

PAPER FOR FIXED RECOVERABLE COSTS REVIEW SEMINAR

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ANDREW WALKER QC

VICE-CHAIRMAN, BAR COUNCIL OF ENGLAND AND WALES

I am grateful to Sir Rupert for the opportunity to speak to him and to you this afternoon.

I have been invited in my capacity as Vice-Chairman of the Bar Council, and my comments will largely adopt the Bar Council's perspective, although I hope you and the Bar will forgive me if I add a few thoughts of my own.

The Bar Council's perspective has been set out in a very detailed paper that our working group has submitted to Sir Rupert, drawing on responses to an earlier survey of a large number of organisations representing the Bar. That paper is publically available on the Bar Council website, and I could not even begin to address all of the issues that it raises, and I am sure that Sir Rupert has them well in mind.

In deciding what to cover in just a few minutes this afternoon, I am of course very conscious of the role of the Bar Council to represent the whole of the Bar.

Some parts of the Bar, such as the PI and Clin. Neg. Bar, have a strong and largely uniform perspective on Sir Rupert's proposals, informed by a great deal of experience of the effects of a range of costs reforms, including fixed recoverable costs ("FRC"), in their field. Much has been said, and very effectively, on their behalf.

In other areas of practice, it is fair to say that there is a wider range of views, and greater uncertainty about the potential impact of FRC. Nevertheless my impression is that a strong majority of views oppose the extension of FRC into the Multi-Track; and that although there is a recognition that FRC will be extended into all or most areas in the Fast Track, this is not without misgivings. Some of these practitioners already have experience of a range of regimes in which there is no costs shifting at all, such as in the First-tier Tribunal, so although many are not used to FRC regimes, it cannot be said that their views are simply uninformed by personal experience.

I propose to use my short slot this afternoon to take a step back from judicial review and to focus on five more general topics:

- 1) The position adopted by the Bar Council
- 2) The nature of a FRC regime
- 3) Evidence, and unintended adverse consequences
- 4) The suggested 'Intermediate' track
- 5) The treatment of counsel's fees.

Introduction

Before turning to those five topics, I want first of all to identify the main benefit which is anticipated from a FRC regime.

Fixed costs are not an end in themselves: they are a means to an end. The end in question is access to justice.

According to the Joint Announcement (of the LC, LCJ, and Senior President of Tribunals), and to Sir Rupert's terms of reference, FRC have become the access to justice method of choice because they are seen as providing three benefits over the current system: "transparency", "certainty" and "[proportionality] to the value of the claim". Is that right?

No-one likes costs budgeting, but it is not going away, other than in the direction of FRC. Just because we do not like it does not mean that it is not effective and does not mean that it will not become more efficient as we gain in experience. So I start from the position that, in order to reach a judgment about whether and how far to extend a FRC regime, it is necessary to ask what that would give us that budgeting does not.

Budgeting provides transparency at a very early stage. Solicitors' own costs estimates to their clients both before and at the outset of litigation also do so, or certainly should do so.

Budgeting also requires the costs to be proportionate. This is to be decided by reference to the criteria set out in the rules, which rightly involve more than just the amount or value in dispute. Sir Rupert's approach to proportionality in relation to FRC is based on the same criteria, but he intends that there should be a fixed starting point based on the amount or value

in dispute, with fixed uplifts (and perhaps limited escape routes) to deal with the other criteria of complexity, the conduct of the other side, and any wider factors such as reputation or public importance.

Both regimes require proportionality, based on the same criteria, and the difference is only in the degree to which this is set by a judge and by reference to the particular circumstances of each case.

So, in terms of the three criteria identified, the real benefit of FRC can only be if there is an access to justice advantage flowing from trading off a decision about proportionality which is based on the circumstances of individual cases, against providing a greater degree of certainty about the liability for the other side's costs (and avoiding a costs budgeting exercise). I say "greater" because the degree of certainty will depend in how the regime is structured.

I have no difficulty in agreeing with Sir Rupert that uncertainty about liability for the other side's costs may inhibit access to justice, and that costs shifting may also inhibit access to justice. But as I think Sir Rupert also recognises, the opposite of both is also true. A fixed cost regime may itself inhibit access to justice, and costs shifting may promote it. As Sir Rupert has rightly said, he has to take account of conflicting considerations. That comment may reflect his terms of reference, but I would put it rather higher than that: these conflicting arguments go to the very heart of the question whether there should be a FRC regime and, if so, in what circumstances; and that depends on how you see the trade off in differing situations. It also highlights the important point that we are talking about trying to influence human behaviour, a point to which I shall return.

The Bar Council's position in summary

The Bar Council is on record as accepting that the time has come to extend FRC to other types of case within the Fast Track, beyond those to which such a scheme currently applies.

It would be wrong to take too much from this. Largely, this is an acceptance of the reality of Sir Rupert's review and of his terms of reference. It appears to have been decided already that the disincentive to claimants – and to some defendants – flowing from the uncertainty about their potential costs liability to the other side is the deciding factor, at least in lower value

cases. The questions left open in Sir Rupert's terms of reference are only how widely this should apply, and how it should be structured.

In accepting horizontal extension, we have made four things clear:

- 1) The extension of FRC into other areas must accommodate the complexities and difficulties inherent in all of the areas of civil litigation in which it would apply. This will be no easy task, and needs to take account of more than just the amount or value in issue.
- 2) There must be proper provision for allocation of appropriate cases to the multi-track, and a sensible application of those provisions. This must be more than an escape clause in exceptional cases; it needs to be one that can be operated where there are unusual features, where there is a degree of real complexity, or where the case is for some other reason not the type of straight forward case for which the Fast Track is designed. That escape route also needs to exist where there is a real risk of inequality of arms, or where there are vulnerable clients.
- 3) There must be scope for the court to order costs recovery in excess of the fixed amounts where it is satisfied that it is necessary to do so in the interests of justice. Nothing short of this will be a sufficient remedy for oppressive conduct by litigants.
- 4) The fixed amounts must be sufficiently remunerative to minimise the adverse impact on access to justice. Otherwise the fixed rates will be irrelevant, as no professional lawyer will be prepared or able to afford to act at those rates.

As those points highlight, there is a balance to be struck in Fast Track cases. So long as the rates are right, the balance between competing access to justice considerations in cases that ought to proceed in the Fast Track could properly be struck by fixing the recoverable costs in an appropriate way.

But we oppose an extension into the Multi-Track, because we do not accept that the balance should be struck in the same way in Multi-Track cases.

There are many reasons for opposing extension to the Multi-Track, and I do not propose to try to outline them all now. I propose simply to identify some of the features of such a regime which makes it highly problematical in Multi-Track cases; problematical in ways that could lead to significant adverse impacts on access to justice.

The nature of a FRC regime

I shall limit myself to five issues relating to FRC in areas other than PI, and even more so in Multi-Track cases:

- 1) Such a regime inevitably either treats all cases the same, or requires them to be placed into a very broad, standardised matrix. Sir Rupert is opposed to what he calls 'Balkanisation' – the application of different matrices to different types of case – but I was pleased to see him accept that there is force in the point that one size does not fit all. But if one size does not fit all, then the question also ought to arise of what the right approach is to each type of case; and I would urge Sir Rupert to ask that question without assuming that the answer will necessarily be some sort of FRC regime.
- 2) The amount or value in issue is proposed as being a key criterion of any regime, as it is already for the proportionality test. But we all know that there may be little relationship between complexity and value in any particular case, and where a case is not such as to fall within the current criteria for allocating it to the Fast Track, it is questionable whether a standardised approach is the one most likely to secure access to justice.
- 3) Just as importantly, I do not know how many of you remember the High Court and County Courts Jurisdiction Order 1991, but I remember well from my early years as a junior chancery practitioner finding it very difficult to identify the "value" of an action in many Chancery cases. It is difficult to see a ready solution to this. Even if property rights are in dispute, their value may be irrelevant to the issues in the action; so even if the costs are to be proportionate to the value in issue, that value may be very difficult to ascertain. In some cases, there may be no obvious value; and even where value can be identified, I am sure that no-one is suggesting that we should be requiring parties

to provide irrelevant valuation evidence simply in order to categorise their claims for costs purposes.

- 4) There are inherent tensions within a FRC regime. It is inevitable that the level of costs to be fixed will not be a level which reflects the reasonable and proportionate costs of litigating the most expensive type of case that falls within the regime. As a result, there are essentially two approaches from which we can expect a range of impacts:
 - a) The level may be such that is economic only for the most straight forward cases within the regime. If so, then that may have three effects so far as parties' own costs are concerned:
 - i) There will be some clients who are unable or unwilling to pay more than the fixed recoverable amounts if they win (particularly in cases in which success will not produce a sufficient cash judgment which is satisfied), and who cannot pay even those amounts if they lose. For these clients, such a regime would be a disaster. No professional lawyer would be willing, or could afford, to act in most cases falling within it, unless they were able to cross-subsidise these cases (e.g. through taking on a large number on CFAs). That is feasible to a degree at the moment, but the absence of CFAs (or other realistic funding alternatives) in many areas, and the dramatic falling off of CFAs in others since the most recent reforms, suggests that this is implausible.
 - ii) Other clients will be able and willing to pay more, but most will have to fund a significant shortfall in their own costs.
 - iii) Amounts set at a very low level are less likely to have an influence over clients' own costs, due to the lack of any sensible relationship with costs in the real world. The regime would be little different from one without costs shifting at all.
 - b) The level is such that it seeks to find some sort of average: a 'swings and roundabouts' approach. If so, then this may have several effects:

- i) There will still be a division between clients who can and are willing to pay more, and those who cannot or will not.
- ii) The amount of costs recoverable in some cases will be a high proportion of those incurred, and possibly even more than the amounts incurred.
- iii) Those with more complex cases will, in effect, be subsidising those with simpler cases. This probably already happens to a degree; but a FRC regime will exacerbate it. The main determinant of who subsidises whom will be complexity and not value, and this will be the case irrespective of the significance of each case for the individual litigants. That might be thought to be acceptable if we are talking about a few £100s in a Fast Track case; it is a different matter altogether if we are talking about £1000s in a Multi-Track case.
- (iv) The impact of a swings and roundabouts approach will depend on the extent to which this works for each lawyer. That will in part depend on human behaviour, but it will also depend on two further things:
 - a) Lawyers involved in cases which are cheaper to run will be happy enjoying the benefits of the swings. Those involved only in more complicated types of case, could spend most of their timing losing on the roundabouts.
 - b) Some practice areas will generate fewer cases, or a lower range of different types, making it much more difficult to generate the intended 'average' fee levels.

Some firms already use civil work to cross-subsidise other work, such as criminal work or some types of civil work. If they find themselves having to cross-subsidise ever more of that civil work as well, then life for smaller firms will only become more difficult.

And all of this is on top of the risk of poorer service quality by less well qualified staff.

- 5) That last difficulty is compounded by the fact that the impact of FRC on human behaviour is likely to be different in different areas of practice. Let me suggest just a

few reasons for this. The nature of the clients, their attitude to litigation, their ability to pay legal costs, the availability of alternative funding models (e.g. the availability of insurance, whether CFAs are feasible, and whether litigation funding is available), the complexity of cases and the need for expertise, the nature of the issues, and the scope for standardisation of legal work; all of these may differ between different practice areas. Those differences may mean that the effects of a single regime may differ widely, not just between cases of similar sorts in similar areas but with different types of claimant and defendant, but even more dramatically between cases in very different areas. If the aim is to affect human behaviour in particular ways, a single tool is unlikely to be the right way to go about it, and is likely to lead to a range of unintended adverse consequences for access to justice. Sir Rupert's Keynote Address last week refers to the views of defendants any liability insurers, but I would question the extent to which the sources of those views necessarily reflect the views of defendants outside the realm of personal injury work – defendants who are not well funded, regular litigators. And even if they do, do they reflect the views of defendants in the full range of types of case to which it is proposed that FRC be extended, even in the Fast Track?

Some of those issues may already be in store for us to some degree, once the significance of the new proportionality test has been fully recognised; but there is a very real risk that they will become much more serious and pronounced if we replace a regime based on flexibility with one based on fixed amounts.

All of those issues suggest to us that we really do need – at the very least – some experience of the operation of a FRC regime in more areas of the Fast Track before we even consider a vertical extension into the Multi-Track in those areas.

I would also urge Sir Rupert to bear two further points in mind about FRC more generally:

- 1) First, some costs shortfalls will be spread among the population at large. For example, a lender or insurer who is unable to recover shortfalls will have to price the cost of those shortfalls in the cost of credit or insurance. This may be an acceptable price for access to justice, but it should not be assumed that the proposal does not have a wider economic cost.

- 2) Second, we should not ignore the risk of simply encouraging greater use of contractual provisions entitling one or both parties to recover shortfalls from the other in contractual disputes. Costs indemnity clauses are already standard in lending agreements and tenancy agreements; and it is inevitably those with greater awareness, greater bargaining power or more frequent experience of litigation who are more likely to take advantage of this, adding to an imbalance in litigation (including in cases which do not allow for any costs recovery).

Evidence and unintended adverse consequences

That brings me to the question of evidence, and of unintended adverse consequences. I propose to deal with these two together because they are clearly related.

Much has already been said by the Bar Council, the Personal Injuries Bar Association and others about the unintended consequences of the FRC regime in PI cases and about the similar experience in criminal defence work, and I do not propose to repeat that. These consequences were not only unintended but also contrary to what Sir Rupert anticipated back in 2010. They are the result of human responses to a FRC regime, and cannot be disregarded as likely consequences of a similar regime in a wider categories of case. If we are to do our best to avoid or minimise the impact of unintended or unanticipated consequences, then we need to tread carefully.

Sir Rupert's own recommendation back in 2010 was that we should extend FRC across the Fast Track as a first step, before tackling the Multi-Track. That did not happen, through no fault of Sir Rupert's. We see much force in that approach, particularly against the background that I have described.

That leads us to say that, at the very least, there should be no attempt to extend FRC into the Multi-Track until at least:

- 1) Horizontal extension into other Fast Track cases has been allowed to bed in and we can reach a judgment as to the likely impacts on the behaviour of all involved in types of case other than PI; and

- 2) The April 2013 costs reforms have had a proper opportunity to bed in. We do not accept that there is a sufficient body of evidence available as yet to reach a conclusion about their effect. Aspects of the reforms are still being litigated in the courts, and it is still too early to say what effects they are having on behaviour.

The challenge of constructing a system of horizontal extension that will apply fairly to all categories of case in the Fast Track is already considerable, and there must be a real danger of getting it wrong at the first attempt.

Given that there are competing access to justice considerations with both the current regime and a FRC regime, it would be reckless to disrupt the market in a widespread fashion until we have seen how such a regime works in practice in those cases to which it is most likely to be suited.

And why, in any event, are we moving in a particular direction without first having looked at the evidence of costs actually being incurred and recovered, and their impact on access to justice?

Intermediate Track

What about an Intermediate Track?

I can see some possible attraction to this, at least if three conditions were to apply:

- 1) It is limited, and tailored, to categories of current Multi-Track cases for which a FRC regime may genuinely be suited and can be designed with some confidence. This is likely largely to apply to any categories of case which may exist in which the procedure is relatively standard, there is a relatively narrow range of potential issues, and the amounts at stake are relatively modest. There may, for example, be categories of case which will ordinarily require a trial longer than a day, but which bear many resemblances otherwise to cases which proceed in the Fast Track.
- 2) The procedure is streamlined and suited to those types of case.

- 3) The same qualifications apply as we have urged should apply in relation to any extension across the Fast Track.

By genuinely suited I mean only any types of case that can be identified in which there are relatively standard paths that they take through the litigation process, so that we can have a sufficient measure of confidence at this early stage, and without more evidence, that any fixed rates chosen will strike a viable commercial balance between effective performance of the litigation steps required in such cases, proportionate costs recovery, and commercial viability for lawyers of the level of seniority and specialism that is appropriate to such cases. That will necessarily limit the types of case that will be appropriate for an Intermediate Track, at least initially.

The key question must be whether any such types of case can be identified effectively and fairly before litigation begins. Without this, it is far from clear that the certainty of FRC would be a price worth paying if there will frequently be argument as to whether a case is suited for the Intermediate Track, involving time, effort and cost that might just as well as spent on costs budgeting.

Counsel's fees

The issues to which I have already drawn attention give rise to even greater concern of adverse consequences regarding counsel's fees; but we can at least seek to avoid some of the risks of adverse consequences in this regard by the way in which we design any scheme.

For some, any suggestion from me that counsel's fees should receive special treatment will be seen as special pleading, so let me address that straight away.

Any extension of FRC to other areas within the Fast Track, and into any areas within the Multi-Track, will have the inevitable effect of extending FRC into areas of specialist practice. Whilst there will be differing degrees of specialist knowledge in each of those areas among litigation solicitors, the effectiveness of our system of the administration of justice still depends to a large degree not just on the specialist advocacy skills of the Bar but also upon specialist advice from the Bar.

This is entirely sensible. Indeed, it is entirely predictable. Such a system is economically efficient, because it allows solicitors' practices to operate in wider fields of practice, at a lower degree of specialisation, calling on both advocacy services and specialist advice from the Bar as and when each case requires; and it enables the Bar to develop specialist expertise and advocacy skills much more quickly and effectively than would otherwise be possible. This is particular so in areas such as chancery work, in which there are far fewer cases than, say, PI work, making it more difficult to build up expertise except in much larger or niche firms.

Equally, in cases of public access to the Bar, it provides the most efficient way for the public to obtain specialist advice and advocacy on what legal regulators now like to call an "unbundled" basis, but which I see as simply a new name for the way in which the Bar has been operating for decades.

This is a large part, I suggest, of the reason why a distinction remains between the work of a litigator and the work of an advocate and specialist advisor, despite the progressively greater scope that has been allowed for the overlap between work done by the Bar and the solicitors' profession since 1990.

That efficiency and effectiveness supports the administration of justice, and promotes access to justice. It is good for both the public and the solicitors' profession, not least because it enables a large number of solicitors across the country to offer litigation services to the public, safe in the knowledge that they can secure specialist advice and advocacy services from the Bar as and when required.

However, the flip side of that efficiency is a weakness for the Bar regarding control and bargaining power. Solicitors advise the lay client on what work needs to be done and by whom, and not the Bar. In an open market, as still exists in most areas of litigation, solicitors' decisions still largely reflect that efficiency. But where the market has been affected significantly by price controls – and this has been the effect of FRC in Fast Track PI claims – we have seen those controls lead to a disruption and distortion of the market, resulting in reduction in the role of the Bar. Even in those portal cases in which there is an allowance for counsel's advice, the message I have been given on circuit visits is that barristers are

encountering judicial resistance to allowing the additional payment; and where an additional payment is not allowed, junior barristers are going unpaid for the advice they have given.

This system also depends on the market working effectively. A FRC may distort that market, as has happened in the PI field. The result may be that junior barristers are not given the opportunity they need to develop their expertise, leading to a longer term impact on the availability of senior practitioners with fully developed expertise, or are asked to do work at unrealistically low rates.

It is for those reasons that I suggest that it is in the public interest that counsel's fees are given separate treatment.

What should that separate treatment be? Experience in the PI field suggests that, in order to avoid abuse either of the potential for an additional allowance or of the junior Bar, it needs to have two features:

- 1) It must avoid the possibility of additional allowances being used to supplement other parts of the litigation, and the abuse of a dominant position by one branch of the profession over another.
- 2) It must set reasonable rates in the light of all categories of work involved, and on the basis that only the more complex cases will be the subject of counsel's involvement.

For these purposes, either of two different approaches is needed (although I would be very keen to hear any other suggestions about this):

- 1) The fixed allowance for counsel's advice, advocacy and other work must be spent – and spent in full – on such work by counsel. Under this model, it would not be permissible for a solicitor to ask, or to agree, to pay counsel less than the fixed amount; nor would counsel be permitted to agree this. This could, perhaps, be achieved by making recovery conditional on payment in full to counsel.
- 2) The fixed allowance for counsel's advice, advocacy and other work should be subject to the indemnity principle, with the result that the allowance should be a fixed maximum rather than a fixed amount. This would permit solicitors and counsel to

agree a lower figure where appropriate, but the amount recoverable from the other party could not exceed that agreed amount. This would not avoid the abuse of market power, but it would avoid the allowance being used to fund other parts of the litigation.

I would urge Sir Rupert to adopt the former model. I do so primarily for two reasons:

- 1) First, the 'swings and roundabouts' of a FRC regime only work if the amount paid to counsel is not less than the fixed fee in every case.
- 2) Second, the use of market power to seek reductions below the figures identified as a reasonable rate reflecting that 'swings and roundabouts' approach would undermine that fundamental aspect of the regime and would, indeed, be anti-competitive.

If I am right about the public interest in securing the involvement of counsel in appropriate cases, and in ensuring that there continues to be a role for junior counsel in lower value cases (at appropriately modest, but nevertheless commercial, rates), then I suggest that there is nothing at all objectionable in this. Indeed, not only do I suggest that it would satisfy a public interest test, but I also suggest that it is a necessary and proportionate adjunct to the market interference which is inherent in a FRC regime.

The current model of FRC does not satisfy the requirements I have identified. It does only what the Bar Council suggested is the minimum, of seeking to provide transparency to the court (Response, para.226) about how much counsel is being paid; and it is far from clear that even this is being operated effectively at the moment.

Whatever approach is adopted, there would be scope (except in relation to allowances for advocacy), if necessary, for requiring the court to be satisfied that it was both reasonable and proportionate to seek specialist advice and other work from counsel (unless the parties agree this); but if that were to be required, then these criteria should not be approached too cautiously, particularly if FRC are to be extended into areas of practice in which it is recognised that specialist expertise is required. Such an approach would be along the lines of r.45.23B(c) (which also allows for advice from a specialist solicitor rather than counsel),

although I am told that the experience of some barristers is that some DJs are reluctant to allow this additional payment.

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