PL Protocol). The category of claims that this exception covers is perhaps wider than first thought, and the definition of "harm" (which is to be distinguished from personal injury) is one with which Courts continue to wrestle.

Conclusion

52. Fixed costs are probably here for a legal generation. They will probably expand in scope and application as that appears to be the direction of travel. Certainly, unless there is a change of government and a change of direction in the Ministry of Justice, they are seen as a solution. But is there really a problem that requires the rollout of fixed costs to this extent, or will more problems simply turn up, through e.g., an increase in the number of challenges to solicitors bills and deductions from monies recovered?