CHANCERY BAR

# FIXED RECOVERABLE COSTS

## Summary of the Chancery Bar Association's position

1. This document is intended to set out a summary of the Chancery Bar Association's current thinking on Fixed Recoverable Costs (FRC) in advance of the forthcoming seminar which Jackson LJ is holding in London on 13 March.

2. We have attached the response we gave in March 2016 ('the 2016 Response') to the questions posed in relation to FRC by the Bar Council Fixed Fees Working Group last year. This sets out the association's views in some detail.

3. However, to summarise:

    3.1. The 2016 Response did not fully oppose the imposition of a FRC regime and saw some potential benefits in FRC. Bearing in mind the contents of Jackson LJ's Note concerning the FRC seminars dated 12 December 2016, we do not think it is realistic to oppose the introduction of FRC altogether. However, there is a real debate to be had about how and when FRC should apply.

    3.2. In particular, we are concerned:

        3.2.1. That many Chancery matters involve legal and factual issues with significant complexity and can readily be distinguished from cases of similar value which do not have such complexity. We do not support any fixed costs regime which would fix recoverable costs at the same level notwithstanding this. Fixed costs which would be appropriate in the context of a simple case

brought to collect a debt of £250,000 are unlikely to be appropriate in the context of a complex trust dispute worth the same amount of money. Either the FRC regime ought not to apply to such complex Chancery matters at all, or there ought be a mechanism in the system to take account of complexity, which could involve a judge taking the view that a complex case should be excepted from the FRC regime, or applying an uplift to the normal fixed costs. In any event, the FRC banding system ought to take account of complexity as well as value in all cases. The risk of not permitting flexibility is that parties will be forced to incur the extra costs of taking advice on very complex matters but then not be able to recover those costs at the conclusion of the claim, which would be unjust.

3.2.2. The proposals for FRC seem to be predicated on the regime applying to cases under a certain value and on cases being placed into bands of particular values. However, in many Chancery cases it is difficult or impossible to say what the value of the claim is either at all (e.g. a claim to remove a trustee) or at least until the conclusion of the case - e.g. claims for an account or claims under the Inheritance (Provision For Family and Dependants) Act 1975, where there is a wide range of outcomes possible in relation to the provision (if any) to be given to the Claimant. We do not see how an FRC regime can easily apply in these cases on the basis of the current proposals.

3.3. We believe the court will need some oversight over the band in which the claim is to fall. Otherwise, the risk is that claimants will artificially inflate claims in order to fall within a higher band. However, equally we are concerned that an early hearing to decide the applicable band could turn into a protracted debate in the nature of a summary judgment application: e.g. 'this claim for £200,000 has no real prospect of success, so the case turns only on the other claim for £50,000 and so the claim should really be in Band 1, not Band 4.' This would result in unnecessary

costs. One way of solving this would be to give the court some sort of residual discretion at the end of the case to adjust the band into which the case falls to avoid any injustice.

3.4. We do not think that FRC should do the work of a legal aid fund. Fixed costs should not be set at unrealistically low levels in order to make litigation affordable for those without any funds of their own. Recoverable costs must be set at a level which fairly remunerates lawyers.

3.5. We share the Bar Council's concern to ensure that an FRC regime does not result in parties being more reluctant to use Counsel for both advisory and pleadings work and interim hearings, or even for trials. We believe that the specialist Bar provides a crucial role in Chancery proceedings by ensuring that clients receive appropriate advice at the stage when it can make a difference and that cases are properly prepared. We believe, however, that it is possible for any FRC regime which applies to Chancery proceedings (and perhaps other kinds of proceedings) to be structured so as to encourage, or at least accommodate, the use of Counsel, for example by including separate fixed fees for Counsel (i.e. separate and additional to the fixed fees for solicitors) which give scope for the instruction of Counsel at appropriate stages of the litigation. There is the opportunity for FRC, if structured right, to encourage the use of the junior Bar, given that it will be more cost-effective for juniors to participate in low value cases.

3.6. We did not think that the proposed figures for fixed costs previously identified at the time of the 2016 Response were at all realistic, for the reasons set out at Paragraph 10 onwards of the 2016 Response. We felt that the figures for the trial stage were particularly unrealistic. In our view, there should be a separate matrix of fixed fees for trial, in which the level of fee bears more relation to the length of the trial rather than the amount at stake. The Court will only have fixed a longer trial if more evidence and/or argument is necessary, in which case it is appropriate

that the lawyers are paid to deal with those issues, regardless of the value at stake.

3.7. The association does not have access to any meaningful statistics which would inform the debate about the structure or level of fixed costs, including the maximum value of claims to which the regime should apply. However, there may well be a case as the Bar Council has argued for there to be more assessment of the effect that costs budgeting is having in bringing down costs, and to therefore set the maximum value for which FRC would apply at a figure which is significantly lower than £250,000.

3.8. A fixed cost regime must go hand in hand with the court carefully controlling the work required by the directions it gives and then the scope of compliance with those directions. For example, it would be unjust to require a party to carry out a wide-ranging disclosure exercise where the costs allowed for disclosure are obviously insufficient to enable compliance. Our experience in lower value cases is that the court is not controlling the directions, and their compliance, closely and effectively enough.

3.9. Some thought needs to be given to dealing with the situation in which a party with deep pockets seeks, by other means, to cause the opposing party to incur unwarranted costs, e.g. by writing numerous and lengthy letters. This again shows the value of the court having a residual discretion to allow more than the fixed costs normally claimable.

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