The Response of Cobden House Chambers to the Fixed Recoverable Costs Consultation Paper 'Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's Proposals'

Chapter 3: The Fast Track

1. Given the Government's intention to extend FRC to fast track cases, do you agree with these proposals as set out? We seek your views, including any alternatives, on:

(i) the proposals for allocation of cases to Bands (including package holiday sickness);

We largely agree with the proposals for the allocation of cases to bands.

However, cases that are currently excluded from the low value pre-action protocols and the existing FRC regime should continue to be excluded from the extended regime. This is because the excluded categories of cases often involve more work for litigators so their inclusion would result in lawyers in these cases being under remunerated. For example where the client is a protected party a litigation friend needs to be appointed and damages need to be approved. More time and effort also needs to be spent ensuring the claimant and/or the litigation friend understands the proceedings and is able to fully engage with the process. Any shortfall in remuneration for undertaking such additional work will act as a deterrent to litigators from undertaking such cases and therefore decrease access to justice for certain classes of individual.

Package holiday sickness claims should be allocated to band 3. The majority of these claims arise from illness overseas, and involve extensive disclosure, complex legal argument, and technical causation disputes. They are not comparable to road traffic claims in terms of difficulty and workload.

(ii) the proposals for multiple claims arising from the same cause of action;

A 10% uplift on costs is insufficient to remunerate litigators for the increased work involved for additional claimants. The injuries sustained will be unique to the individual and require the separate consideration of causation and quantum. Furthermore experts will need to be instructed, disclosure given, witness statements (on liability and quantum) drafted, instructions taken, and advice given all on a separate individual basis. 10% is insufficient to cover all of these additional tasks. We are concerned that limiting additional costs to 10% would act as a deterrent to litigators to act on behalf of multiple claimants or result in delays in pursuing multiple claims arising out of the same cause of action.

We suggest that the FRC for each additional claimant should be set at 50% of that of the principal claimant to accurately reflect the work involved and maintain access to justice.

(iii) whether, and how, the rules should be fortified to ensure that (a) unnecessary challenges are avoided, and (b) cases stay within the FRC regime where appropriate; and

We agree that inappropriate challenges to allocation should be discouraged. That being said, we consider the current rules provide sufficient guidance to the judiciary in the use of their discretion to decide appropriate allocation. The court must retain a residual discretion to determine allocation both on an application by a party and on its own initiative. We do not consider that overly stringent or determinative rules are necessary or appropriate.

Allocation should be undertaken by a judge and not as an administrative exercise by a court officer.

Inappropriate and unsuccessful challenges to allocation which result in a hearing generally already result in a cost penalty ordered against the unsuccessful party. We agree with this penalty to discourage frivolous challenges. However, if there were multiple reasons for listing the hearing then no penalty ought to be incurred. Unopposed allocation challenges should not

attract a penalty, regardless of whether they are successful. If an allocation challenge is successfully made and the opposing party unreasonably opposed the challenge then the penalty ought to apply to the unsuccessful opposing party.

(iv) Part 36 offers and unreasonable litigation conduct (including, but not limited to, the proposals for an uplift on FRC (35% for the purposes of Part 36, or an unlimited uplift on FRC or indemnity costs for unreasonable litigation conduct), and how to incentivise early settlement.

We support the introduction of an uplift on FRC of 35% where an offer to settle is not beaten by the other party at trial. However, further clarification is required in respect of the proposal. Would this uplift apply to all FRC including counsel's fees? We suggest it should to act as an incentive to settle.

Further, would this uplift apply to liability only offers? We suggest it should. Liability is often the more contentious issue at trial, particularly on the fast track. If liability can be settled quantum can more readily be agreed without the need for a court hearing, as is demonstrated by the fact that quantum is often agreed between counsel at the door of court subject to liability, or at a brief disposal hearing. The uplift should apply to such offers to ensure proper consideration by parties of all settlement negotiations unless, in accordance with current rules, the court considers it unjust to impose the cost consequences.

We suggest that a successful party should still be entitled to penalty interest in accordance with the current Part 36 rules as the measures are designed to be punitive.

We believe that indemnity costs should remain in cases of unreasonable litigation conduct. There is a difference between failing to accept a Part 36 offer due to a reasonable belief in the prospects of a case and actively behaving unreasonably during the course of litigation. A set uplift would not allow consideration of the seriousness of the conduct in question. Indemnity costs allows the court to tailor the punitive measures to fit the conduct.

We take the opportunity to call for the re-introduction of ring-fencing of counsel's fees under the FRC regime. When FRC were first introduced it was expected that counsel would still be instructed throughout the course of litigation and paid from solicitors profit costs. Not only does this create a source for conflict between solicitors and counsel, but practical experience shows this is often not the case with counsel excluded from FRC cases until trial, notably the only ring fenced fee within the FRC regime. It is a predictable consequence of limiting profit costs that specialist work is being carried out in-house by solicitors. This may be appropriate for larger firms of litigators who have specialists available to, by way of example, carry out drafting work or assess quantum. However, in smaller outfits the lack of specialist input can disadvantage a litigant in the pursuit of their case. In personal injury, the failure to ring fence counsel's fees puts claimants on an unequal footing to defendants. Defendants, who are funded by the insurance industry, are able to engage counsel at earlier stages as they are not reliant on the FRC regime. This is not an option for many claimants funded by way of conditional fee agreements under the FRC regime.

We firmly believe that the early involvement of counsel assists the preparation and presentation of cases, and thereby increases the prospect of successful settlement negotiations.

Chapter 4: Noise Induced Hearing Loss

2. Given the Government's intention to extend FRC to NIHL cases, do you agree with the proposals as set out? We seek your views, including on alternatives, on:

(i) the new pre-litigation process and the contents and clarity of the draft letters of claim (and accompaniments) and response

We agree with the proposed contents of the letters of claim and response.

We also agree with the proposed accompaniments for the letter of claim save for the schedule of employment from HM Revenue and Customs ('HMRC'). It often takes up to 12 months from the date of request for HMRC to provide a schedule of employment. Lawyers cannot be expected to wait for this document to be provided before sending the letter of claim as this would significantly delay, and in some cases prevent, compliance with the pre-action protocol. Accordingly all parties would be prejudiced by the requirement for a schedule of employment

to accompany the letter of claim. We suggest that the rules should provide that a schedule of employment is provided as soon as reasonably practicable after the sending of the letter of claim.

(ii) the contents of the proposed standard directions, and the listing of separate preliminary trials

We agree that standard directions should generally be used for NIHL cases. These should mirror the current standard fast track directions with the inclusion of provisions for the instruction of a single joint acoustic expert.

We agree that there should be tighter controls on listing NIHL cases for preliminary issue trials on limitation. NIHL claims are generally of low value. In the majority of cases preliminary issue trials are unnecessary and disproportionate as all issues can be justly dealt with in one day.

We disagree with the CJC's proposal for how to determine if there should be a preliminary issue trial on limitation. Defendants will be able to establish a prima facie case for a preliminary issue trial in the vast majority of cases as NIHL claims often concern historical exposure. Thus a prima facie case would be made out merely by the fact that it has been several years since the Claimant was last exposed to noise in excess of the prescribed thresholds. We suggest narrowing the criteria further by requiring a defendant to provide documentary evidence in support of any request for a trial on limitation. This could be with reference to entries in a claimant's GP records or audiograms/hearing tests contained within a claimant's occupational health records.

We also suggest that if a defendant insists on a preliminary issue trial on limitation and loses, the costs of this trial should be assessed on a summary basis and payable within 14 days of the trial, and not be ordered as costs in the case.

In respect of the proposed FRC regime, we suggest that counsel should always be a separately recoverable disbursement at all stages of litigation provided their involvement was reasonable.

We also suggest that the current proposals provide insufficient remuneration for lawyers in multi-defendant cases. The current proposals provide (at the maximum level) for £1,537 per each additional defendant. Each defendant adds a significant amount of work that would not be covered by this sum. Therefore multi-defendant cases would either be less well prepared or not taken on by solicitors. This would restrict the access to justice of a claimant with multiple potential or actual defendants.

Clear guidance will be required on the costs position where a claimant initially pursues multiple defendants, because the ultimately liable defendant(s) failed to admit its/their liability pre-issue, and then only proceeds to trial or settlement against a sub-set of the original defendants. We suggest that the costs provisions in respect of the initial number of defendants ought to apply at the conclusion of a successful action even if by the conclusion of the litigation a lower costs figure would be indicated.

Chapter 5: 'Intermediate' Cases

3. Given the Government's intention to extend FRC to intermediate cases, do you agree with the proposals as set out? We seek your views, including any alternatives, on:

(i) the proposed extension of the fast track to cover intermediate cases;

We oppose the extension.

CPR 28.2(4) currently provides that the standard period between directions being given and trial should be no more than 30 weeks on the fast track. It is unclear if, and to what extent, a standardised timetable is going to be adopted for intermediate cases. Intermediate cases, by virtue of their higher value and greater complexity, are not suitable for an accelerated timetable. Some of the most simplistic intermediate cases could be disposed of within an accelerated timetable, but the vast majority cannot be and require tailored directions. The propensity of

intermediate cases to have variable and/or elongated timetables is such that these cases are unsuitable for any fixed recoverable costs regime.

Furthermore, fast track cases are frequently subject to restrictive directions on expert and/or lay evidence, and disclosure. Such restrictions cannot be adopted for intermediate cases.

Addressing the proposed fixed recoverable costs regime specifically, our response is as follows:

- The regime provides insufficient remuneration for lawyers. If this regime is imposed it will no longer be profitable to properly litigate intermediate cases. Incurring the extra time and effort necessary to deal with the complex issues or extensive documentation that arise in many of these cases will no longer be commercially viable. Accordingly this extra work will no longer be undertaken. This will have the effect of reducing the quality of the preparation of cases brought before the courts and/or limiting the access to justice for people with complex or document heavy cases.
- This will result in more bulk and de-personalised litigation where instructions are taken from parties remotely. This disadvantages people with less access to modern technology or with communicative impairments.
- Small and medium size firms will be disadvantaged and move away from litigating these types of claim. Larger firms are likely to cope better as they are able to spread their overhead costs over a broader area as they have more cases, but this is not an option for smaller and/or high street firms. This is bad for the legal market as a whole.
- All of counsel's fees (for drafting, conferences, advising, and advocacy) should be ring-fenced and awarded separately to the profit costs paid to solicitors. Otherwise counsel will no longer be instructed until the eve of trial, as is now common in fast track cases. This would have a detrimental effect on litigants' access to justice and on the quality of cases brought before the courts. The early involvement of counsel can also encourage settlement thereby saving court time and resources.
- The current proposals only provide that one document drafted by counsel, be it an advice or a statement of case, is recoverable at the issue stage of a case. They also only provide for one conference or written advice during the course of a case. Intermediate cases are likely to require several documents drafted by specialists, multiple conferences (with the client and with experts), and multiple advices (on liability,

causation, quantum, and settlement). Each item on counsel's fee note should be separately recoverable provided it was reasonably incurred.

- Skeleton arguments should be a separately recoverable disbursement. A properly prepared and drafted skeleton argument greatly assists a trial judge in determining a claim.
- The brief fees for trials are too low. They are a significant reduction on what is currently assessed as being reasonable for lower value multi-track cases.
- Counsel's fees recoverable for a JSM are too low. They should be closer to, whilst not matching or exceeding, the fees recoverable for a trial.

We object to the proposal that court fees should remain the same. Court fees are often one of the most significant disbursements incurred by litigants. If the proposals are introduced reduced court fees should be introduced to reflect the decrease in work undertaken by the court.

<u>(ii) the proposed criteria for allocation as an intermediate case and whether greater certainty is required as to the scope of the track;</u>

We believe that the proposed criteria for allocation as an intermediate case, if such a system is to be adopted, are too imprecise.

A case should not be allocated as an intermediate case if it has two or more defendants advancing separate defences. The increased workload in a multi-defendant higher value case cannot be adequately dealt with within an accelerated timetable. A multi-claimant case could be dealt with as an intermediate case provided all of the claimants' cases individually satisfy the requirements of intermediate cases and all the claimants have the capacity to litigate. Appropriate remuneration, in terms of additional costs being applicable in respect of each additional claimant, would be required. A multi-defendant case where there is only one defence advanced (for example a road traffic case where the insured driver is D1 and the insurer is D2) could also still qualify as an intermediate case.

The difference between a case worth £26,000 and one worth £100,000 is significant. Save for cases at the very bottom of this range, intermediate cases are not suitable for fixed recoverable

costs and/or an accelerated procedure. If FRC for intermediate cases are to be adopted, we suggest that allocation ought to be limited to cases worth up to £50,000.

Similar to the above, there is a significant difference between cases with a likely trial length of one day and those with a likely trial length of three days. A three day trial case is likely to include significant factual and/or legal disputes requiring extensive expert and lay evidence, and thus is not suitable for allocation as an intermediate case. Only one or two day trial cases ought to be allocated as intermediate cases.

Cases requiring oral expert evidence from two witnesses from each party are likely to be too complex for allocation as an intermediate case. We would suggest that only cases with oral evidence being called from one expert per party should be allocated as intermediate cases. If oral evidence from experts is required from more than two parties (for example in a case with multiple claimants and/or defendants) then that case should not be allocated as an intermediate case.

Limits on the length of statements of case, expert reports, and witness statements should not be applied. Cases with values greater than £25,000 frequently require lengthy documents. Restrictions would prejudice the parties. Standard disclosure would be acceptable provided the parties retained the right to apply for specific disclosure where appropriate. Restricting the number of applications and the time when such applications are to be made (i.e. to the CMC) would also be unacceptable as it would prejudice the parties; the appropriate remedy for unnecessary or late applications is by way of a costs order.

We agree that cases involving wider factors (for example reputation or public importance) and mesothelioma/asbestos claims should be excluded.

The definition of ‘complex PI’ claims to be excluded from the proposed regime requires clarification with specific guidance.

(iii) how to ensure that cases are correctly allocated, and whether there should be a financial penalty for unsuccessful challenges to allocation;

We agree that if an intermediate case regime is to be introduced then the pre-action protocols ought to be amended to provide that parties should indicate their proposal for allocation in the letter of claim or response. However this proposal should not be viewed as determinative or overly persuasive as it will come very early on in the life of a case. There should be no penalty for a party amending its proposal at the formal allocation stage provided the original proposal was made with a reasonable belief in the value of the claim and in good faith.

Allocation should be undertaken by a judge, and not as an administrative exercise by a court officer.

We agree that if the only reason for an allocation hearing is an opposed allocation challenge, and this is unsuccessful, then the unsuccessful party should incur a costs penalty. We believe this penalty needs to be high enough to discourage frivolous challenges and would suggest £500-£1000. If there were multiple reasons for listing the hearing then no penalty ought to be incurred. Unopposed allocation challenges should not attract a penalty, regardless of whether they are successful. If an allocation challenge is successfully made and the opposing party unreasonably opposed the challenge then the penalty ought to apply to the unsuccessful opposing party.

The court must retain a residual discretion, both on an application by a party and on its own initiative, to re-allocate if the criteria for an intermediate case are no longer met. Such applications for re-allocation would attract the same penalty, and in the same scenarios, as for challenging allocation at the first instance.

(iv) whether the 4-band structure is appropriate, or whether Bands 2 and 3 should be combined, given the closeness of the proposed figures: if you favour combining the bands, we welcome suggestions as to how this should be done; and

We agree that bands two and three in Sir Rupert's proposal ought to be combined. The new bands should be as follows:

- Band one - simple cases worth less than £30,000, where only one issue is in dispute, and where the trial will take a day or less. Causation and quantum should be explicitly stated to be two separate issues, so cases where both are disputed would be unsuitable for this band;
- Band two - the normal band; and
- Band three - for complex and/or lengthy cases.

Specific guidance will be required on whether a case is to be regarded as simple, normal, or complex. It would be overly simplistic to base this purely on valuation.

Band proposals ought to be included in the letter of claim or response. As above, this proposal should not be viewed as determinative or overly persuasive as it will come very early on in the life of a case. There should be no penalty for a party amending its proposal at the formal allocation stage provided the original proposal was made with a reasonable belief in the value of the claim and in good faith.

The court must retain a residual discretion, both on an application by a party and on its own initiative, to re-allocate a case to a different band if the criteria for the current band are no longer met. Such applications for band re-allocation would attract the same penalty, and in the same scenarios, as for challenging allocation at the first instance.

The rules will need to specify what costs apply for the period of a claim prior to re-allocation if it is subsequently re-allocated.

<u>(v) whether greater certainty is required regarding which cases are suitable for each band of intermediate cases.</u>

Specific guidance will be required on what cases will fall within each band. It would be overly simplistic to base this purely on valuation.

The guidance should include consideration of the type of case, the issues in the case, if fraud or dishonesty is implicitly or explicitly alleged, the number of expert disciplines, the number of experts giving oral evidence, the number of lay witnesses, the extent of disclosure, the complexity of the law, and the valuation.

Prepared by Philip Simms and Jennifer Dickinson in conjunction with the Personal Injury Department at Cobden House Chambers.