



## FIXED RECOVERABLE COSTS IN CIVIL CASES: THE BAR'S CASE FOR REFORM

### INTRODUCTION

#### The Extension of Fixed Recoverable Costs

1. Sir Rupert Jackson's report proposing an extension of Fixed Recoverable Costs ['FRC'] was published in July 2017. The Ministry of Justice ['MoJ'] published a consultation paper on implementing reform and invited responses between March and June 2019. The Bar Council ['BC'] and other specialist bar associations, including the Personal Injuries Bar Association ['PIBA'], provided detailed responses. The Government published its response to the consultation in September 2021.
2. The government proposes to extend FRC to all other civil cases up to the value of £ 25, 000: 'horizontal extension'. The Fast Track would be extended to include simple 'intermediate' cases worth between £ 25, 000 and £ 100, 000: 'vertical extension'. There will be schemes for fixed costs set within bands based primarily on the value of the case. Counsel's fees would be ring-fenced in a separate scheme for Band 4 cases and claims for Noise Induced Hearing Loss ['NIHL']. The extension of FRC will take effect by amendment to the Civil Procedure Rules.

#### The Concerns of the Bar Council and PIBA

3. The publication of the Government's response coincided with a number of issues being raised by PIBA in relation to the Fast Track, in particular (i) the failure of successive governments to increase trial advocacy fees; (ii) the adverse consequences of the late vacation of trial dates by the court; and (iii) the decision of the Court of Appeal in *Aldred v Cham* which restricted the court's ability to award costs for advice in cases involving children. A joint BC/PIBA paper on increasing fast track advocacy fees was sent to the MoJ and Civil Justice Council ['CJC'] as long ago as October 2019. BC/PIBA were told that this was a matter that would be considered as part of the broader review of FRC. A further joint paper which updated the comments made in relation to advocacy fees, but also raised issues in relation to (ii) and (iii) above was sent to the MoJ and CJC on 30 July 2021.

#### **The Purpose of this Paper**

4. The purpose of this further paper is to draw attention to the issues we have previously identified in the context of the proposed expansion of FRC. The comments previously made remain valid and should be considered as the Civil Procedure Rules Committee are engaged in drafting new rules for the expanded Fast Track.
5. There are two overarching points that we make:
  - (i) The success of any FRC regime depends on costs being fixed at a reasonable level. It has always been recognised as essential that fee levels should be increased at a reasonable rate at appropriate times. Fast Track Trial advocacy fees have not been increased since 2013 in relation to Protocol Claims and since 2009 for other fast track advocacy fees. The fees originally suggested in 2019 were updated in the paper submitted in July 2021. Such updating has also to be seen in the context of an economic environment which has

changed significantly since 2019 and has also changed significantly since the previous paper in July 2021.

- (ii) The role of the advocate in Fast Track cases gives rise to some anomalies in the current rules that merit careful consideration by the rules committee. In this paper we have sought to explain how the current rules can impede access to justice. We suggest how those rules could be drafted so that these problems can be prevented in the future. The need to do so is particularly important in the context of the expansion of FRC currently contemplated.

### **The Argument**

- 6. This paper is concerned with matters to which the rules committee should have proper regard when considering the implementation of an expanded FRC regime. There is an inevitable overlap with the papers previously submitted, and some content is replicated below to assist in understanding our position. This paper is structured as follows:

- I. The Government's Proposed Extension of FRC: summary of recommendations
- II. Current Rules in relation to Advocacy and other fixed fees
- III. Updating Fast Track Trial Advocacy Fees
- IV. Current Issues with Fast Track Trials in Practice
- V. *Aldred v Cham*

- 7. The BC/PIBA make the following argument:

- (i) The Government propose an extension of FRC which is very wide in its content and scope. The current proposals are summarised at §§ 8-31 below. All of these proposals will be implemented through the drafting of

new rules. These rules are likely to be complex and provide a significant challenge to those responsible for their drafting.

- (ii) The nature of the scale of that challenge is further underlined by consideration of the current rules for FRC. The rules that apply to the current fast track are unnecessarily complex and in places contradictory as set out at §§ 32-57.
- (iii) Fixed costs have to be set at a reasonable level. The expansion of FRC has always been accompanied by a commitment to putting in place a system of periodic review, but this is not the experience of the Bar, the personal injury bar in particular.
- (iv) The failure to increase advocacy fees on the fast track is a particular source of concern, see §§ 58-61 below. The current level of fast track advocacy fees lags significantly behind the rate of inflation, as illustrated further by developments between July 2021 when the BC/PIBA last presented these arguments and now, see § 61.
- (v) Taking these factors into account the BC/PIBA's analysis is that the proposed advocacy fees in the expanded FRC are significantly too low, see §§ 62-65 below.
- (vi) The case for periodical review of fixed advocacy fees is overwhelming.
- (vii) Any expansion of FRC must take into account the experience of those familiar with FRC and how it operates in the current fast track. §§ 66-77 set out the experience of personal injury practitioners working in the current FRC and illustrates likely problems to be repeated in the expanded FRC: in particular, the lack of any mechanism under the rules to recover advocacy fees when trials are vacated late. When counsel will have undertaken preparation and incurred expense but have no realistic expectation of receiving remuneration for the work done.

- (viii) The rules set out at §§ 32-57 suggest some means by which amendments to the CPR could alleviate some of these issues. The BC/PIBA have proposed specific rule changes that could be made, see § 78-86;
- (ix) The amendments referred to at (viii) above should be taken into account when the new rules for the expanded FRC are being considered. The problems identified by personal injury practitioners can be dealt with and avoided or at least mitigated in the expanded fast track.
- (x) A specific example of the current rules operating in such a way which is potentially detrimental to access to justice is the Court of Appeal's decision in *Aldred v Cham*. Our understanding is that this matter is already being considered by the rules committee, and we set out our further thoughts on this important issue at §§ 87-98 with our specific recommendation of a rule change set out at § 98.

The success of the fast track has been significantly undermined by the failure to increase fixed advocacy costs and the late vacation of trials which result in advocates incurring expense in preparing for trials but receiving no remuneration. These are problems that should be addressed as a matter of urgency and must be considered seriously before further expansion of the FRC is implemented.

# I. THE GOVERNMENT'S PROPOSED EXTENSION OF FRC: SUMMARY OF RECOMMENDATIONS

**Horizontal Extension: extending the Fast Track to all civil claims up to £ 25, 000**

8. The MoJ accepts Sir Rupert Jackson's recommendation to extend the Fast Track to all civil cases worth up to £ 25, 000. Fixed Recoverable Costs will be set in 4 Bands according to complexity.

Table 1: Fixed recoverable costs in the fast track

Stage:	Complexity Band			
	1	2	3	4
Pre-issue £1,001 – £5,000		The greater of £572 or £104 + 20% of damages	£988 + 17.5% of damages	£2,250 + 15% of damages + £440 per extra defendant
Pre-issue £5,001 – £10,000		£1,144 + 15% of damages over £5,000	£1,929 + 12.5% of damages over £5,000	
Pre-issue £10,001 – £25,000	£500	£2,007 + 10% of damages over £10,000	£2,600 + 10% of damages over £10,000	
Post-issue, pre-allocation	£1,850	£1,206 + 20% of damages	£2,735 + 20% of damages	£2,575 + 40% of damages + £660 per extra defendant
Post-allocation, pre-listing	£2,200	£1,955 + 20% of damages	£3,484 + 25% of damages	£5,525 + 40% of damages + £660 per extra defendant
Post-listing, pre-trial	£3,250	£2,761 + 20% of damages	£4,451 + 30% of damages	£6,800 + 40% of damages + £660 per extra defendant

Trial advocacy fee <a href="#">bookmark4</a>	a. £500	a. £500	a. £500	a. £1,380
	b. £710	b. £710	b. £710	b. £1,380
	c. £1,070	c. £1,070	c. £1,070	c. £1,800
	d. £1,705	d. £1,705	d. £1,705	d. £2,500

### Advocacy Fees

9. The trial advocacy fee further broken down as follows:

Table 2: Trial Advocacy Fees in the Fast Track up to £ 25, 000

	Complexity Bland			
Claim value	1	2	3	4
up to £3,000	a. £500	a. £500	a. £500	a. £1,380
£3,001 to £10,000	b. £710	b. £710	b. £710	b. £1,380
£ 10,001 to £15,000	c. £1,070	c. £1,070	c. £1,070	c. £1,800
£15,001 to £25,000	d. £1,705	d. £1,705	d. £1,705	d. £2,500

### Miscellaneous Issues

10. Interim applications and preliminary issues. Both interim applications and trials on preliminary issues are discouraged. If there is a preliminary trial, followed by a subsequent trial two advocacy fees will be recoverable, but no other fees, though the two trials need not be in the same band.
11. Indemnity costs. A successful party can be awarded higher costs on the 'indemnity basis' where it has been put to additional expense, either in relation to Part 36 offers or as a result of unreasonable litigation conduct by the other party, see § 13 below.
12. Part 36. The MoJ propose an uplift of 35% on the FRC for the purposes of Part 36.
13. Unreasonable conduct. The courts can order that the costs be assessed on the indemnity basis where unreasonable litigation conduct on the part of one party



causes the other party to incur additional expense. Sir Rupert recommends that where costs are subject to FRC, the court should be able to either award a fixed percentage uplift on costs (as for Part 36 offers, above), or to make an order for indemnity costs in cases of unreasonable litigation conduct.

14. Counsel's fees. Sir Rupert recommends specific amounts that can be recovered by 'counsel or specialist lawyers' in NIHL and Band 4 cases limited to: post-issue advice or conference: £1,000; and settling defence or defence and counterclaim: £500. These sums would be additional to the fixed advocacy fee.
15. London Weighting. Current rules providing for a 12.5% uplift on fixed costs payable to a party who lives in the London area and instructs a legal representative who practises in the London area will remain in place.
16. Multiple claims arising from the same cause of action. Where the cause of action is the same and the claim is either similar or subsidiary to the principal claim, the FRC for each additional claimant should be set at 10% of that for the principal claimant.
17. Assessment of costs. After trial, the judge will summarily assess costs at the end of the hearing. In cases which do not go to trial, there should be a shortened form of detailed assessment: see the last sentence of Practice Direction 47, paragraph 5.7. There would be a provisional assessment fee cap of £500.

**Vertical Extension: Intermediate Cases between £ 25, 000 and £100, 000**

18. Intermediate cases will be allocated to an expanded fast track and would be subject to FRC. Intermediate cases will not be suitable for the High Court owing to their relatively low value and complexity.

### Allocation

19. The following criteria apply to allocation in intermediate cases:

- (i) The case is not suitable for the small claims track or the fast track (up to £25, 000).
- (ii) The claim is for debt, damages, or other monetary relief, no higher than £100, 000.
- (iii) If the case is managed proportionately, the trial will not last longer than three days.
- (iv) There will be no more than two expert witnesses giving oral evidence for each party.
- (v) The case can be justly and proportionately managed under an expedited procedure.
- (vi) There are no wider factors, such as reputation or public importance, which make the case inappropriate for allocation as an intermediate case.
- (vii) The claim is not for mesothelioma or other asbestos related lung diseases.

Even if none of criteria (i)–(vii) are met, there may be reasons to allocate it as an intermediate case.

20. Cases that will not usually fit the criteria for allocation to the intermediate track include mesothelioma cases which are subject to specific statutes and case law beyond that normally applicable for PI claims; some complex PI and professional negligence claims; clinical negligence cases; some multi-party cases; some actions against the police and child sexual abuse cases; and intellectual property cases.

21. Pre-action protocols ['PAPs'] shall be amended to require the parties to agree the appropriate track for cases pre-action. Claimants should state their proposal in the letter of claim, and defendants in the letter of response. If agreement is not reached, cases will be provisionally allocated according to the value of the

claim. Parties can challenge allocation via the directions questionnaire. Allocation will then be reviewed and determined by the judge at the allocation stage. Should a party wish to challenge this decision, they may request a hearing on payment of a fee. If the only reason for holding a hearing is the dispute about assignment, the unsuccessful party on that issue will incur a costs liability of £300.

22. The court will have a residual discretion to allocate *any* case as an intermediate case, where it is considered advantageous in promoting access to justice.
23. Where the nature of a case changes fundamentally the court may re-allocate a case, but this should be limited to exceptional circumstances.

#### Procedure

24. For FRC to work in intermediate cases there will be a streamlined procedure, including:
  - statements of case no longer than 10 pages
  - written witness statements as evidence in chief, with a party's statements limited to 30 pages
  - standard disclosure in PI cases
  - in non-PI cases each party will disclose the documents upon which it relies, as well as documents that the court orders
  - oral evidence limited to one expert witness per party (two, if reasonably required and proportionate), with each expert report limited to 20 pages (excluding photographs etc)
  - Oral evidence will be time-limited and directed to the matters identified at the CMC
  - applications to be made at the CMC as far as possible
  - control by the court of the scope and number of interim applications or procedural gamesmanship

#### The Four Bands

25. FRC intermediate cases are divided into four bands:

**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, e.g., debt

claims.

**Band 2:** along with Band 3 will be the 'normal' band for intermediate cases, with more complex claims going into Band 3.

**Band 3:** along with Band 2 will be the 'normal' band for intermediate cases, with 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.

26. Personal injury cases will be allocated into bands as follows:

- Straightforward quantum-only cases: **Band 1**
- Liability and quantum dispute: **Band 2** or **Band 3**
- Serious issues on breach, causation, and quantum: **Band 4**

It is not clear if 'straightforward' quantum cases would exclude cases where there is an allegation of fundamental dishonesty, but such an allegation would in any event be a relevant matter for the parties and the court when determining allocation.

27. Most non-PI intermediate cases will go into **Band 2** or **Band 3**. **Band 1** will be used for straightforward cases with only one issue in dispute (such as proving a debt), and **Band 4** will be used for more complex cases.

28. PAPs should be amended to require parties to endeavour to agree the appropriate allocation of cases pre-action, as well as the appropriate band for intermediate cases. Claimants should state their proposals in this regard in the letter of claim, and defendants should do the same in the letter of response.

29. A new practice direction with specific guidance on allocation to bands, similar to CPR 26.8. A new directions questionnaire will also be required.

30. On allocating an intermediate case, the judge will (either by agreement or by reference to the directions questionnaire) assign it to one of four bands. Either party may challenge the assigned band at CMC. If the only reason for the CMC is a dispute over banding, then the unsuccessful party shall incur a costs liability of £300.

#### **The FRC for the four bands**

31. The FRC for the four bands is set out in Table 3.

Table 3: Fixed recoverable costs for intermediate cases

<b><u>Stage (S)</u></b>	<b><u>Band 1</u></b>	<b><u>Band 2</u></b>	<b><u>Band 3</u></b>	<b><u>Band 4</u></b>
S1 Pre-issue or pre- defence investigations	£1,400 + 3% of damages	£4,350 + 6% of damages	£5,550 + 6% of damages	£8,000 + 8% of damages
S2 Counsel/ Specialist lawyer drafting statements of case and/ or advising (if instructed)	£1,750	£1,750	£2,000	£2,000
S3 Up to and including CMC	£3,500 + 10% of damages	£6,650 + 12% of damages	£7,850 + 12% of damages	£11,000 + 14% of damages
S4 Up to the end of disclosure and inspection	£4,000 + 12% of damages	£8,100 + 14% of damages	£9,300 + 14% of damages	£14,200 + 16% of damages
S5 Up to service of witness statements and expert reports	£4,500 + 12% of damages	£9,500 + 16% of damages	£10,700 + 16% of damage	£17,400 + 18% of damages
S6 Up to PTR, Alternatively 14 daysbefore trial	£5,100 + 15% of damages	£12,750 + 16% of damages	£13,950+ 16% of damages	£21,050 + 18% of damages
S7 Counsel/ specialist lawyer advising in writing or in conference (if instructed)	£1,250	£1,500	£2,000	£2,500

S8 Up to trial	£5,700 + 15% of damages	£15,000 + 20% of damage	£16,200 + 20% of damage	£24,700 + 22% of damage
S9 Attendance of solicitor at trial per day	£500	£750	£1,000	£1,250

<b><u>Stage (S)</u></b>	<b><u>Band 1</u></b>	<b><u>Band 2</u></b>	<b><u>Band 3</u></b>	<b><u>Band 4</u></b>
S10 Advocacy fee: day1	£2,750	£3,000	£3,500	£5,000
S11 Advocacy fee: subsequent days	£1,250	£1,500	£1,750	£2,500
S12 Hand down of judgment and consequential matters	£500	£500	£500	£500
S13 ADR: counsel/ specialist lawyer at mediation or JSM (if instructed)	£1,200	£1,500	£1,750	£2,000
S14 ADR: solicitor at JSM or mediation	£1,000	£1,000	£1,000	£1,000
S15 Approval of settlement for child or protected party	£1,000	£1,250	£1,500	£1,750
Total: (a) £30,000 (b) £50,000 (c) £100,000 damages	(a) £19,150 (b) £22,150 (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

## II. CURRENT RULES IN RELATION TO ADVOCACY AND OTHER FIXED FEES

### Introduction

32. The case for an increase in Fast Track advocacy fees was set out in the BC/PIBA paper submitted in October 2019. The argument was updated and re-stated in the paper in July 2021. The present paper summarises and updates those arguments: the current rules are set out below, some observations are made about the operation of the current rules, and further points are made about the need to update Fast Track advocacy fees in the context of the horizontal and vertical expansion of FRC.

### The Fast Track Advocacy Fee: definition

33. The advocacy fee is recoverable only in cases which are listed for trial. It is payable whether the advocate is a solicitor or a barrister. The fee includes a conference, final preparation for trial by the advocate, and preparation of a skeleton argument. It does not include travel expenses, though the necessity of travel is considered a factor in the assessment of the overall fee. It does not include certain types of work that are not considered 'advocacy', for example preparation of trial bundles.<sup>1</sup> At the conclusion of the trial detailed submissions on costs may also be required and there is no provision under the rules for the preparation that may be required.

34. CPR 45.37(2)(a) contains definitions of both 'advocate' and trial':

*'advocate' means a person exercising a right of audience as a representative of, or on behalf of, a party;*

*'fast track trial costs' means the costs of a party's advocate for preparing for and appearing at the trial, but does not include –*

*(i) any other disbursements; or*

*(ii) any value added tax payable on the fees of a party's advocate; and*

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<sup>1</sup> This summary is based on Lord Woolf, *Access to Justice. Final Report*. Chapter 4, §§37-44:  
<http://webarchive.nationalarchives.gov.uk/20060214041355/http://www.dca.gov.uk/civil/final/sec2b.htm#c4>

*'trial' includes a hearing where the court decides an amount of money or the value of goods following a judgment under Part 12 (default judgment) or Part 14 (admissions) but does not include –*

- (i) the hearing of an application for summary judgment under Part 24; or*
- (ii) the court's approval of a settlement or other compromise under rule 21.10.*

### **CPR Part 45: two regimes for PI cases**

35. There are two regimes for PI cases on the fast track:

**Section IIIA.** *Claims Which No Longer Continue Under the RTA or EL/PL-Action Protocols and Claims to Which the Pre-Action Protocol for Resolution of Package Travel Claims Applies; and*

**Section VI.** *Fast Track Trial Costs*, rr. 45-37-45.40, which applies to all other fast track trials.

### **Fast Track Trial Advocacy Fees: Section VI claims**

36. r. 45.37 (1) defines the scope of this Section as dealing with "*the amount of costs which the court may award as the costs of an advocate for preparing for and appearing at the trial of a claim in the fast track*" ("*fast track trial costs*"). The amount of fast track trial costs the court may award are set out in r. 45.38:

<b>Value of Claim</b>	<b>Fee</b>	<b>Rule</b>
No more than £3,000	<b>£485</b>	Table 9 45.38
More than £3,000 but not more than £10,000	<b>£690</b>	Table 9 45.38
More than £10,000 but not more than £15,000	<b>£1,035</b>	Table 9 45.38
More than £15,000	<b>£1,650</b>	Table 9 45.38

37. The court may award more or less than the amount of fast trial costs in certain circumstances under r. 45.39, including: when, in addition to the advocate, it is necessary for a party's legal representative to attend the trial; a separate trial is



required in relation to an issue; a party is a litigant in person; both claim and counterclaim succeed; and there is unreasonable or improper conduct on the part either of the claimant or defendant.

38. 45PD.4 contains further guidance:

*4.1 Section VI of Part 45 applies to the costs of an advocate for preparing for and appearing at the trial of a claim in the fast track.*

*4.2 It applies only where, at the date of the trial, the claim is allocated to the fast track. It does not apply in any other case, irrespective of the final value of the claim.*

*4.3 In particular it does not apply to a disposal hearing at which the amount to be paid under a judgment or order is decided by the court (see paragraph 12.4 of Practice Direction 26)*

#### **Section IIIA claims**

39. Section IIIA applies to claims started under the RT or EL/PL protocols, and claims to which the PAP for Resolution of Package Travel Claims Applies. It excludes disease claims started under the EL/PL protocol.

40. Fixed costs are set out in rr. 45.29C to 45.29E. Costs are calculated in accordance with a matrix of fees which provide for the value of the claim and the stage at which the claim concludes: [A] *before issuing proceedings*, [B] *after issue but the case settles before trial*, and [C] *if the claim is disposed of at trial*. The costs at [C] include fixed costs and "(c) the relevant trial advocacy fee". Trial advocacy fees are set out at [D], so, for example, for cases under the RTA protocol trial advocacy fees are fixed under r. 45.29C as follows:

Value of Claim	Fee	Rules
No more than £3,000	£ 500	Table 6B 45.29C
More than £3,000 but not more than £10,000	£ 710	Table 6B 45.29C
More than £10,000 but not more than £15,000	£ 1,070	Table 6B 45.29C
More than £15,000	£ 1, 705	Table 6B 45.29C

In respect of EL and PL claims the same advocacy fees apply: see Tables 6C and 6D respectively. Reference to "trial" for the purposes of Tables 6B, 6C, and 6D, is *"a reference to the final contested hearing"*: rr. 45.29C(4) and 45.29E(4).

### **Stage 3 Advocacy Costs**

41. Section III of Part 45 provides for fixed costs in respect of claims up to £ 25, 000 brought under the RTA and EL/PL protocols when liability is admitted. Stage 3 costs consist of Types A, B, and C. Type A is *"the legal representative's costs"*, Type B is *"the advocate's costs"*, and Type C is the costs for advice where the claimant is a child, r. 45.18(2). Pursuant to r. 45.18(3) *"Advocate"* has the same meaning as in r. 45.37(2)(a). Advocate's costs in all cases up to £25, 000 are fixed at £ 250, Tables 6 and 6A.
42. A Stage 3 hearing is defined in 8BPD as *"a final hearing to determine the amount of damages that remain in dispute between the parties"* (§ 3.4). In cases where court approval of a compromise is required a *"settlement hearing"* is defined at § 3.3 as *"a hearing where the court considers a settlement agreed between the parties (whether before or after proceedings have started) and the claimant is a child"*.
43. Where the court adjourns a settlement hearing or a Stage 3 hearing, it may, in its discretion, order the costs to be paid in accordance with r. 45.27, 8BPD §14.1. r.45.27 provides that in adjourning a settlement hearing or Stage 3 hearing the court may order a party to pay *"(a) an additional amount of the Stage 3 Type B fixed costs; and (b) any court fee for that adjournment"*.

### **Fixed Costs and Disbursements**

44. Part 45 contains various procedures for the payment of disbursements, including counsel's fees. Specific rules provide for counsel's fees as a disbursement be

included within fixed costs. Further rules include fees for advice on settlement of a claim on behalf of a child, work which is predominantly undertaken by Counsel.

### Disbursements

45. The relevant sections of Part 45 concerned with disbursements are:
- *Section II. Road Traffic Accidents – Fixed Recoverable Costs*: r. 45.12
  - *Section III*. (Cases determined under the Protocols): r.45.19
  - *Section IIIA*. (Cases no longer proceeding under the protocol): r. 45.29I

### Section II

46. *Section II* is concerned with claims where the RTA occurred on or after 6 October 2003 and the value of the agreed damages, including in respect of personal injury, damage to property or both, does not exceed £ 10, 000, r. 45.9(2). Court proceedings are only envisaged when there is a dispute on costs, r. 45.9(1)(a), or for approval of a settlement or compromise under r. 21.10(2), r. 45.9(1)(b). Under r. 45.10 the only costs allowed are fixed costs in accordance with r. 45.11 and disbursements in accordance with r 45.12.
47. Many matters that may have previously proceeded under this rule, now fall within the pre-action protocol for RTAs. In *Aldred v Cham* (see further below) the Court of Appeal observed that the section "*is now of limited utility*". (§17) and this observation accords with the experience of PIBA's members. The section is of interest, however, because it is drafted to provide for the recovery of certain costs as disbursements. r. 45.12 provides that the court

*(1)) (a) may allow a claim for a disbursement of a type mentioned in paragraph (2); but (b) will not allow a claim for any other type of disbursement.*

*(2) The disbursements referred to in paragraph (1) are –*

...

*(b) Where they are necessarily incurred by reason of one or more of the claimants being a child or protected party as defined in Part 21 –*

*(i) fees payable for instructing counsel; or*

*(ii) court fees payable on an application to the court; or*

*(c) any other disbursement that has arisen due to a particular feature of the dispute.*

There is no equivalent to r. 45.12 (b) in either *Sections III* or *IIIA* of Part 45.

### *Section III*

48. r. 45.17 provides that the only costs allowed under Section III are fixed costs under r. 45.18 and disbursements under r. 45.19.

49. Fixed Costs under r. 45.18(2) includes "*Type C Fixed Costs*" defined as "*the costs for the advice on the amount of damages where the claimant is a child*".

50. Disbursements under r. 45.19 are limited to costs of obtaining medical records, medical or non-medical expert reports, court fees, and "*(e) any other disbursement that has arisen due to a particular feature of the dispute.*"

51. Section III also contains provision in r. 44.23B that additional advice can be obtained on the value of the claim:

*Where—*

*(a) the value of the claim for damages is more than £10,000;*

*(b) an additional advice has been obtained from a specialist solicitor or from counsel;*

*(c) that advice is reasonably required to value the claim,*

*the fixed costs may include an additional amount equivalent to the Stage 3 Type C fixed costs.*

52. Stage 3 Type C Fixed Costs are fixed by the rules at **£ 150**, see Tables 6 and 6A.



### Section IIIA

53. In respect of the RTA protocol costs are limited to fixed costs in r. 45.29C and disbursements in accordance with 45.29I.
54. Fixed costs are determined by the value of the claim and the stage at which the proceedings are settled as appropriate. If the case proceeds to trial, fixed costs are awarded, including the relevant trial advocacy fee as discussed at § 40 above.<sup>2</sup>

**TABLE 6B**

Fixed costs where a claim no longer continues under the RTA Protocol				
A. If Parties reach a settlement prior to the claimant issuing proceedings under Part 7				
Agreed damages	At least £1,000, but not more than £5,000	More than £5,000, but not more than £ 10,000	More than £10,000	
Fixed costs	The greater of— (a) £550; or (b) the total of— (i) £100; and (ii) 20% of damages	The total of— (a) £1,100; and (b) 15% of damages over £5,000	The total of— (a) £1,930; and (b) 10% of damages over £10,000	
B. If proceedings are issued under Part 7, but the case settles before trial				
Stage at which case is settled	On or after the date of issue, but prior to the date of allocation under Part 26	On or after the date of allocation under Part 26, but prior to the date of listing	On or after the date of listing but prior to the date of trial	
Fixed costs	The total of— (a) £1,160; and (b) 20% of damages	The total of— (a) £1,880; and (b) 20% of damages	The total of— (a) £2,655; and (b) 20% of damages	
C. If the claim is disposed of at trial				
Fixed costs	The total of— (a) £2,655; and (b) 20% of the damages agreed or awarded; and (c) the relevant trial advocacy fee			
D. Trial advocacy fees				

<sup>2</sup> The “advocacy fee” may be paid to Counsel as a ‘disbursement’ in the form of a Brief Fee, but where Counsel is so instructed it has never been suggested that they are paid as a “disbursement” for the purposes of the fixed costs rules, see *Mendes v Hochtief (UK) Construction Ltd* [2016] EWHC 976 (QB), discussed at §§ 71-75 below, and *Aldred v Cham* at § 48.

Damages agreed or awarded	Not more than £3,000	More than £3,000, but not more than £10,000	More than £10,000, but not more than £15,000	More than £15,000
Trial Advocacy fee	£500	£710	£1,070	£1,705

TABLE 6C

Fixed costs where a claim no longer continues under the EL/PL Protocol – employers’ liability claims				
A. If Parties reach a settlement prior to the claimant issuing proceedings under Part 7				
Agreed damages	At least £1,000, but not more than £5,000	More than £5,000, but Not more than £10,000	More than £10,000	
Fixed costs	The total of— (a) £950; and (b) 17.5% of the damages	The total of— (a) £1,855; and (b) 12.5% of damages over £5,000	The total of— (a) £2,500; and (b) 10% of damages over £10,000	
B. If proceedings are issued under Part 7, but the case settles before trial				
Stage at which case is settled	On or after the date of issue, but prior to the date of allocation under Part 26	On or after the date of allocation under Part 26, but prior to the date of listing	On or after the date of listing but prior to the date of trial	
Fixed costs	The total of— (a) £2,630; and (b) 20% of the damages	The total of— (a) £3,350; and (b) 25% of the damages	The total of— (a) £4,280; and (b) 30% of damages	
C. If the claim is disposed of at trial				
Fixed costs	The total of— (a) £4,280; (b) 30% of the damages agreed or awarded; and (c) the relevant trial advocacy fee			
D. Trial advocacy fees				
Damages agreed or awarded	Not more than £3,000	More than £3,000, but not more than £10,000	More than £10,000, but not more than £15,000	More than £15,000
Trial advocacy fee	£500	£710	£1,070	£1,705



TABLE 6D

Fixed costs where a claim no longer continues under the EL/PL Protocol – public liability claims				
A. If Parties reach a settlement prior to the claimant issuing proceedings under Part 7				
Agreed damages	At least £1,000, but not more than £5,000	More than £5,000, but not more than £10,000	More than £10,000	
Fixed costs	The total of— (a) £950; and (b) 17.5% of damages	The total of— (a) £1,855; and (b) 10% of damages over £5,000	The total of— (a) £2,370; and (b) 10% of damages over £10,000	
B. If proceedings are issued under Part 7, but the case settles before trial				
Stage at which case is settled	On or after the date of issue, but prior to the date of allocation under Part 26	On or after the date of allocation under Part 26, but prior to the date of listing	On or after the date of listing but prior to the date of trial	
Fixed costs	The total of— (a) £2,450; and (b) 17.5% of the damages	The total of— (a) £3,065; and (b) 22.5% of the damages	The total of— (a) £3,790; and (b) 27.5% of the damages	
C. If the claim is disposed of at trial				
Fixed costs	The total of— (a) £3,790; (b) 27.5% of the damages agreed or awarded; and (c) the relevant trial advocacy fee			
D. Trial advocacy fees				
Damages agreed or awarded	Not more than £3,000	More than £3,000, but not more than £10,000	More than £10,000, but not more than £15,000	More than £15,000
Trial advocacy fee	£500	£710	£1,070	£1,705

55. If the case settles before the date of the trial, neither trial fees nor advocacy fees are recoverable. Under the RTA protocol if the claim settles "*On or after the date of listing but prior to the date of trial*", fixed costs are determined under category B: a base fee of £ 2, 655 and 20% of damages. If the claim is "disposed of trial" costs are fixed under category C. Fixed costs under category C are the same as Category B save for the inclusion of the advocacy fee, so fixed costs are £ 2, 655; 20% of damages; and the relevant trial advocacy fee. For reasons discussed below "*disposed of at trial*" includes a claim which is settled on the day listed for trial, see §§ 74-75 below.
56. CPR 45.29I allows for certain categories of disbursement under r.45.29I(2) and (3) but "*will not allow a claim for any other type of disbursement*". r.45.29I(2) provides for "*(c) the cost of any advice from a specialist solicitor or counsel as provided for in the relevant Protocol*"<sup>3</sup> and "*(h) any other disbursement reasonably incurred due to a particular feature of the dispute*".
57. Section IIIA does not provide the specific provisions for an advice on settlement on behalf of a child which is specifically included in Section II or as a fixed cost under Section III as discussed above.

### III. UPDATING FAST TRACK TRIAL ADVOCACY FEES

#### The BC/PIBA Proposal

58. In their July 2021 paper the BC and PIBA set out their case for updating current fast track trial fees.

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<sup>3</sup> § 7.10 of the RTA Protocol and §7.8 of the EL/PL Protocol provides that in some cases worth more than £ 10, 000 an additional advice from specialist solicitor or counsel may be justified where it is "reasonably required to value the claim", see *Dover v Finsbury Food Group PLC* (SCCO, Master Brown, 25.09.19). *Dover* is authority for the point that the cost of such advice is not limited to £ 150.

- (i) A simplification of the current rules which removed the distinction between fees under Section III and Section VI was appropriate.
- (ii) A simple pro-rata increase of fees would be a reasonable basis upon which to fix advocacy fees if the trial fees were to be subject to annual review or some other form of periodic index-linked revision. The position of PIBA and the BC is that all fixed costs should be subject to fixed periodical review. It is entirely consistent with the views expressed by Sir Rupert Jackson in both his *Final Report* into Civil Litigation Costs and his *Supplementary Report on Fixed Costs*.
- (iii) If no such mechanism is in place, the acceptable course would be to provide for a figure which is inflation-proofed, i.e., set at a level which anticipates increases in the costs of living over the short term.
- (iv) If such inflation-proofing were to be included in figures an increase of 25% may be a reasonable approach, giving revised figures at:

Value of Claim	(+25%)	Suggested Fee
No more than £3,000	£ 869	<b>£ 870</b>
More than £3,000 but not more than £10,000	£ 1, 236	<b>£ 1, 235</b>
More than £10,000 but not more than £15,000	£ 1,854	<b>£ 1, 855</b>
More than £15,000	£ 2,913	<b>£ 2, 915</b>

59. CPI in June 2021 was 2% and RPI was running at 3.8%; by contrast the comparable figures for June 2022 are 9% and 11.1% respectively.<sup>4</sup>

60. Increasing the fees proposed in July 2021 to take into account RPI would result in figures increased in line with inflation as follows<sup>5</sup>:

Value of Claim	Suggested Fee	RPI
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<sup>4</sup> <https://www.ons.gov.uk/economy/inflationandpriceindices>

<sup>5</sup> <https://www.hl.co.uk/tools/calculators/inflation-calculator>

No more than £3,000	<b>£ 870</b>	£ 952
More than £3,000 but not more than £10,000	<b>£ 1, 235</b>	£ 1, 352
More than £10,000 but not more than £15,000	<b>£ 1, 855</b>	£ 2, 008
More than £15,000	<b>£ 2, 915</b>	£ 3, 190

61. The change in the cost of living between July 2021 and June 2022 powerfully underlines the point we made in October 2019 that the current level of fees was too low and ceased to reflect appropriate market forces. It also provides a compelling illustration of why annual fixed reviews are the best means of ensuring that fixed costs are set at appropriate and sustainable levels.

### Updating Fast Track Advocacy Fees and the Extension of the FRC

#### (1) Horizontal Extension

62. Comparison between the trial advocacy fees suggested at § 60 above indicates that the advocacy fees set out in the current proposals are demonstrably too low. The starting point is that the current £ 500, £ 710, £ 1, 070, and £ 1, 705 fixed advocacy fees currently used for Section IIIA claims inform the approach set out in the table quoted at § 9 above. The fees as set out there are:

	Complexity Band			
Claim value	1	2	3	4
up to £3,000	a. £500	a. £500	a. £500	a. £1,380
£3,001 to £10,000	b. £710	b. £710	b. £710	b. £1,380
£ 10,001 to £15,000	c. £1,070	c. £1,070	c. £1,070	c. £1,800
£15,001 to £25,000	d. £1,705	d. £1,705	d. £1,705	d. £2,500

Applying the same approach as has been suggested for personal injury cases, these figures should be increased by 25 % and rounded up as follows:

	Complexity Band			
Claim value	1	2	3	4
up to £3,000	a. £870	a. £870	a. £870	a. £1,725
£3,001 to £10,000	b. £1235	b. £1235	b. £1235	b. £1,725
£ 10,001 to£15,000	c. £1,855	c. £1,855	c. £1,855	c. £ 2, 250
£15,001 to £25,000	d. £2.915	d. £2,915	d. £2,915	d. £ 3, 125

## (2) Vertical Extension

63. The above analysis also suggests that advocacy fees on the intermediate track are also too low. The basis for this conclusion is slightly different. Clearly, in setting advocacy fees in the intermediate track, further consideration has been given to the length of preparation for trials of some complexity. The starting point for this exercise is not the current fast track trial fee for personal injury claims. However, having recognised that the current level of Fast Track advocacy fees has not been updated since 2013 and the need for a significant increase in the level of fees justifies a significant increase, also impacts on the level of fees on the intermediate track.
64. Increasing fast track advocacy fees in personal injury cases, but not factoring this into fees set in the intermediate track would create some obvious anomalies and inconsistencies: most importantly a brief fee of £ 3, 125 in a Fast Track trial worth between £ 15 and 25, 000 would be incompatible with a brief fee of the intermediate track which was £ 2, 750. Such inconsistency would drive behaviours which are inconsistent with the good administration of justice.

65. If the same approach is taken to the intermediate track as to the fast track up to £ 25, 000 and a general 25% increase is applied the comparable figures for the table set out at § 31 above are as follows:

### Current proposal

<b><u>Stage (S)</u></b>	<b><u>Band 1</u></b>	<b><u>Band 2</u></b>	<b><u>Band 3</u></b>	<b><u>Band 4</u></b>
S10 Advocacy fee: day1	£2,750	£3,000	£3,500	£5,000
S11 Advocacy fee: subsequent days	£1,250	£1,500	£1,750	£2,500
S12 Hand down of judgment and consequential matters	£500	£500	£500	£500
S13 ADR: counsel/ specialist lawyer at mediation or JSM (if instructed)	£1,200	£1,500	£1,750	£2,000
S14 ADR: solicitor at JSM or mediation	£1,000	£1,000	£1,000	£1,000
S15 Approval of settlement for child or protected party	£1,000	£1,250	£1,500	£1,750

Increase by 25%:

<b><u>Stage (S)</u></b>	<b><u>Band 1</u></b>	<b><u>Band 2</u></b>	<b><u>Band 3</u></b>	<b><u>Band 4</u></b>
S10 Advocacy fee: day1	£3, 450	£3, 750	£4, 375	£6, 250
S11 Advocacy fee: subsequent days	£1, 565	£1, 875	£2, 185	£3, 125
S12 Hand down of judgment and consequential matters	£ 625	£625	£625	£625
S13 ADR: counsel/ specialist lawyer at mediation or JSM (if instructed)	£1,500	£1,1875	£2,185	£2,500
S14 ADR: solicitor at JSM or mediation	£1,250	£1,250	£1,250	£1,250
S15 Approval of settlement for child or protected party	£1,250	£1,565	£1,875	£2,185





#### **IV. CURRENT ISSUES WITH FAST TRACK TRIALS IN PRACTICE**

##### **Introduction**

66. In contemplating significant expansion of FRC, there is inevitable value in considering how some aspects of the current system can give rise to problems. Personal injury barristers have more experience of the Fast Track than any other specialist bar association, and in recent years PIBA has become increasingly concerned with systemic issues that seriously undermine the work of their members in these cases.

##### **Fast Track Trial Listing in the County Court**

67. The late vacation of hearings is a recurrent and nationwide problem. In many cases notice of vacation may be given in advance, but the court may also contact the parties on the morning of the hearing itself. While the pressures on the resources of the court and judicial availability are well understood, it is important to emphasise the impact the late vacation of hearings has on advocates. Invariably hours of preparation time will have been wasted, travel plans will have been made, non-refundable tickets purchased, and accommodation costs incurred. Under the current system, in most instances, individual barristers have to bear the costs thrown away. This state of affairs impacts primarily on junior barristers at the outset of their careers.

##### **The Rules**

68. There is limited scope for costs recovery for legal representatives attending a Fast Track trial other than the advocate. There is no mechanism for the recovery of fees incurred as a result of a trial being vacated at short notice either under Section VI or Section IIIA. In contrast to Section VI and IIIA, there is provision under Section III that when a Stage 3 or settlement hearing is adjourned the court does

have discretion to award the Stage 3 advocacy fee pursuant to r. 45.27, see § 43 above.

### **Block Listing**

69. Fast Track trials are usually placed in a fixture list either before specific judges or a floating list with a number of judges. Block listing of this kind is effective if a large number of cases settle at short notice, but is entirely inappropriate when trials are effective: some trials will proceed, but the majority will not be heard. Progress through the list will depend on how quickly a trial will last, but given that Fast Track trials are usually allocated a time estimate of a day, the expectation is that if you attend court for a trial and are not first or possibly second on the list, the case will not proceed.

### **The Extent of the Problem**

70. In the July 2021 paper BC/PIBA provided data from two sets of chambers: *Chambers 1*. In the period 01.09.20 to 23.12.20, 359 Fast Track cases were ineffective; 238 were vacated, 66.3%; 185 were vacated and notified to Counsel within the working day of the hearing (77.7%). *Chambers 2*. In the period 01.09.20 to 04.11.20, 168 Fast Track trial cases were ineffective: notice was given within 2 days in 50 cases, but 103 the day before and 6 on the day of the hearing; so almost 65% within a working day of the trial date. PIBA continues to gather data about this issue which can be provided in due course, but multiple reports confirm that the same problems continue, nationwide.

### **Timing of Instructions to Counsel**

71. In the overwhelming majority of cases Counsel is instructed for trial. In some instances, counsel may be asked to advise on prospects in relation to an upcoming trial. A conference with the client will not usually occur until attending court on the morning of the trial. The move to remote working for Fast Track trials

means that pre-trial conferences have moved online. Inevitably Counsel gives advice about substantive matters at a late stage: for example, advice on evidence, quantum, contributory negligence, and settlement offers. In a case that is vacated there is no rule entitling Counsel to payment for this valuable work. In many cases Counsel will go unpaid when a vacated hearing subsequently settles on the basis of advice given but this is of real benefit to the parties. The Court also benefits by the reduction in the pressure on lists, reducing backlogs.

### **Vacated Hearings and Conditional Fee Agreements**

72. On the basis that there is no clear entitlement to payment where the trial is vacated under the rules, it is highly unlikely that Counsel will have a realistic ability to recover incurred fees from the client under a CFA. In effect if there is no mechanism to recover costs from the Defendant, Counsel will not be paid for any work undertaken. This undermines an integral part of civil litigation: if junior counsel are reluctant to enter into CFAs for trials as there is a distinct likelihood that they will not be paid, clients will be left without appropriate representation and there is a potential for a funding “gap”: cases in which CFAs are not used and no alternative form of funding exists for an impecunious claimant.

### **Late Settlement of Cases**

73. In circumstances when settlement is achieved “at the door of the court” Counsel is entitled to recover the brief fee for trial: *Mendes v Hochtief (UK) Construction Ltd* [2016] EWHC 976 (QB).<sup>6</sup> Coulson J. (as he then was) held that the claim was disposed of “at trial” albeit by settlement rather than by judgment [§21]. As a matter of policy an advocate should not lose out financially for negotiating settlement at the door of the court. Arguments about when a trial had “commenced” were fact sensitive, likely to cause confusion about the application

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<sup>6</sup> <https://www.bailii.org/ew/cases/EWHC/QB/2016/976.html>

of the rules, and were best avoided. [§24] An advocate recovering a fee for the preparation and attendance at trial was not receiving a 'windfall' if the case settled at the door of the court. [§25] Coulson J. did not consider his interpretation was inconsistent with the definition of trial as "*a reference to the final contested hearing*" as defined by 45.29C(4)(c), see § 40 above. A settlement on the day of trial is settlement of the case on the day of the "final contested hearing".

74. In *Mendes* Coulson J was not concerned with cases which settle before the day listed for trial. A rule which limits recovery of trial fees to cases which settle on the day of trial is neither logical nor fair. If costs can be recovered at the door of the court at 0930 on Friday, then why not if compromised over the phone at 1645 on Thursday? Limiting the rule of recoverability of advocacy fees to cases which settle on the day of trial is clearly arbitrary.
75. In Table 6B, 6C, and 6D the recoverable base fees are the same from the date of listing to the date of trial. Costs awarded within that stage allow for 'swings' and 'roundabouts': cases will be settled at an early stage so further costs will not be incurred, other cases will proceed to trial and costs may be incurred at an amount which exceeds fixed costs. However, there is no comparable position in relation to the advocacy fee for trial. As base fees remain the same up until trial, in most cases the risk of non-recoverability of the advocacy fee rests with Counsel rather than the solicitor whose claim for costs is limited to the base fees plus percentage.

### **Skeleton Arguments and Abated Brief Fees**

76. As noted at § 33 above, the preparation of skeleton arguments is included in the advocacy fee. Provision for the filing and exchange of skeleton arguments is often but not always included in standard directions for Fast Track trials. On occasion trial judges may expect them even in the absence of an order. In many cases counsel draft skeleton arguments although not specifically required by the court directions.

77. In *Coleman v Townsend* (SCCO, 13 July 2020, Master Haworth) directions provided for exchange of skeleton arguments two days prior to trial. The claim settled the day before trial. The Claimant submitted that Counsel's fee for the skeleton argument and an abated fee for trial were recoverable as disbursements pursuant to CPR 45.29(2)(h). Although Counsel prepared a skeleton argument in accordance with the court's directions, Master Haworth held that neither an abated brief fee nor a fee for the skeleton argument were recoverable. The claim had not reached the trial stage, so the trial advocacy fee "*and implicitly the costs of preparing for the trial which self-evidently would include a skeleton argument*" were not recoverable. Recoverable costs were limited to Stage B costs, from the date of listing but prior to the date of trial.

#### **Rule changes to allow for recovery of abated brief fees**

78. The discussion above identifies two particular situations where the current rules are unsatisfactory: when cases are vacated at short notice and when cases settle after the instruction of counsel to prepare for trial but before the date of trial. In both scenarios 'advocacy' is predominantly undertaken by Counsel in self-employed practice. The reality of funding arrangements and the limits of fixed costs under CPR 45 mean that preparatory work undertaken by Counsel goes unremunerated. These problems have become a source of acute frustration to personal injury barristers, and it is appropriate that those concerns are addressed before FRC is expanded in the ways set out at §§ 8-31 above.
79. Counsel's fees are incurred on a disbursement basis. This creates no difficulty when the rules provide that Counsel's fees are paid on a disbursement basis, for example pursuant to r.45.29(2)(c). However, the instruction of Counsel by payment of a brief fee works less well in the context of fixed costs. Despite the fact that the intention of the trial advocacy fee was to include preparation for trial,

and the rules specifically define fast track trial advocacy costs as "*preparing for and appearing at trial*" (r.45.37(2)(a)), such costs are only recoverable when a claim concludes whether by settlement or determination by the court on the date of trial. Rules that recognised that costs are incurred on the delivery of the brief to Counsel is consistent with ordinary practice in multi-track cases, common practice among defendant solicitors instructing Counsel on the Fast Track and should be the model adopted in the expanded FRC.

80. As has been discussed above, see §§ 74-77, it is clear that the advocacy fee is recoverable in cases when the claim settles on the day of trial. This point could also be clarified in the rules. When a trial does not go ahead the rules should also provide the right to recover an abated advocacy fee. These rules should cover existing Fast Track cases and cases falling within the expanded FRC. We propose that such a rule should provide that:

- (a) in cases settled or removed from the list on the day of trial, the full trial advocacy fee should be recoverable; and
- (b) in cases settled or removed from the list within 48 hours of the date fixed for trial 75% of the full trial advocacy fee should be recoverable.

#### **Drafting a rule change to allow for the recovery of abated fees**

81. The discussion above has indicated the different ways in which fixed fees for advocacy or payment of Counsel as a disbursement are woven into the fixed costs rules. The essential distinction between these two mechanisms is that if included under fixed costs such fees will be recoverable in all cases that reach the appropriate stage whereas in the case of disbursements the court retains a discretion to award the costs, so for example, under 45.29(1)(a) the court "*may allow a claim for a disbursement of a type mentioned in paragraphs (2) and (3)*".

### Proposal 1: Rule Change included in Fixed Costs

82. An example of how recommendations (a) and (b) at § 81 could be implemented in relation to Table 6B is as follows:

**Amended** TABLE 6B

Fixed costs where a claim no longer continues under the RTA Protocol				
A. If Parties reach a settlement prior to the claimant issuing proceedings under Part 7				
Agreed damages	At least £1,000, but than £5,000	More than £5,000, but not £10,000	More than £10,000	
Fixed costs	The greater of— (a) £550; or (b) the total of— (i) £100; and (ii) 20% of the damages	The total of— (a) £1,100; and (b) 15% of damages over £5,000	The total of— (a) £1,930; and (b) 10% of damages over £10,000	
B. If proceedings are issued under Part 7, but the case settles before trial				
Stage at which case is settled	On or after the date of issue, but prior to the date of allocation under Part 26	On or after the date of allocation under Part 26, but prior to the date of listing	On or after the date of listing but prior to trial	
Fixed costs	The total of— (a) £1,160; and (b) 20% of the damages	The total of— (a) £1,880; and (b) 20% of the damages	The total of— (a) £2,655; and (b) 20% of the damages	
C. If the claim is disposed of at trial				
Fixed costs	The total of— (a) £2,655; and (b) 20% of the damages agreed or awarded; and (c) the relevant trial advocacy fee			
D. Trial advocacy fees				
Damages agreed or awarded	Not more than £3,000	More than £3,000, but not more than £10,000	More than £10,000, but not more than £15,000	More than £15,000
If the trial is disposed of or is removed from the list on the day of trial	£500	£710	£1,070	£1,705
If the trial is removed from the list or is settled 2 days before the day of trial	£375	£533	£803	£1,279





## Alternative Proposal 2: Rule Change as a Disbursement

83. An example of how recommendations (a) and (b) at § 79 could be implemented be amending the rules in relation to disbursements is as follows:

*(1) Subject to paragraphs (2A) to (2E), the court—*

*(a) may allow a claim for a disbursement of a type mentioned in paragraphs (2) or (3); but (b) will not allow a claim for any other type of disbursement.*

*(2) In a claim started under the RTA Protocol, the EL/PL Protocol or the Pre-Action Protocol for Resolution of Package Travel Claims, the disbursements referred to in paragraph (1) are—*

*(a) the cost of obtaining medical records and expert medical reports as provided for in the relevant Protocol;*

*(b) the cost of any non-medical expert reports as provided for in the relevant Protocol;*

*(c) the cost of any advice from a specialist solicitor or counsel as provided for in the relevant Protocol;*

*(d) court fees;*

*(e) any expert's fee for attending the trial where the court has given permission for the expert to attend;*

*(f) expenses which a party or witness has reasonably incurred in travelling to and from a hearing or in staying away from home for the purposes of attending a hearing;*

*(g) a sum not exceeding the amount specified in Practice Direction 45 for any loss of earnings or loss of leave by a party or witness due to attending a hearing or to staying away from home for the purpose of attending a hearing;*

*(gg) the relevant trial costs pursuant to Table 6B, 6C, and 6D where a party's advocate is instructed to prepare for and appear at a trial which is removed from the list on the day of trial due to lack of judicial availability;*

*(ggg) a sum equivalent to 75% of the relevant trial costs pursuant to Table 6B, 6C, and 6D when a party's advocate is instructed to prepare for and appear at a trial and –*

*(a) the trial is removed from the list two days before the date of trial due to lack of judicial availability or*

*(b) the parties reach agreement less than 2 days before the*

*date listed for trial; and*  
*(h) any other disbursement reasonably incurred due to a particular  
feature of the dispute.*

84. There are several points that need to be made about these proposed amendments and how they differ from Proposal 1 in relation to fixed costs:

- (1) For the reasons explained above, the current rules allow recovery of the advocacy fee for a case which settles at trial. This is included in Proposal 1 above as this is a fixed cost and the suggested wording provides clarity. As this fee is recoverable as a fixed costs it does not need to be included in any amended rule concerned with disbursements;
- (2) In drafting the proposed amendment to the disbursement rule a proper control mechanism exists as the court maintains its discretion to award such costs;
- (3) A further control mechanism exists in that the rules only apply in cases when counsel *is "instructed to prepare for and appear at a trial"*, i.e., recovery can only be made when counsel is briefed to attend at trial. The wording, of course, is consistent with r.45.37(2)(a).
- (4) The proposal described at § 83 uses the term 'removed from the list' which could include a multitude of reasons, including settlement.
- (5) The term *"the parties reach agreement less than 2 days before the date listed for trial"* is consistent with the relevant phrasing used for settlement in Tables 6B, 6C, and 6D.
- (6) A further control mechanism that limits recovery under this head is that it will only be recoverable in cases which settled 2 days before the date listed for trial.

#### Alternative Proposal 3: adapting r. 45.27

85. There is no good reason why the Adjournment provision under r. 45.27 which applies to Stage 3 hearings cannot also apply to Fast Track trials, see § 43 above. It would not be appropriate to adapt the rule to cases which settle shortly before

the date listed for trial, but it provides a useful example of how such a rule could apply for cases which are removed from the list at short notice.

86. A new rule could be introduced to Section III and Section VI, and included in the expanded FRC, providing that:

*Where a party's advocate is instructed to prepare for and appear at a trial and the trial is removed from the list due to lack of judicial availability the court may in its discretion order a party to pay –*

- (a) the relevant trial costs pursuant to Table 6B, 6C, and 6D when the trial is removed from the list on the day of trial;*  
*(b) 75% of the relevant trial costs pursuant to Table 6B, 6C, and 6D when the trial is removed from the list two days before the date of trial.*

## **V. *Aldred v Cham***

### **Introduction**

87. The facts of *Aldred v Cham* are unremarkable. The 7-year-old Claimant was injured in an RTA on 5 September 2015. His claim commenced in April 2016 under the RTA Protocol. The claim exited the Portal because the Defendant denied liability. After negotiations, the defendant confirmed he would settle the Claimant's claim in full and in August 2016 made an offer of £2,000. The Claimant's solicitors instructed counsel to prepare an advice on the offer. Counsel advised acceptance of the offer and Part 8 proceedings were issued for approval of the settlement. Settlement was approved by the judge with an order that the Defendant do pay the Claimant's costs to be assessed if not agreed.
88. In his Bill of Costs the Claimant claimed the cost of counsel's advice at £ 150 plus VAT. In its Points of Dispute the Defendant took issue with Counsel's fee, contending that Section IIIA did not permit recovery of Counsel's fee for an advice

on settlement as a disbursement under r. 45.29I. The cost of counsel's work was "subsumed" in the fixed costs permitted under Table 6B.

89. In Reply the Claimant argued that counsel's fee was recoverable as a disbursement under CPR 45.29I(2)(h). At provisional assessment and an oral hearing the District Judge allowed recovery of the fee as a disbursement. On appeal HHJ Owen QC upheld the District Judge's decision.

### **The Court of Appeal's Decision**

90. The issue that the court had to determine was a narrow one: whether the cost of Counsel's advice on the quantum of settlement in an RTA claim when the Claimant is a child was a disbursement "reasonably incurred due to a particular feature of the dispute", r 45.29I(h).
91. The rules prescribe certain steps must be followed where there is a compromise of a claim on behalf of a child or protected party under CPR 21. R. 210.10(1) provides that:

*Where a claim is made –*

*(a) by or on behalf of a child or protected party; or*

*(b) against a child or protected party,*

*no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court.*

PD 21 at § 5.2 provides that:

*(1) An opinion on the merits of the settlement or compromise given by counsel or solicitor acting for the child or protected party must, except in very clear cases, be obtained.*

*(2) A copy of the opinion and, unless the instructions on which it was given are sufficiently set out in it, a copy of the instructions, must be supplied to the court.*

There was no suggestion that *Aldred* was "a very clear case" that did not require Counsel's advice.

92. In giving the leading judgment of the court Coulson LJ held that Counsel's advice provided to the court in accordance with r. 21 was not recoverable as a disbursement under r 45.29I(h) as he did not consider "*that the fact that the respondent was a child was a particular feature of the RTA dispute between the respondent and the appellant.*" [39] Although this finding was sufficient to dispose of the matter Coulson LJ also found that Counsel's fee was subsumed within fixed costs in Table 6B. Following reasoning similar to that in *Nizami v Butt*, see § 76 above, but referring to *Sharpe v Leeds City Council* [2017] EWCA Civ 33<sup>7</sup>, Coulson LJ held that incurring this fee within fixed costs was an inevitable consequences of the "*swings and roundabouts as there are in any regime designed to deal with high bulk, low value claims*": "*The fact that this additional cost will be necessary in some cases but not in other claims is simply another example of that process.*" [56]

### Application to the Supreme Court

93. The Claimant applied for permission to appeal to the Supreme Court. PIBA intervened and lodged submissions in support of the Claimant's application. On 19 May 2020 permission was refused but the Court indicated that this was a matter that could be considered further by the Rules Committee.

### Analysis

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<sup>7</sup> The Court found that the fixed costs regime applied to application for Pre-action disclosure; see Briggs LJ (as he then was) : "*The starting point is that the plain object and intent of the fixed costs regime in relation to claims of this kind is that, from the moment of entry into the Portal pursuant to the EL/PL Protocol (and, for that matter, the RTA Protocol as well) recovery of the costs of pursuing or defending that claim at all subsequent stages is intended to be limited to the fixed rates of recoverable costs, subject only to a very small category of clearly stated exceptions. To recognise implied exceptions in relation to such claim-related activity and expenditure would be destructive of the clear purpose of the fixed costs regime, which is to pursue the elusive objective of proportionality in the conduct of the small or relatively modest types of claim to which that regime currently applies.*" [31]

94. It would be fair to say that the overwhelming majority of PIBA members consider that *Aldred v Cham* was wrongly decided in the Court of Appeal, but it is also the case that it did not reflect our members' understanding or experience of the rules. There are four main reasons for this:

- (1) There is a long and established practice of the Courts allowing child litigants to recover disbursements in respect of Counsel's fees for advice on settlement and for attendance at a settlement hearing, including cases under Section IIIA Part 45.
- (2) Having been taken to other provisions within Part 45 and, in particular Section II and Section III, the court was aware of the specific provisions under these sections for the recovery of Counsel's advice on settlement on behalf of a child, see §§ 46-52 above. In this respect, the absence of a similar provision in Section IIIA was anomalous.
- (3) PIBA and the BC have discussed the recovery of Counsel's fees for advice on behalf of children with the MoJ and other stakeholders in various consultations from 2003 onwards. Indeed, PIBA and the BC specifically lobbied for Counsel's fees in respect of such advices in both 2003 and 2010. Representatives of PIBA and the BC participated in the stakeholders' meetings in 2012-13 which informed Sir Rupert Jackson's recommendations in relation to fixed costs. It was their clear understanding that the costs of Counsel's advice in cases involving protected parties, and the costs of other disbursements, such as interpreter's fees, were not included either in the data provided in relation to the level of fixed costs or discussions about the level of fixed costs.
- (4) The understanding referred to at 3 above is consistent with the recommendations made by Sir Rupert Jackson in his Final Report. At § 5.16 in Chapter 15 his recommendations included:

*Children and protected persons. In cases where the claimant is a child or protected person, any settlement requires court approval. In such cases I propose that the following be added to the fixed recoverable costs in respect of the pre-issue period: (a) a fixed fee of £500 for the solicitors, (b) £150 for counsel (as a disbursement) to advise on quantum and (c) court fee for approval application.<sup>8</sup>*

95. Powerful critiques of the decision in *Aldred* were set out in both the Claimant's and PIBA's applications to the Supreme Court. It is not necessary for the purposes of this paper to demonstrate that *Aldred* was wrongly decided, but rather that the decision draws attention to an anomaly in the rules that should be rectified. In simple terms there should be provision within the rules to allow for recovery of an advice on quantum where a claim settles on behalf of a child in Section IIIA of Part 45.
96. There are many reasons that justify such a rule change, but there are four central policy justifications:
- (a) The provision of such an advice is required by the rules, CPR 21, except in a clear and obvious case. Where a step is required by the rules it should be accommodated within fixed costs: a complimentary rule should allow for costs recovery of such a discrete step, similar to the current provisions which apply in Section II and Section III. This ensures consistency and prevents any potential unfairness to a particular category of claimants, such as children.
  - (b) The current rules in Section IIIA as interpreted by the Court of Appeal in *Aldred* demonstrate inconsistent approaches to the cost of Counsel's advice on settlement for a child or protected party which are arbitrary and appear

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<sup>8</sup> Cases involving protected parties were later removed from the pre-action protocols.



to lack any underlying policy justification. It is not clear to us why child claimants whose claims are settled under the protocols should be treated differently from child claimants whose claims settle later in the process. The possibility that there could be a potential costs advantage for Defendants in allowing a claim brought by a child to fall out of the protocol before settlement is an obvious perverse incentive, far removed from the 'swings' and 'roundabouts' justification for the anomalies created.

- (c) The current rules as interpreted by *Aldred* create significant anomalies:
- (i) If the claimant is a protected party, Section II applies. The cost of the advice is recoverable as a disbursement under r.45.12(2)(b) if it was "*necessarily incurred by reason of*" the claimant being a protected party, see § 47 above.
  - (ii) If the claimant is a child and the claim falls under Section II then the same provision as in (i) above will apply. Although the Court of Appeal in *Aldred* noted the limited effect of this situation, it continues to apply in certain cases, for example if the defendant's vehicle is registered outside the UK or the claim is pursued against the MIB under the Untraced Drivers' Agreement.
  - (iii) If the claimant is a child and the case is dealt with under Section III, and the advice is confined to the issue of damages, it is recoverable as a fixed cost of £150. CPR 45.18(2), see § 49 above.
  - (iv) If the claimant is a child and the case is dealt with under Section III, but the advice is on "settlement" rather than just "damages", the cost can be claimed as a disbursement under the catch-all in 45.19(2)(e): "*any other disbursement that has arisen due to a particular feature of the case*", see § 31 above. This is the case if the advice deals with issues of liability, including contributory negligence, in addition to "damages" alone. PD 21 requires an advice not just on "the amount of damages"

(which would be covered by the Type C fixed cost) but an "*opinion on the merits of the settlement or compromise*".

- (v) Within Section IIIA itself the costs of an advice on settlement can be recovered under r.45.29I(2)(c) for "*the cost of any advice from a specialist solicitor or counsel as provided for in the relevant Protocol*", i.e., in some cases worth more than £ 10, 000 an additional advice from a specialist solicitor or counsel may be justified where it is "*reasonably required to value the claim*", see § 56 above.

- (d) The current rules as interpreted in *Aldred* are potentially discriminatory. Different rules apply between claims involving children that are settled within or outside the protocol and where the value of the claim is more or less than £ 10, 000. These anomalies in the rules have a potentially discriminatory effect on particular categories of child claimants, and in its submissions to the Supreme Court PIBA drew attention to the potential issues of discrimination and interference with rights under Article 1 of the First Protocol of the European Convention on Human Rights.

- 97. PIBA and the BC submit that there are overwhelming grounds for amending the rules to end the anomalies highlighted by the *Aldred* decision.

### **Recommendation**

- 98. Both Section II and Section III provide examples of how a rule allowing for the recovery of Counsel's advice on settlement on behalf of a child could be incorporated into the rules in Section IIIA. The best way forward is probably an amendment to r. 45.29I to allow for the recovery of advice on settlement on behalf of a child. A suggested draft amendment is as follows:

45.29I-(1) Subject to paragraphs (2A) to (2E), the court

*(a) may allow a claim for a disbursement of a type mentioned in paragraphs (2) or (3) or (4); but*

*(b) will not allow a claim for any other type of disbursement.*

...

*(4) Where they necessarily incurred by reason of one or more of the claimants being a child as defined in Part 21, to include (i) fees payable for an advice on the merits of the settlement or compromise given by counsel or solicitor; and (ii) court fees payable on an application to the court.*