Fixing problems

Andrew Hogan examines proposals for an extension of fixed costs

Photograph: istockphoto

By the time you read this article, the interregnum will be over and the country will have a new prime minister. Doubtless Brexit will continue to paralyse the political debate into the autumn (at least), but the work of government must go on.

In March, the government published its latest proposals for a wider introduction of fixed costs, and the consultation closed on 6 June. If one were to assume that the proposals set out in the government's paper will largely come to pass, what will the fixed costs regime look like in 2020/2021?

The paper's subtitle is 'Implementing Sir Rupert Jackson's proposals', and it references his report of July 2017. However, its opening premise is to ignore one of his concerns about the 'Balkanisation' of costs by having numerous differing costs regimes for differing varieties of case.

The consultation paper begins by noting that the proposals exclude clinical negligence cases due to the work commissioned from the Civil Justice Council and the capped costs pilot in business and property cases. It should also be noted that the government does not intend to introduce an intermediate track: instead, intermediate cases will be assigned to an extended Fast Track, and the government has decided not extend the Aarhus rules to all judicial review cases.

As the government notes in the executive summary:

'This means, in summary, that we are consulting on:

i. extending FRC to all other cases valued up to £25,000 in damages in the fast track as set out in chapter 3 below;

ii. a new process and FRC for NIHL claims, as set out in chapter 4 below; and

iii. expanding the fast track to include the simple 'intermediate' cases valued £25,000 – £100,000 in damages'

The figures for fixed fees proposed by Jackson are to be adopted: 'The proposed figures for FRC were devised by Sir Rupert based on data submitted by Taylor Rose (a firm of solicitors and costs lawyers) that was analysed by Professor Paul Fenn. Sir Rupert consulted with his team of fourteen assessors, drawing on a breadth of views and experience, and brought his own expertise to bear in finalising the figures. As such, we consider that the figures have been devised with appropriate rigour and intend to implement them as he recommends. There are consultation questions on which we would welcome responses, including evidence in support.'

Turning to consider each of those principal areas in turn, the first point to note is that the original intention in the 1999 reforms which introduced the Fast Track, was to move to a regime of fixed costs for such cases. For various reasons, including the fact that the rules were implemented without being fully drafted, this did not happen. Solicitors woke on 26 April 1999 to the happy consequence that scale 1 had been abolished. In a sense this is unfinished business from 20 years ago.

Second, the noise induced hearing loss 'bubble', whose timing is synchronous with the rise and fall of Quindell, has already burst: so the proposals in chapter 4 of the paper may be a solution in search of a problem; though deafness claims have proved themselves resilient in the past. The NIHL fees are not dealt with in this article due to lack of space.

Third, the cases that are described as intermediate cases include claims of up to £100,000 involving a three-day trial. It is surprising to note that such a case could be described as a 'fast track' case without testing the terminology to the point of destruction.

Finally, another proposal (or lack of) later in the paper rejects the notion of extending the Aarhus rules to all judicial review claims: it comes as no surprise that the government has no interest in making judicial review claims easier.

FEE BANDS

Perhaps the key proposal is the first one, to introduce (for costs purposes) four bands, or scales of costs recoverable for Fast Track cases, which fall within a category of case:

FIXED COSTS

Photograph: istockphoto

'● Band 1 for RTA non-PI claims (ie. 'bent metal' or damage to vehicles only), defended debt claims;
● Band 2 for RTA PI claims (within the Pre-Action Protocol (PAP));
● Band 3 for RTA PI claims (outside the PAP), ELA, PL, tracked possession claims, housing disrepair, other money claims;
● Band 4 for ELD (excluding noise induced hearing loss (NIHL)), particularly complex tracked possession claims or housing disrepair claims, property disputes, professional negligence claims and other claims at the top end of the fast track.'

The government proposes that a separate scale of costs will be applicable to each band of case: 'We propose to apply the FRC in Table 1 below to all cases in the fast track to which, going forward, FRC extend. Our proposed FRC in Bands 1 and 4 are as recommended by Sir Rupert. They are based on analysis of a sample of closed cases by Professor Fenn, and have been adjusted to take account of efficiency savings from fixed costs. Bands 2 and 3 are the current fast track pre-trial fixed costs in PI, with a 4% uplift to take account of inflation. All the figures for FRC throughout this paper are exclusive of VAT. It is important to read the table subject to the rules he sets out.'

Table 1 Fixed recoverable costs in the Fast Track

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

PROCEDURAL REFORM

Curiously, Part 36 is to be weakened by removing indemnity costs from the Part 36 sanctions which might apply at trial. Instead, a percentage uplift is to be applied to the fixed costs.'We agree with Sir Rupert that an uplift on FRC is preferable, as indemnity costs undermine the principle of FRC by requiring detailed costs assessment (and the keeping of records to inform an assessment should it arise). As with FRC more generally, this approach would also provide more certainty for litigants. Taking the mid-point of Sir Rupert's suggestions, we therefore propose an uplift of 35% on the FRC for the purposes of Part 36.'

The court will retain a residual discretion to allow indemnity costs for 'seriously unreasonable behaviour': an exception rarely likely to be found.

The practice of preliminary trials on limitation that has proved such a staple source of work for the junior personal injury bar, is largely to come to an end: 'Our proposal therefore is strongly to discourage the ordering of preliminary issue trials (eg. on limitation) in fast track cases, as we do in the rest of the fast track. At present there is an inconsistent approach taken by the judiciary which means that these trials may be ordered without the request of either party or without a hearing. Rather, there should be tighter controls on the criteria applied when ordering such a trial. If such a preliminary trial goes ahead, FRC should apply also to the preliminary trial.'

EXPANDED FAST TRACK

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

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

Continued on page 8

Continued from page 7

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

Fixed recoverable costs for intermediate cases

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

They have reinvented the wheel by bringing back scales of costs

Thus for a case worth about £100,000 with up to three days of trial, with all steps completed and all costs incurred, the fixed costs element for solicitors and counsel should total at most £68,450.

Looking at these proposals in the round, it is probably inevitable that fixed costs will be brought in for all classes of case, worth up to £25,000. This is unfinished business from 20 years ago. Solicitors have been living on borrowed time ever since 26 April 1999.

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

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

What will flow from the implementation of these proposals, are two phenomena. The first is that both solicitors and counsel will have to revise their work flows, to try to ensure that work is done efficiently. Opinions that go on for folio after folio, might have to be dispensed with for a short email advice. Skeleton arguments might need to be forgone. Trial bundles might have to be limited to 150 pages. Probably with no discernible effect on the quality of justice.

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

Ominously, the paper concludes by noting that even more reform is to be considered, possibly leading to a position where virtually all cases, apart from the truly exceptional ones, will be subject to fixed costs.

'We agree with Sir Rupert that his recommendations should be regarded as an incremental next step. Once the reforms have bedded in, it will be for consideration whether and how FRC should be extended to cover more cases: higher value claims, Part 8 claims as intermediate cases, and the costs incurred before the first costs and case management conference in cases which are not otherwise subject to FRC.'

Andrew Hogan is a barrister at Ropewalk Chambers in Nottingham specialising in costs and funding; blog:www.costsbarrister.co.uk

FIXED COSTS