Response of the Chancery Bar Association

To the Questions from the Bar Council Fixed Fees Working Group

The Chancery Bar Association ("ChBA") is one of the longest established Bar Associations and represents the interests of over 1,250 barristers. Its members handle the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales and in cases overseas. It is recognized as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

Section 1 – the Assumptions

1. It is suggested (2.10) that the experience of fixed costs regimes has been satisfactory for both practitioners and litigants. If your SBA has experience of work in a fixed costs area (particularly personal injury and IP Enterprise Court) are you able to comment on this suggestion?

    - *It is understood that the Intellectual Property Bar Association have been sent this Questionnaire and they appear to be best placed to respond to this question in relation to the IPEC.*

    - *Members of the Association do have experience of appearing in fast track consumer credit claims where the costs of the advocate appearing at trial are fixed under r. 45.38. Such claims are highly complex on account of the nature of the statutory regime and defendants often run a large number of technical defences. This can mean that the trial costs which can be awarded to the creditor claimant simply do not reflect the costs which they incur in pursuing the claim. This illustrates the need to ensure that fixed costs are set at a realistic level and that there is flexibility to deal with complexity.*

2. Is (having regard to the experience in your area of practice) the certainty and predictability a fixed costs regime something which litigants desire and litigants desperately need (2.13)?

- *We note that Sir Rupert Jackson said only that "most" litigants desire certainty and predictability and that "some" litigants desperately need it. This is still a generalisation upon which it is difficult to comment meaningfully, but we think it is probably correct that the majority of litigants do wish to have a reliable idea at the outset of a case about the amount of costs they are likely to incur. A fixed costs regime would give them considerably more certainty than the present system.*

- *The principal criticism which can be made about fixed fees is not that they do not promote predictability, but that, by their nature, they treat all cases alike. A fee which is proportionate in the context of a simple case brought to collect a debt of £250,000 may not be proportionate in a complex probate dispute about an estate worth £250,000 (on the assumption that the limits on value would apply to such cases). Chancery matters often involve legal and factual issues with significant complexity. This is true no matter what the value of the claim might be. An issue about proprietary estoppel and constructive trusts, for example, is complicated whether the property concerned is worth £100,000 or £10 million.*

- *Many (but by no means all) litigants are willing and able to afford more expensive specialist representation in order to increase the prospects of succeeding in a potentially complicated matter. In our view, many of those litigants would consider it unfair if the increased costs could not be recovered from the other side in the event of success. In our view, the scheme proposed by Sir Rupert Jackson does not take sufficient account of potential complexity. The New Zealand model, in which differing levels of complexity are taken into account as well as value, better caters for the substantial variations in subject matter and specialism which can occur in Chancery cases Nevertheless, we agree with the principle that, even in a complex case, the recoverable costs ought not to be obviously disproportionate to the amount at stake.*

- *It is difficult to know precisely what was meant by Sir Rupert's comment that some litigants desperately need the certainty of fixed costs. If this was a reference to the increasing number of litigants who are unable to afford legal representation at all, it seems to us that fixed costs cannot be expected to do the work of a legal aid fund. The 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, even for relatively low value claims, otherwise no one will be prepared to offer representation at all.*

3. Sir Rupert Jackson suggests (2.2) that the genesis of the, so called, problem is that the influence of costs shifting and the system of "hourly rate" remuneration the inevitable driver for making the civil justice system exorbitantly expensive.

(1) In your area of practice do you accept the proposition that the system is "exorbitantly expensive"?

(2) If so, what are the causes of this?

- *It is unlikely that any lawyers will agree that the system is exorbitantly expensive in their area of practice. It is nevertheless true that many ordinary individuals cannot afford to litigate and that, for this reason, Sir Rupert is correct that there is a real (not just "so called") problem about access to justice.*

- *The causes of the high expense of litigation seem to us complex and open to debate. It is impossible to speculate about these matters in a way which can be said to represent the views of all, or even a majority of, the members of the Chancery Bar Association, except to make the obvious point that it does not necessarily follow from the high expense involved in litigation that the fees which lawyers are charging are unreasonable. We certainly do not accept that our members are inefficient, let alone that they deliberately spend more time than they need.*

- *Costs shifting is a long-standing feature of our system and the alternatives are equally open to criticism. Since costs shifting will apply to the proposed fixed fee*

system, it does not seem to us to be informative to consider it further.

- *The system of hourly rate remuneration also represents a choice between alternatives, none of which is perfect. It used to be more common for practitioners to charge standard fees for particular tasks, but this system was replaced by hourly rates to preclude the same fee being charged for a task which took much less time in one case than in another. Hourly rates are regarded by many as fairer to clients, who generally understand the principle that a task which takes longer costs more (and vice versa). Fixed costs will swing the pendulum back the other way. This is not necessarily unfair on the client or the lawyer, if there are sufficient safeguards in place: in our view the key is to set the fixed fee at an appropriate level and to build in sufficient flexibility to cater for complexity.*

- *It is worth commenting that our understanding is that under a fixed costs system, the prescribed sum is payable <u>regardless</u> of whether the work done would have been worth that amount if it had been calculated on an hourly rate basis. Although this is not expressly spelt out anywhere, it seems to us that it is implicit in the "swings and roundabouts" concept. We cannot see the utility in a fixed costs system which simply sets maximum recoverable costs, but which still requires there to be a detailed assessment to determine whether a sum lower than the fixed amount should be recovered.*

4. It is suggested that, "We now have enough experience (including that gained from costs budgeting and the existing fixed costs regimes) to devise a coherent scheme of fixed costs for the whole of the fast track and for the lower reaches of the multi-track." Having regard to the experience of costs budgeting (and/or fixed costs if applicable) in your practice area do you accept that a system of fixed costs can safely and fairly be built on the experience of budgeting to date and the existing fixed costs regimes?

- *This is another question which invites speculation and on which the views of the members of the Chancery Bar Association are bound to differ. In our view, the principal difficulties with fixed fees are not that there is insufficient evidence to*

enable appropriate levels to be set, but first the risk that these levels will be set too low to enable lawyers to be properly remunerated and secondly the risk that they will be applied inflexibly, no matter how complex and specialised the case may be.

Section 2 – Scope (Value)

5. What proportion of work in your area of specialism is valued at £250,000 or less and accordingly likely to be caught by the fixed fees if implemented?

- *The Chancery Bar Association does not have, and has no means of obtaining, statistics of this kind. In any event, the answer will vary substantially between different members of the Chancery Bar Association, depending on such matters as seniority and where they practice. The most that can safely be said is that a significant number of members are instructed on cases which would be caught by the proposed fixed fees.*

- *We understand that the Chancellor has collected certain statistics relating to cases issued in the Chancery Division in London and he may be willing to provide them to the Bar Council. We suggest, however, that these statistics would present a somewhat imperfect picture, since a large number of cases conducted by members of the Chancery Bar Association worth less than £250,000 are likely to be issued and tried outside London, or in the County Court.*

6. Do you accept (giving examples or evidence where possible) that the costs in your area can safely and fairly be fixed for cases up to £250,000? If not, do you accept that a fixed costs scheme could be introduced for lower value cases and if so what value do you propose?

- *Again, this is a question about which the members of the Chancery Bar Association are likely to disagree. More junior members may benefit from the fixed fees, if the effect is that work which might normally go to more senior practitioners comes to them instead. There will undoubtedly be a significant number of cases suitable for Chancery counsel worth less than £250,000 where the issues are complex and the*

fixed fees are unrealistically low. Much depends on the level at which the fixed fees are set and the availability of sufficient flexibility in the system to accommodate novelty and complexity. We are unable to say that fixed fees for cases up to £250,000 are necessarily unfair in principle.

7. The working group's provisional view is that it ought to be possible to propose a system of fixed fees for all cases allocated to the fast track (£25,000 or less) but not beyond. The provisional view is to engage with any consultation or big tent with such an approach. Do you have any views or comments on such an approach in principle and/or are you able to comment on the level of fixed fees for fast track cases in your area? We have attached at Annex 1 an initial draft of the figures proposed.

- *For the reasons given above, we do not consider that our membership is likely to have a consistent view about whether the limit for fixed fees ought to be set as low as £25,000.*

- *Fixed fees are, to some extent, equivalent to automatic costs budgeting. In cases worth less than £250,000, judges are likely, in any event, to set costs budgets at a relatively low level. This recognises the need for proportionality, which has much to recommend it. There may be advantages to saving the expense of the budgeting exercise in such cases, provided the fixed rates are not set at unrealistically low levels and there is sufficient flexibility to accommodate any complexities in a particular case.*

Section 3 – Specific Practice Areas

8. Are there any particular features of your practice area which make it particularly suitable or unsuitable for a fixed costs regime?

- *As explained above, many cases conducted by members of the Chancery Bar Association have some degree of legal and factual complexity. There are very few (if any) "standard" claims following a common pattern in this field. This means that it is not a practice area which is particularly suited to a fixed costs regime.*

- *There is considerable difficulty in relation to probate, family provision, proprietary estoppel, and rectification cases in ascertaining their value. Is the value of the estate the guide? Often the value of the claim itself is completely obscure at the outset and may bear no relation to the size of the estate.*

- *It does not, however, follow that it is particularly unsuited to such a regime, provided that there is sufficient flexibility to enable increased costs to be recovered where that is justified.*

9. Would you suggest, having regard to the Balkanisation point, that your practice area should be in one of the areas where an additional percentage should apply (see 5.7 in the lecture). If so, why?

- *We believe that most (if not all) cases requiring Chancery counsel are of sufficient complexity to warrant additional costs. The difficulty is to determine when a case truly merits Chancery expertise and how much the uplift should be. It seems to us that it ought to be possible to devise a system which gives the Court some discretion to determine an appropriate uplift (if any), perhaps subject to a predetermined maximum, on the grounds that the case involves specialist Chancery expertise. A system like that used in New Zealand, where the appropriate level of complexity is determined at an early stage and this then triggers different levels of fees, might cater for both flexibility and certainty.*

Section 4 – The Proposed Figures

10. Please comment on the structure and stages of the grid insofar as they apply to your practice area. When doing so, it would be helpful for you to identify the tasks which counsel are commonly instructed to undertake at each stage of the grid and, if possible, for you to indicate (using a range) the time (hours./mins) such work would usually take.

- *There are probably many different ways of structuring the grid, but the proposed structure and stages (as opposed to level of fees) seem to us workable for Chancery cases, with the exception of the assumption about the length of the trial and the*

omission of any contingent stages for interim applications and the like (which we deal with below).

- *It is impossible to identify tasks which counsel are commonly instructed to undertake in a Chancery case at each stage of the grid. Chancery cases vary widely. Consequently, it is also impossible to indicate the times which different stages usually take. We wonder, therefore, whether there is any merit in seeking to identify a "typical" period of time taken for any particular task, or even whether it makes sense to speak about a "typical" Chancery case. In any event, a fee calculated on an hourly basis is the product of the time taken <u>and</u> the hourly rate, and arguments that particular tasks take more hours to perform than has been allowed for can be countered by arguing that the hourly rate is too high.*

- *It seems to us that the more useful starting point is the <u>total</u> amount of recoverable costs in the bottom line of the grid. Ultimately, it is the overall sum recoverable about which clients are likely to be concerned and the proportionality of which ought to be measured against the total amount at stake (although we, of course, accept that many cases settle before trial). Setting the appropriate total figure is bound to be a question of judgment, balancing the desire to keep costs proportionate against the desire to allow costs to be shifted to the other side in an appropriate case.*

- *Once the total figure is settled, the calculation of the figures for the various stages making up the total becomes a matter of deciding the appropriate proportion of the total for each stage.*

- *Trial length: In the vast majority of cases, the trial is the most expensive element of the claim, by a considerable margin. There is almost always a considerable amount of work involved in the preparation for, and the conduct of, a trial and the amount of work is broadly proportionate to the number of days the trial lasts (or is anticipated to last), rather than to the amount of money at stake. In reality, with effective case management, the length of the trial is likely to be set taking into*

account the amount at stake.

- *The grid is, therefore, defective in providing for a fixed cost for preparation and conduct of a trial lasting <u>up to 5 days</u> (with an uplift of 5% per day thereafter) in <u>all</u> four Bands. For example, it is reasonably unlikely that a trial in a claim for less than £50,000 (Band 1) would last 5 days, but if it were to last that long, costs of £1,900 for preparation and £3,750 for the trial would obviously be inadequate: the length of trial would suggest that there was considerable factual and/or legal complexity. If £7,500 and £18,000 are allowed for preparation and conduct (respectively) of a 5 day trial for a claim in Band 4, it is difficult to understand how a similar length of trial could cost significantly less than this, just because the amount at stake is less.*

- *We suggest that consideration should be given to the preparation of a separate grid for trials (preparation and conduct of the trial itself) which puts more emphasis on the length of the trial and less emphasis on the amount at stake (although some, less significant differentiation between the Bands might still be justified).*

11. Please comment on the figures in the grid at 5.4 of the lecture insofar as they apply to your practice area.

<u>Band 1:</u>

- *The total of £18,750 is unrealistically low, particularly if it is assumed that there will be a trial lasting 5 days. Whilst it is at least possible that a solicitor would be prepared to take on most of the burden of the earlier stages of the proceedings (except, perhaps, statements of case), it is unusual for counsel not to be instructed for a trial in a Chancery matter. It is unrealistic to expect even the most junior Chancery counsel to charge only £1,900 and £3,750 for preparation and conduct of even a short trial, let alone one lasting a week. This is before one considers the time costs of the solicitor involved at the preparation and the trial stages. Some costs will be incurred even if the solicitor does not attend the trial, including in relation to the*

preparation of the trial bundle. In this regard, it is noted that the grid in general does not take account of the extra burden the claimant's legal team may take on either at the CMC stage or in preparing the trial, which it should.

- *It seems to us that the assumption in Band 1 ought to be that the trial will last no more than two days and that figures comparable to those allowed in Band 3 (£5,000 and £11,000) ought to be allowed.*

Band 2:

- *Again the figures for trial preparation and the trial seem low. We take the view that the Band 3 figures are more realistic.*

General comments on the bands

- *The figures for negotiations and ADR seem to us to be very low across the bands, when one considers for example the cost of a mediation. A mediation will often be the best route to solving probate and inheritance disputes, for example, without the expense of a trial, but the parties will need to pay for the costs of a mediator who is a specialist in the field (which may climb if the mediation runs on late), potentially for a venue and for the costs of those representing them. Preparation is required from those representing clients at mediations, including position statements. We are concerned that even the figures for Band 4 are not realistic bearing this in mind, and bearing in mind the need to engage in settlement discussions at other points during the case. The figures that have been chosen would jeopardise the settlement of disputes pre-trial.*

- *There needs to be clarity on what is, and is not, included in each band (the "boundary dispute" point referred to by Sir Rupert in para 5.5). The guidance to precedent H is unclear in places and has made it difficult to compare costs budgets filed by different parties on occasion. That said, it seems to us that this point is of less significance if our understanding is correct that, under a fixed costs system, the fixed sum is recoverable regardless of whether the work would have been worth*

that much if calculated on an hourly rate basis.

- *The figures for disclosure could be very low in a case with a significant quantity of material to deal with. This can be the case, for example, in a proprietary estoppel dispute where the disclosure given may go back over decades (if the representations and detriment are alleged to have taken place over such a period of time). Witness evidence in such a case could also be significant.*

- *The figures for issue and statements of case could be low even in Band 4 where there are complex legal and factual issues necessitating lengthy pleadings.*

- *The grid does not allow for contingent costs as on precedent H – e.g. interim applications. Some allowance should be made for this.*

12. Are you able to provide (or obtain) any evidence to inform a debate about the proposed structure of or level of fixed costs. It is anticipated that evidence will be important in shaping the case. **In particular** can you provide a sample of costs budgets from your practice area (redacted as appropriate to preserve confidentiality) setting out: (i) budget as claimed, (ii) budget as approved/agreed; (iii) whether the party filing the budget is Claimant/Defendant/other, (iv) value of case (by reference to the proposed Bands in the grid tables – Band 1 = 25,000 – 50,000, Band 2 = 50,001, 100,000, Band 3 = £100,001 - £175,000, Band 4 = £175,001 - £250,000).

    - *Whilst we appreciate the importance of evidence, the Chancery Bar Association does not have easy access to such material and any sample runs the risk of being unrepresentative.*

13. In cases valued at up to £250,000 how wide is the range between costs charged (or incurred) in particular cases?

    - *It is very difficult to comment on this without access to meaningful statistics, but we suspect that there could be a significant variation based on the complexity or*

otherwise of the issues at stake.

A. Section 5 – Effect on Lay Clients

14. In your practice area, do you anticipate that the imposition of a fixed costs scheme (at the figures suggested or otherwise) is likely to have a direct effect on access to justice for Lay Clients? If so, why?

- *Yes, but there are potentially positive and negative effects. If lay clients know in advance the amount of costs they will face paying if they lose the case, that will give them a level of certainty which might encourage them to pursue the matter. On the other hand, if the fixed costs claimable from the other side in the event of success are not realistic and do not take account of the complexity of the matter, they may face paying a significant shortfall in the event that they are charged more than the allowable costs by those representing them. This could act as a disincentive for parties to litigate for their rights.*

- *If the effect of introducing a fixed costs scheme is to reduce the cost of litigation generally (at least in those cases to which the scheme applies), then this could improve access to justice. The question is whether the reduction in fees also brings about a reduction in the quality of representation, or results in it being difficult to obtain representation at all. Much depends on the level at which the fees are fixed and it is impossible to know what the effects will be in advance.*

15. Are you able to comment on whether Lay Clients in your practice area are likely to be able to pay the shortfall (if any) between the costs incurred/charged to them and the recoverable fixed costs (assuming these are passed on –see also Section 6 below).

- *This depends entirely on the individual circumstances of the client, which vary widely. However, the point can be made that traditionally litigants have had to expect to pay a substantial shortfall in the event of success where they are awarded costs on a standard basis.*

16. How large do you think this shortfall could be on the figures suggested?

- *Again this depends on the individual case. If any regime implemented does not take sufficient account of the complexity in many Chancery cases, then the shortfall could be substantial.*

17. How might the principle of equality of arms be affected by a fixed costs scheme in your area?

- *It could be beneficially affected. For example, we have seen cases under the costs budgeting regime where one party has been allowed costs which are four times that of the other party on account of instructing city solicitors with significant expertise in the area, with the other party instructing a high street firm. Costs budgeting does not always promote the principle of equality of arms.*

18. Are you able to set out or comment on where the most significant gaps between the costs you now expect to incur and the costs as suggested in the Jackson Grid are?

- *See our comments above.*

B. Section 6 – Effect on Practitioners

19. What effect (if any) do you anticipate a fixed fee scheme (at the levels set out or otherwise) will have on practitioners in your area? When answering this question if there is likely to be a particular effect on the junior bar in your practice area we would be grateful if you would set this out.

- *The imposition of such a regime could encourage use of the very junior bar, but it is very difficult to predict how the market would react. Many Chancery claims are above the value to which the fixed cost regime would apply, and so they would not be affected by this.*

20. The existing fixed costs schemes have been predicated on the basis of a large number of cases with serial participants where cases are predominantly funded by conditional fee

agreements. In these cases, it has been said that the, so called, "roundabouts and swings" can apply (see for example Simon J in *Nizami v Butt* set out at paragraph 9 here http://www.bailii.org/ew/cases/EWCA/Civ/2007/429.html).

(1) Is this "roundabouts and swings" concept applicable to practitioners in your area; is their case load such that the proposed fixed costs will on average provide reasonable remuneration across the full spectrum of cases caught by the proposed fixed costs regime.

- *We do not think that the concept is applicable in the same way as it is in some other practice areas, in which claims tend to have more similarities. The nature of Chancery work is highly variable and unpredictable and some cases require much more work than others.*

(2) If no, what effect will this the imposition of fixed costs have on: (i) individual practitioners (with particular reference to the junior bar); and (ii) lay clients.

- *As stated above, many Chancery claims are worth more than £250,000. To the extent that they are not, there needs to be sufficient flexibility in the system for particularly complex cases. Otherwise, there is a risk that the bar will not be sufficiently rewarded for the work involved or that the lay clients will incur a shortfall as described above.*

21. Are you able to comment on whether practitioners in your area will absorb the fixed fee (ie. limit their fees to the amount recoverable) or pass on the excess to lay clients?

- *This will depend on the attitude of the solicitor and the bargaining power which junior practitioners will have. It is hard to say and is likely to vary from case to case.*

22. The scheme proposed does not distinguish between the fees for solicitors and/or counsel. Please comment on this and its likely effect in your work area. In particular:

(1) What behaviour, if any, is this likely to drive in your practice area?

- *This phenomenon has already been seen in costs budgeting in our experience where the court has been known to fix figures for individual phases based, for example, on only one fee earner (including Counsel) being able to attend a mediation, or only solicitors and not Counsel being involved in particular phases (e.g. disclosure). This may make no difference to Counsel in that Counsel might still be instructed for a mediation without a solicitor attending, or it might mean that instructing Counsel for a particular phase is not realistic should the client wish to stick to the fixed fee.*

- *One area of potential concern relates to the preparation for trial, where it is often important that the solicitor is fully involved as well as the barrister, for example in the preparation of bundles, chronologies, dramatis personae and so on. The fees allowed in the grid for trial preparation do not appear to take this adequately into account.*

(2) If a fixed fee is to be "shared" between solicitor and counsel what effect will this have (if any) on the level of fees capable of being charged by counsel in your SBA?

- *Clearly solicitors might have to use Counsel with more economy than they might otherwise. However, this depends on the level of fixed fees for each phase and the work that is required.*

(3) Is your practice area likely to be affected by solicitors taking tasks which were traditionally performed by Counsel in house? Please provide details if possible.

- *One possibility is that more CMCs would be conducted by solicitors in-house given the limited costs available. Where cases involve complex Chancery issues in which the solicitors concerned do not have full expertise, it may be unlikely that there is any significant change but clearly it is hard to predict the impact of a major change to the costs regime on the market.*

(4) Again, if there is likely to be a particular effect on the junior bar please set this out.

- *If more CMCs were conducted in-house then this would affect the amount of*

advocacy experience which the junior bar obtains, which in our area of practice can already be limited. On the other hand, this might be balanced by the availability of more trial experience for the junior bar. Again, it is difficult to predict how the market will react.

23. Are there any specific changes you would suggest to the structure of the grid to reflect work which has generally been done by Counsel (or solicitor-advocate).

- *The statements of case and hearings normally involve a much greater input from Counsel than the other stages. There might be some merit in splitting out these stages of the proceedings into separate fixed fees for solicitor and counsel, although this might reduce flexibility.*

24. If, in your practice area, these proposals are likely to have a damaging effect on the Bar or parts of it (particularly the junior bar) please set out how this may directly or indirectly affect access to justice.

- *As stated above, fixed costs might mean that members of the very junior bar are instructed in cases in which they would otherwise not be involved, and hence gain experience earlier. To draw a parallel, in Court of Protection proceedings, where there is no fixed costs regime but on assessment the hourly rates of more senior practitioners are unlikely to be allowed, this has resulted in many more junior practitioners being instructed than would otherwise be the case. On the other hand, if more advocacy is taken in-house, that would be to the detriment of the junior bar gaining advocacy experience, which is bad for lay clients.*

C. Section 7 – Review or indexation

25. The lecture suggests that there must be a review mechanism or indexation (5.13):

(1) If a review mechanism is to be implemented, how should such a review mechanism work and what evidence should be provided to the reviewing body?

(2) If indexation to be used, which index should be used and why?

- *A regular review mechanism is essential, particularly in the trial period of any scheme. It is unlikely to be possible to collect (let alone then thoroughly to analyse) detailed statistical data as to how fixed fees are working in practice. As with most reviews of Court rules and procedure, there will need to be a committee involving willing representatives of different categories of users of the justice system: judges, costs judges, barristers, solicitors and (if possible) lay clients. There should be an opportunity for anyone who is not on the committee to make representations for the committee's consideration.*

- *Some form of indexation is obviously required and ought to be taken into account as part of a wider, regular review. We have no strong views as to the index to be used.*

26. Should a review mechanism include a review of whether the fixed costs scheme is having an adverse effect on access to justice or practitioners in particular areas? If so, how would you propose this would work?

- *Yes – this would seem sensible. It does not seem easy to stipulate in advance how the review should proceed other than to ensure that access to justice is on the agenda, and that interested individuals and organisations should be allowed to submit evidence dealing with the point.*

D. Section 8 - Safeguards

27. Are there any particular safeguards which are either required or desirable to run alongside a fixed costs scheme to mitigate any access to justice issues. For example, an extension of legal services commission funding or (as set out by Sir Rupert Jackson in his other recent speech, a CLAF).

- *As stated above, we take the view that there should be flexibility in the regime to allow for particularly complex cases, so that successful litigants do not have to meet*

a significant shortfall on the costs they have incurred as against the costs they can recover.

- *As noted above, the fixed costs regime cannot properly be regarded as an alternative means of funding litigation for those who would not otherwise be able to afford it. An extension of Legal Aid Agency funding (the Legal Services Commission was replaced on 1 April 2013) or the introduction of a contingent legal aid fund would be welcome, but seems to us to be a separate (if connected) issue.*

E. Section 9 – Adverse behaviour or conduct

28. What behaviours or conduct might be driven in your area by a fixed costs scheme?

- *An obvious concern with a fixed costs scheme is that lawyers might be encouraged to take short cuts which are not in the client's interests in order to generate income for the least amount of effort. An obvious example would be to keep pre-action correspondence to the bare minimum whilst still claiming the full fixed fee. We do not believe that any members of the Chancery Bar Association would be likely to take this approach, but the concern is applicable to all lawyers involved in litigation.*

- *In our view, this is principally a professional conduct issue to be dealt with by the regulators. There might, however, be a need for a provision in the rules enabling the fee for a particular stage to be disallowed if the work done is de minimis, or if the work has been started before that stage would normally be reached in order to be able to charge the full fixed fee.*

F. Section 9 – Rules applicable to a fixed costs scheme

29. Which consequential changes to Court Rules would be necessary (or desirable) in a fixed costs scheme. In particular which rules are necessary (or desirable) to:-

(1) Ensure equality of arms;

(2) Avoid tactical running up of costs by a party with deep pockets;

(3) Penalise or disincentivise adverse conduct.

- *A fixed costs regime would need to go hand in hand with the court carefully controlling the scope of compliance required with 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.*

- *There does not currently seem to be any mechanism for dealing with interim applications, unless it is intended that these should fall wholly outside the fixed costs regime and be dealt with by summary assessment.*

- *The Court would also need to control the scope and number of any interim applications. For example, the Court should have a discretion to address repeated applications for specific disclosure by a party with deep pockets by ordering that the costs of compliance can be added to the fixed costs recoverable if the impecunious party is ultimately successful.*

- *Similarly, it is necessary to deal 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.*

30. How should Part 36 (or other offers to settle which are bettered) be dealt with in a fixed costs scheme. In particular:

(1) Should the bettering of an offer automatically take the case out of fixed costs?

- *Sir Rupert Jackson's talk would imply that it should, at least after the expiry of the relevant period, given that the fixed costs regime should not apply where indemnity costs are awarded (and see our comments on indemnity costs below).*

(2) How should costs be assessed on the indemnity basis (or some other basis which sought to penalise failure to settle or conduct issues) – should this be back to a

traditional hourly rate x time basis or should it be some form of uplift.

- *An indemnity costs award might produce disproportionately different outcomes to fixed costs if costs were assessed on a traditional hourly rate x time basis and the party concerned had spent much more than the allowed figures, and this could result in parties making more frequent and time-consuming applications for indemnity costs.*

- *Furthermore, if indemnity costs were to be calculated on the traditional basis, there would need to be much more detailed record keeping (involving further costs) and, more importantly, an expensive detailed assessment process.*

- *For these reasons, we suggest an uplift would be more appropriate.*

G. Section 10 – Determining value

31. The current Jackson Grid suggests different Bands of fees which apply depending on value of the claim but does not specify how that value is calculated. There are a number of possible options here, each with consequences:

(1) The Band is based on the pleaded sum;

(2) The Band is fixed at the start of the case (or on/shortly after issue, or at allocation) based on agreement or assessment by the Court;

(3) The Band is based on the sum recovered.

- *See the response to the next question.*

32. Are you able to set out your preferred approach (with reasons) having regard to the consequences of each approach including:-

(1) Certainty of being able to advise Lay Clients if the Band is fixed up front/lack of certainty of the Band is fixed at the end.

(2) Being able to plan the expenditure for the litigation.

(3) Effect on practitioners (particularly if it is felt, see questions above, that practitioners will be limited to the fixed costs and clients will be unable or unwilling to pay the shortfall).

(4) Conduct or behaviour (eg. inflating pleaded value, satellite litigation around the margins).

(5) Any other factors

- *This is where, in our view, the biggest problem exists with the proposal overall. In some of the cases our members are involved with, it is particularly difficult to know until the end of the action what the value of the claim is likely to be. Examples are claims under the Inheritance (Provision for Family and Dependants) Act 1975 ('1975 Act'), proprietary estoppel claims (where relief is in the discretion of the court) and claims for an account where the amount of money missing might be unclear. In many other claims – e.g. for the removal of trustees – no monetary sum might ever be awarded. In some cases the relief sought might include both a claim for money and a claim for other relief which is difficult to quantify. It is hard to see how the banding system could apply to such cases.*

- *We believe that the proposals very much proceed on the basis of relatively simple claims for money, when in our area of practice this is often not the sort of claim being made. Either Chancery claims of the sort we mention above need to be excluded from the proposals (so that only claims where there is a solely a pleaded claim for money are included) or the banded system needs to be revisited.*

- *Where money claims are concerned, it would seem to make sense to set the band at the start of the proceedings, otherwise (a) parties will not know how much they can spend and (b) the stated aim of improving access to justice will not be achieved. On the other hand, if the band is set purely by reference to the sum claimed, the parties will be encouraged to include as many claims as possible for as much as possible,*

even if the prospects of success are slight, in order to maximise costs recovery.

- *It is likely, therefore, that the court will need some oversight of the band into which the claim should fall. Whilst option (2) might be an appropriate way of dealing with this issue, we are concerned that an early hearing to assess 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 the claim should really be in Band 1, not Band 4". Such a dispute at an early stage would tend to increase costs, rather than reduce them and could result in significant unfairness if the claim for £200,000 ultimately succeeds.*

- *We suggest, therefore, that the Court must have some residual discretion at the end of the case to adjust the Band into which the case falls to avoid any injustice.*

33. Should claims which include an element of non-monetary relief be including in the proposed fixed costs scheme? If so, how are such claims to be allocated to a Band.

- *See our comments above. We do not think there is any simple way of deciding whether such claims should be within the fixed costs system given the current banding proposals, or what band they should be allocated to. The only obvious answer at the moment is that they should be excluded.*

Andrew Twigger QC & Will East

3rd March 2016