CJC Working Group on Technical Aspects of Jackson Implementation: Options for proportionality, Part 36 Offers and Qualified One-way Costs Shifting

Contents

Introduction

1. At the invitation of the Ministry of Justice, the Civil Justice Council was happy to assist in developing approaches to implementation of certain aspects of costs reform. This follows the MoJ's consultation paper 13/10 *"Proposals for Reform of Civil Litigation Funding and Costs in England and Wales: Implementation of Lord Justice Jackson's Recommendations"* and the subsequent Government Response (Cm 8041) which was issued in March 2011.

2. The nature of the CJC's activity was set out on the CJC's website during summer 2011. The Council agreed to form and support a Working Group of expert practitioners to help develop the detail of secondary legislation (regulations, court rules) with regard to:

- Qualified one way costs shifting – atypical cases and behavioural aspects
- Introduction of an additional sanction/reward under Part 36
- The detail of the proportionality test – content of a Practice Direction - examples of when the test should not be applied.

3. The Working Group was asked to develop realistic options in each area and to advise on the pros and cons of each option. The policy objectives outlined in the Government response and the fine drafting of any secondary legislation were, in broad terms, outside the Group's remit.

4. The full Working Group met on three occasions, in addition to which subject-specific subgroups also met. The Council is extremely grateful to all of those who gave their time to attend these meetings and to exchange early views and position papers at the beginning of this activity. The members of the Working Group are listed below. In addition, several officials from the Ministry of Justice sat as observers.

• Alistair Kinley* - Berrymans Lace Mawer (Chair) • Janet Tilley* - Coleman Tilley • John Usher* - USDAW • Colin Stutt* - formerly of the Legal Services Commission	• Don Clarke - (FOIL Vice-President) Keoghs • Judith Gledhill - Thompsons • Hardeep Nahal - McGuireWoods • Graham Huntley - Hogan Lovells • Mandy Knowlton-Rayner – (ALARM)

• Mark Harvey* - Hugh James • Nicholas Bacon QC - 4 New Square • David Marshall - The Law Society • Howard Grand - Aviva • David Fisher - AXA • David Bott - (APIL President) Bott & Co * denotes Civil Justice Council Member	Norfolk County Council • Kay Majid - Tesco plc • Kathryn Mortimer - DAS • Rocco Pirozzolo - QBE • Hilary Homfray - Birmingham City Council

5. The Working Group was not tasked with seeking consensus on the options for implementation of measures relating to any of the three topics which it examined. Therefore proposals in the body of this paper are often qualified as being representative of the views of a majority, or of certain sections, or even of a minority of the Working Group.

6. This paper was edited by Alistair Kinley, Nicholas Bacon QC and David Marshall, supported by Alex Clark and Graham Hutchens from the CJC Secretariat. The proposals it contains reflect the areas of concern and the practical solutions raised by members and, with limited time available for this work, it is almost inevitable that some aspects may require further development and discussion with a broader range of stakeholders.

7. Such an outcome was anticipated by the MoJ, which also invited the CJC to organise an experts workshop at the end of October where the findings of this work would be discussed with other expert practitioners. The MoJ has made related papers available for discussion at this event, scheduled to take place on 31st October 2011, on the financial aspects of qualified one-way costs shifting and on the 25% cap on damages.

Civil Justice Council
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Summary of options for Proportionality

Objective

1. The objective of ensuring that costs are both reasonable and proportionate is desirable and should be achieved.

Proportionality Models

2. There are four potential new alternatives to the current *Lownds* test (and its current application) which could meet the objectives of the new rule on proportionality:

   A. The Long stop model. There would be no preliminary determination as to proportionality akin to the current *Lownds* test. Instead, under this proposal reasonableness (alone) would be applied to each item of costs or category of costs as disputed by the paying party or as identified by the court. It would only be at the end of the assessment that proportionality and the new rule would be applied and then only in exceptional cases. The purpose of the long stop is to provide the court with an extra tool (as a longstop) to be applied only in exceptional cases to reduce otherwise reasonable costs to a proportionate level. The cases falling within the long stop would be exceptional and rare (because under this model reasonableness is synonymous with proportionality) and in all probability would bite on cases which in the light of the overall reasonable expenditure should not have been pursued and brought to a conclusion in the way they were. These will tend to be rare and exceptional cases.

   B. Reversal of Lownds model. Under this model there would be no "long stop" application of proportionality. Proportionality would be applied at the end in all cases. Instead of proportionality being considered at the outset (Lownds) it would only be considered at the end and then not part of a long stop. The bill of costs would be assessed item by item (or by category) against the sole test of reasonableness. Once the bill has been assessed as reasonable, the court

would go on as a matter of routine to apply the proportionality test to reduce the bill still further to a proportionate level. Unlike Option A, the proportionality test would be applied and engaged in all cases and not just "rare" or "exceptional" cases.

C. **The hybrid model.** Under this model both reasonableness and proportionality are considered at the same time when ever an item or category of costs is being assessed / budgeted. Unlike Option A and B, proportionality (and the new rule) is applied as the items of the bill or categories of costs are being assessed alongside considerations of reasonableness. There is then a residual long stop for the court to reduce the figure still further if the proportionality rule justifies it. This will be applied in only rare / exceptional cases. Like Option A, the application of the long stop will be in exceptional or rare cases only, but this time not because reasonableness would have catered for disproportionate costs (as in Option A) but because inevitably where a court has assessed items as being reasonable and proportionate during an assessment it will only be in exceptional or rare cases that the outcome of the assessment results in a disproportionate figure.

D. **Retention of Lownds.** Proportionality would be considered at the outset. If the costs as a whole appeared disproportionate within the meaning of the new rule then the necessity test would apply. Unlike the present day application of Lownds, the PD would contain list of factors relevant to the application of the necessity test and make it clear that what may be reasonably may not be.

New Practice Direction

3. The new rule on proportionality should be supported by a new Practice Direction / amendments to the existing PD to incorporate the new rule.

4. The new PD could:

a) Set out the basic procedure to be applied when assessing costs to which the new rule applies.

b) Set out the factors the court would be required to have regard to when applying the new test.

New Approaches

5. There may be room for some new approaches to the determination of what is proportionate:

   a) A reasonable bystander test – whether a reasonably resourced litigant in the position of the receiving party would have paid the costs from his own pocket to obtain the outcome achieved.

   b) Rebuttable presumptions as to reasonableness/proportionality of the costs by reference to their prior approval by the court in a court approved budget.

Costs Management

6. The new test on proportionality must work alongside rigorous and active costs management and costs budgeting.

Judicial Training

7. Whichever test is adopted, judicial training as to the application of the test will be required.

Summary of options for
Sanctions for the Claimant's Part 36 Offer

1. Most, although not all, of the Working Group favoured a costs-based sanction, rather than the damages-based sanction recommended by Lord Justice Jackson.

2. If a costs-based sanction were to be implemented, the majority of the Working Group was attracted to a solution involving significantly enhanced interest on costs of a prescribed rate of say 25% above base rate under CPR 36.14(3) (c).

3. If a costs-based sanction were to be implemented, there are three options to be considered:

   3.1. Option A1: Costs-based sanction (enhanced interest on costs of a prescribed rate of say 25% above base rate) biting on judgment only – preferred by the majority of the Working Group;

   3.2. Option A2: Costs-based sanction (enhanced interest on costs of a prescribed rate of say 25% above base rate) also biting on acceptance of Claimant's Part 36 Offer pre-trial – preferred by a minority of the Working Group;

   3.3. Option A3: Costs-based sanction applying to non-personal injury cases with the damages-based sanction only applying to personal injury cases - preferred by a minority of the Working Group.

4. If a damages-based sanction as proposed by Lord Justice Jackson were to be implemented, a majority of the Working Group agreed:

   4.1. A costs-based sanction as outlined above (i.e. of enhanced interest on costs of a prescribed sum of say 25% above base rate, subject to agreement as to the appropriate rate)) should be used for non-financial claims;

   4.2. A costs-based sanction as outlined above (i.e. of enhanced interest on costs of a prescribed sum of say 25% above base rate, subject to agreement as to the appropriate rate)) should be used for mixed claims;

5. The Working Group agreed that the sanction, whether damages-based or costs-based, should also apply to liability only offers (a payment on account of costs would normally be ordered, and that should continue, but there is no reason why the additional sanction cannot be resolved on trial or earlier settlement of the quantum claim). However, a majority of the Working Group considered that this was more easily dealt with by way of a costs-based sanction than a damages-based sanction (only one award of an additional 10% of damages can presumably be made in each case, even if separate Part 36 offers are made in respect of liability and quantum).

6. The Working Group were not able to agree on whether there should be a taper or cap on a damages-based sanction or what it should be. Three options are set out:

    6.1. Option B1 - no taper/cap on damages-based sanction;

    6.2. Option B2 - taper and cap on damages-based sanction, as per Lord Justice Jackson's proposal;

    6.3. Option B3 - cap at £100,000 on the damages-based sanction, but no taper.

Summary of options for Qualified one way costs shifting

In respect of Qualified One-way Cost Shifting (QOCS) we reached the following positions on key issues.

1. That the phrase “claims for personal injury” should be widely interpreted for the purposes of QOCS.

2. That the operation of QOCS where a claimant has failed to beat a defendant’s Part 36 offer is a critical area.
    - A majority favoured the normal principles of Part 36 taking precedence over QOCS, with a set off of damages operating as a control mechanism.
    - A majority also favoured setting off costs as well as damages.
    - A minority rejected the costs set off, arguing that it could cause uncertainties and raise indemnity principle points.
    - A minority favoured the primacy of QOCS over Part 36.

3. We unanimously agreed that the bringing of a fraudulent claim should cause the loss of QOCS protection.

4. Most accepted that:
    - the striking out of a claim for abuse of process should cause the loss of QOCS,
    - the impact on OQCS of the bringing of a frivolous claim or general unreasonable litigation conduct could be resolved by
        - adopting a high threshold test, or
        - adopting a low threshold test, or
        - by judicial discretion.

5. There was uncertainty about the response of the After The Event insurance market to costs risks and issues which might arise in relation to QOCS.

6. We agreed that QOCS should apply to
    - areas and types of personal injury claims in which costs are fixed,

- counterclaims and to cases involving multiple defendants,
- multiparty claims in which the harm complained of falls within the personal injury as widely interpeted, and
- mixed claims, in which damages for personal injury are sought alongside a non-monetary remedy (although we identified five distinct tests for deciding on the scope of QOCS protection in such mixed claims).

7. We proposed that QOCS should not apply to claims withdrawn before proceedings are issued, but recognised that this could remove a current deterrent against the pursuit of claims of limited merit.

8. We raised a number of practical questions about how QOCS might apply in cases in which a claim has been discontinued.

CHAPTER 1 – PROPORTIONALITY

Introduction

1. We have been asked to consider:

    a) The Ministry of Justice's preliminary conclusion on the benefits of a Practice Direction to support the new proportionality test, and

    b) The content of such a Practice Direction, including:
        (i) Suggestions for inclusion in a Practice Direction
        (ii) The pros and cons of giving more detailed examples along the lines suggested by respondents to the consultation paper
        (iii) Other options there might be to reduce satellite litigation on the introduction of the proportionality test

2. We have also been given the following terms of reference:

        (i) To consider and develop options for clarifying the way the new proportionality test will operate in order to increase certainty around the applicability of challenge under the proportionality test while reducing the prospect of satellite litigation;
        (ii) To provide written advice to the MOJ by the end of September 2011 on the advantages and disadvantages of each proposed option and to indicate where there is a unanimous view on the best option.

Proportionality as a principle

3. The objective of ensuring that costs are both reasonable and proportionate is desirable and should be achieved.

4. Any analysis of what may feature in any new approach to the application of proportionality must accommodate and address the reasons why proportionality has not been achieved hitherto and hence the underlying cause for reform.

5. Lord Justice Jackson has recommended that the current *Lownds* test of proportionality (necessity and the two stage approach) should be replaced. This is because it is not achieving its purpose namely of ensuring that costs as between the parties are kept proportionate.

6. If the former *Lownds* test did not produce the right result of proportionate costs then the solution going forward must reflect the identified reasons given for the past failures.

Lownds

7. The *Lownds* test requires the court to apply a two stage test to the determination of proportionality. At the outset of the assessment (summary or detailed) the court is required to determine whether the costs claimed are or have the appearance of being disproportionate. If the costs do not appear to be disproportionate then the court is required to proceed with the assessment by applying the reasonableness test rather than the necessity test. The court in this situation retains a discretion to apply necessity if during the assessment items or categories of costs appear disproportionate despite the initial global approach finding. Where the court concludes that the costs appear to be disproportionate (or disproportionate) then the necessity test applies throughout.

8. Lord Justice Jackson has concluded that this approach has not worked. Under the *Lownds* test apparently disproportionate costs are being allowed. We ask ourselves why?

9. The principle reasons appear to relate to either a failure on the part of the courts to identify costs as being disproportionate at the outset of the assessment and/or then in applying the necessity test without sufficient rigour as to what may or may not be “necessary”. Some have commented that costs are assessed with only a nodding respect to proportionality. Accordingly, we have to take into account that it may not be the *Lownds* test per se that has failed, but the application of the test by the wider judiciary or at least a combination of the two.

10. Any new test that is promulgated should be supported by judicial training as to its application. Investing in Judges and training to ensure that the new rules are

applied with the vigour intended is likely to be as equally important as the dictate of the new rule itself.

11. There is no point in having new rules if the judiciary are not, from a practical level, given sufficient time and resources to apply them.

One rule fits all

12. The new rules and their application should be drafted to accommodate the wide ranging nature of cases and litigation in general.

13. There must be one rule that fits all.

14. There is always going to be a tension between low value cases which necessarily require legal spends in excess of the value of the claim. Similarly, at the other end of the spectrum there will be the multi-million pound commercial cases where costs of many hundreds of thousands of pounds may not appear disproportionate to the level of the claim but which are in fact disproportionate when set against the steps that could reasonably have been undertaken and the deployment of resources that could be reasonably required to produce the final outcome.

15. Any new rule needs to accommodate both of these extremes and all cases falling within the wide spectrum between them.

Costs Management

16. Issues over proportionality are likely be minimised through the use of costs management.

17. Where a court is able to monitor and where possible sanction recoverable expense as the cases progress there will be less room either for disproportionate bills to be submitted or arguments as to the incidence of costs being disproportionate. Costs budgets will be modified to reflect proportionality and judges will be required to sanction recoverable proportionate legal spends such that ultimately there ought not to be much dispute if any as to the level of costs incurred.

18. In theory, therefore, by the time a case gets to the detailed assessment stage, issues over proportionality should (stress) have been dealt with as the case passed through its costs management stages. However, inevitably the rules should legislate on the premise that there will be cases where this may not happen. Accordingly, whatever rule/PD is promulgated, it has to be fit for purpose to accommodate lack of or inadequate costs management.

19. Any judicial training as to the application of costs management must incorporate the new proportionality test. The two are inseparable.

Conduct

20. Conduct and the behaviour of the parties should play an important role in the determination of whether costs are to be reduced on proportionality grounds.

21. Where a party by their conduct has caused another to incur costs which are disproportionate it should not be permissible for the party causing the costs to be able to contend that the costs should be reduced on the grounds that the costs are disproportionate in so far as those disproportionate costs were caused by that party. Any other approach is likely to cause injustice and hardship and the incidence of costs will be used as a tactical tool by those more able to afford to litigate than others.

Further overall reflection on Lownds

22. It is important that any new rule is not perceived by the profession and the courts to be tantamount to or appear less rigorous/weaker than the current *Lownds* test.

23. Practitioners generally regard reasonableness and proportionality as separate concepts. What may be reasonable is not necessarily proportionate. This was the fundamental premise behind *Lownds* and the necessity test. Whilst practitioners will obviously respond to any new rules as though they were a new procedural code, there will remain a perception that *necessity* means something more rigorous and less generous than reasonableness. It would generally therefore be unwise for any new rule to treat reasonableness as synonymous

with proportionality. Such an approach is unlikely to result in any significant change to the status quo.

24. If under the new test costs are assessed on the basis of reasonableness, and the proportionality test applied only in “a few” or “rare” cases, then without more there would be a concern that in most assessments the costs recovered will be the same or more than previously allowed under the *Lownds* two-stage process. This is reflected in the loss of the “necessity” test which should have been applied with greater vigour in many more than a few or “rare” cases.

25. Worst still, in producing a limited solution to a wider problem one runs the risk of producing a set of rules which might worsen the situation by creating scope for more argument and dispute with a tribunal determining the margin of disproportionality that should be disallowed following the assessment on the basis of reasonableness.

The New Costs Landscape

26. It should not be forgotten that with the abolition of additional liabilities (success fees and recoverable ATE premiums) under the new reforms the risk of costs appearing disproportionate are reduced.

27. Furthermore, in a costs landscape where many more cases are likely to be subject to fixed costs the risks of disproportionate costs being claimed inter partes is reduced still further.

Need to know likely approach

28. Wherever possible practitioners need to know right at the outset of a case the costs parameters they are working within.

29. It would be helpful if the PD could give practitioners some idea or steer of what the court will treat as relevant to the determination of proportionality whether as part of a long stop or generally. Without this it may be difficult to plan and budget and advice to clients will be circumspect and couched with uncertainty as to outcome as to the likely levels of recoverable costs.

30. Legislating to accommodate these concerns may be difficult. We have set out below some suggested pointers that could be incorporated into a PD supporting the new rule.

Satellite Litigation

31. It is inevitable with the introduction of a new rule about a concept as fundamental as proportionality that the will be challenges to the application and interpretation of the rule. It is hoped that through the PD such challenges can be minimised but it is impossible to secure an outcome which avoids some consequential spin off satellite litigation developing.

32. Consideration can be given to fast tracking appeals to the Court of Appeal direct pursuant to CPR 52.14. This will avoid delays and inconsistencies developing unnecessarily.

The Proposed New Rule.

33. In his *Review of Civil Litigation Costs – Final Report*, Sir Rupert Jackson recommended a new test of proportionality for costs assessed on a standard basis as follows:

> *"Costs are proportionate if, and only if, the costs incurred bear a reasonable relationship to:*
> *(a) the sums in issue in the proceedings;*
> *(b) the value of any non-monetary relief in issue in the proceedings;*
> *(c) the complexity of the litigation;*
> *(d) any additional work generated by the conduct of the paying party; and*
> *(e) any wider factors involved in the proceedings, such as reputation or public importance."*

34. The wording of this rule may need to be changed to reflect the final proportionality package but for the purposes of this paper we have assumed that the rule will appear in much the same form as it is currently drafted.

35. It can fairly be said to be implicit that the word "costs" in the proposed new rule means costs as having been assessed as reasonable in amount and reasonably

incurred. This is because as the introducing sentence above states, the rule is intended to be "a new test of proportionality for costs assessed on a standard basis".

36. Accordingly, as required by the standard basis (CPR 44.4(1)), the costs must first meet the requirements of reasonableness both as to amount and as to whether they were reasonably incurred.

37. We note from the MOJ paper ("Paper for CJC Working Group – New Test of Proportionality") that it is intended that the new test "would replace the current test of reasonableness and necessity."

38. In our briefing paper we are informed that:

> *"The intention behind the proposed new test of proportionality is that the costs payable by the paying party 'should not be greater than the subject matter of the litigation warrants, taking into account the circumstances of the case and its importance.*
> *……*
> *Under the new test the court would first consider the reasonableness of each item of costs on the basis of the factors set out at Rule 44.5(3) of the Civil Procedure Rules, before going on to consider the proportionality of the whole and where the total costs are considered disproportionate, to reduce the total to an appropriate (proportionate) level. "*

Application of Proportionality – the Options

39. Our briefing paper makes it clear that the current Government policy is to:

> *"introduce a new test of proportionality as recommended by Sir Rupert Jackson. This is on the basis that, as anticipated by Sir Rupert, the new test will act as a long stop in cases where the costs are clearly disproportionate to the circumstances and value of claim taking into account all the factors set out in the proposed test. "*

40. We have very much borne this in mind in making the recommendations and observations that we have in this paper.

41. However, if proportionality is just a “long stop” then without more there is a reasonable prospect that the costs recovered will be the same or more than previously allowed under the *Lownds* two stage approach – reflecting the loss of the necessity test. There is an assumption under the proposed new rule that “reasonableness” will generate a different result than at present. What is the justification for that thinking? This is the concern discussed above in paragraph 23.

42. Whilst recognising that one must not treat the Jackson report as a statute, we observe with some caution that the words “clearly disproportionate” lie at the centre of the policy statement. Some of us commented that if the proportionality test is to apply only in *rare* instances then it might be unhelpful to further limit its application to only those cases where the court considers that something “clearly” exceeded what is reasonable/proportionate.

43. "To analyse the options for introducing a Proportionality test we have to consider both:

    a) Substantive issues i.e. what exactly is the test and in what material ways does it differ from the Reasonableness test?
    b) Procedural issues - at what stages and in what ways should the new test be applied?

44. It is clear to us that these two sets of issues cannot be looked at in isolation from each other because substantive policy will drive procedural requirements (and sometimes vice versa). We could seek to produce a whole matrix of options with varying severity of test and varying stages at which it could be applied, but we doubt this would be helpful in finalising the policy. Instead having considered the issues in detail we concluded that there are broadly three potential options available, which we set out in more detail below.

45. In putting these forward we stress that it is not simply a question of choosing between them. For options B and C in particular the way the test would operate in practice would be greatly affected by the way in which the substantive test of proportionality is set out in any Practice Direction, effectively giving ministers a series of sub-options. These are considered further at paras 81 to 96 below.

46. Having considered the various options we concluded that there are broadly four potential options available for the introduction of a new proportionality test which incorporates a longstop. In summary they are as follows:

    a) The long stop model.
    b) The hybrid model.
    c) The reversal of Lownds model.
    d) The retention and reinforcement of Lownds.

47. Each of these are considered below.

Option A – the Long stop model

48. There would be no preliminary determination as to proportionality akin to the current *Lownds* test. Instead, under this proposal reasonableness (alone) would be applied to each item of costs or category of costs as disputed by the paying party or as identified by the court.

49. This model assumes that the current application of reasonableness will be applied taking into account the factors under CPR 44.5 as to the amount of the costs claimed. It assumes that the application of reasonableness will result in proportionate costs in the vast majority of cases.

50. It would only be at the end of the assessment that proportionality and the new rule would be applied and then only in exceptional cases.

51. The purpose of the long stop is to provide the court with an extra tool (as a longstop) to be applied only in exceptional cases to reduce otherwise reasonable costs to a proportionate level.

52. This model would apply reasonableness to each item / category of costs taking into account the costs management orders that have gone before. Only at the conclusion of the case would the new rule be engaged. There would be a strong presumption that costs would not be reduced at the end of the assessment under the new proportionality test.

53. The cases falling within the long stop would be exceptional and rare (because under this model reasonableness is synonymous with proportionality) and in all probability would bite on cases which in the light of the overall reasonable expenditure should not have been pursued and brought to a conclusion in the way they were. These will tend to be rare and exceptional cases. It would presumably be up to a paying party asking for costs to be disallowed on proportionality grounds either to argue that the proceedings should not have been brought at all or to put forward a specific proposal as to how the receiving party could and should have brought the case to a conclusion at a more proportionate cost. This might for example be applicable in cases where ADR should have been considered. These cases will by definition be rare and exceptional.

54. The model assumes that the reasonable costs allowed would be those costs that had to be incurred to realistically achieve the outcome obtained. By definition the new rule would assume those costs were proportionate but that in those rare cases where the reasonably assessed costs were so out of kilter with the factors set out in the new proportionality rule, the long stop could be applied to reduce the costs figure to a proportionate figure.

55. The benefits of this proposal are as follows:

    a) It is a clear and simple model. Costs are assessed against the tariff of reasonableness alone leaving proportionality as a last resort.
    b) The assessment of costs is not complicated by the subtleties between reasonableness and proportionality.
    c) It is likely to reduce the risk of satellite litigation as proportionality and the application of the longstop will only be engaged in rare cases.

56. The disadvantages of this model are:

    a) The model is less likely to actively reduce costs for the reasons given in paragraphs 22 and 23 and 41 above.
    b) Accordingly, it is unlikely that the model will achieve the objective underlying the proposed rule change.
    c) Proportionality will be somewhat lost to the backburner rather than at the forefront of costs recovery as it arguably should be.
    d) In practice it is unlikely to make any substantial difference to the current assessment approach under *Lownds*.

e) It may be difficult to apply (if at all) to summary assessments because the long stop would only be applied at the end of the case to the totality of the costs incurred. This could cause complications down the line with the possibility of summary assessments having to be revisited where the long stop is applied.
f) It is likely that in those cases which should not have been brought in the way they were that the court will have identified them early on leaving the new proportionality test with little or no impact on assessments.

Option B – Reversal of Lownds – Proportionality only considered at the end of the assessment.

57. Under this model there would be no "long stop" application of proportionality. Proportionality would be applied at the end in all cases. Instead of proportionality being considered at the outset (Lownds) it would only be considered at the end and then not part of a long stop.

58. The bill of costs would be assessed item by item (or by category) against the sole test of reasonableness. Once the bill has been assessed as reasonable, the court would go on as a matter of routine to apply the proportionality test to reduce the bill still further to a proportionate level.

59. Unlike Option A, the proportionality test would be applied and engaged in all cases and not just "rare" or "exceptional" cases.

60. The disadvantages of this approach are as follows:

a) Satellite litigation about the application of proportionality is likely to arise in every case.
b) Injustices over the level of recoverable costs are more likely to arise under this model.
c) There will be considerable uncertainty about the application of proportionality to the case which will not be resolved until the end of the assessment process.
d) It is evident from the proposals that some of the factors under CPR 44.5 are to be repeated in the proposed new rule on proportionality. See for example, "value", "conduct" and "complexity". We question how it is intended that

common factors will be used first to assess “reasonableness” and then to disallow “disproportionate” costs based on the same reasons. It can be said with some force that it would be preferable for the application of proportionality to involve the application of different factors to those already considered and applied by the court if this option were adopted.

e) It places a greater burden on the court to navigate its way around the conceptual problems in (d) above, when giving “reasons”.

61. The advantages of this approach:

a) Proportionality will be considered in all cases, and not just by way of a long stop. This reinforces the importance of proportionality generally.
b) The model is likely to provide extra discipline in the incidence of costs.
c) It is likely to result in a reduction of recoverable costs from those currently allowed and thus reduce the incidence of legal costs generally – one of the fundamental objectives of the Jackson reforms.
d) Proportionality ultimately prevails over reasonableness which was one of the principle recommendations in the Final Report.

Option C – Merger of Lownds and Jackson proposals – the hybrid

62. Under this model both reasonableness and proportionality are considered at the same time when ever an item or category of costs is being assessed / budgeted.

63. Unlike Option A and B, proportionality (and the new rule) is applied as the items of the bill or categories of costs are being assessed alongside considerations of reasonableness.

64. There is then a residual long stop for the court to reduce the figure still further if the proportionality rule justifies it. This will be applied in only rare / exceptional cases.

65. Like Option A, the application of the long stop will be in exceptional or rare cases only, but this time not because reasonableness would have catered for disproportionate costs (as in Option A) but because inevitably where a court has assessed items as being reasonable and proportionate during an assessment it

will only be in exceptional or rare cases that the outcome of the assessment results in a disproportionate figure.

66. The disadvantages of this proposal are:

a) The residual discretion to apply the long stop may create uncertainty of outcome.
b) It is unlikely that there will be a need for a long stop if proportionality is properly applied.
c) There may be a conflation between whether an item of costs has been disallowed by reason of reasonableness as opposed to proportionality and vice-versa.
d) There may be a risk of double jeopardy with a court applying proportionality twice, once during the assessment and again at the end in rare cases.

67. The advantages of this model are as follows:

a) This model allows for flexibility of approach. It does not tie the court into applying reasonableness and proportionality separately and attempting to distinguish between the two concepts. Costs could be disallowed on the grounds of both reasonableness and proportionality without having to make obvious distinctions between the two.
b) The model retains the intended approach of having a long stop that could be applied in rare cases.
c) The model is consistent with the broad policy objective of ensuring that costs are both proportionate and reasonable. With proportionality ultimately prevailing over reasonableness.
d) It has the attraction of being simple and easy to apply.
e) It merges the benefits of Lownds with the Jackson proposals – it retains the distinction between reasonableness and proportionality so that they are not synonymous with each other (unlike Option A).
f) The model fits well with budgeting where both reasonableness and proportionality should be considered at the same time rather than just at the end of the case.
g) The retention of the longstop should ensure that only proportionate costs are allowed.

h) The risk of double jeopardy referred to in paragraph 64(d) above is overcome if the PD makes it clear that all decisions as to proportionality are always made subject to the long stop. This enables the court to stand back having assessed the costs to take a view as to proportionality at the end in the round.

Option D – Retention of Lownds

68. Given our observations in paragraph 9 above, there is room for a further option, namely the retention of *Lownds* but with the PD providing the court and the parties with a much clearler direction as to the application of necessity over reasonableness.

69. This option would require the court to consider at the outset of the proceedings whether costs were or had the appearance of being disproportionate within the meaning of the new rule. If they did not appear to be disproportionate then the assessment would proceed on conventional reasonableness grounds. If however the costs appeared to be disproportionate then the test of necessity would apply. However, unlike the present rules (which are silent on necessity), the PD would spell out that in this event the court would be required to assess the costs by reference to a necessity test rather than reasonableness.

70. The PD could make it very clear that by necessity the court would only be allowing those costs that were essential or indispensible in the pursuit of the claim by reference to the outcome achieved.

71. As a bolt on option, a long stop provision along the lines considered in Option C above could also be retained. This provision could make it clear that even where costs were necessary, if the ultimate figure was still disproportionate within the meaning of the new rule, the court could reduce them.

72. The disadvantage of this option are:

a) It may be perceived as not achieving the policy objectives of the current reforms which specifically refer to the reversal of Lownds.
b) There is every chance that without a cultural and/or uplift in judicial training this test will not be applied with sufficient rigour (as historically has been the

case) thus it may have little impact in reducing costs and in acting as a workable solution to the failure of the Lownds test to date.

c) Arguments as to whether a cost was “necessary” within the meaning of the new rule/PD will arise in much the same way as they do currently – words like “essential” or “indispensible” are likely to require clarification.

d) The bolt on option is likely to result in satellite arguments about its application as in Option B and C above.

73. The advantages of the option are:

a) Practitioners and judges are used to the approach. So in theory it should be easier to accommodate with considerably less satellite litigation than any of the other options.

b) With proper training and a PD which spells out clearly that the test of necessity is a tougher standard than reasonableness, courts may be more disciplined in its application in securing more proportionate outcomes on assessments.

c) Necessity if defined provides a lowest common denominator for the incidence of costs and so it is a fair standard to apply where costs appear to be disproportionate.

d) The ability of the court to stand back under a long stop (paragraph 68 above) at the end of the assessment positively adds to the courts weaponry and will ensure that the necessity test does not result in disproportionate costs being allowed.

Other Models

74. We have considered an alternative of having proportionality being applied at the outset rather than at the end of the assessment. We note that some commentators have observed that if the court has the jurisdiction at the end of an assessment to reduce a bill that has been assessed as reasonable to a sum that is proportionate, then why does not that second stage take place at the outset. So for example, assume a bill of £250,000 is reduced on assessment based on reasonableness to £160,000 but that the damages recovered were only £100,000. Assuming that the court took the view that the costs as assessed were disproportionate, the court under a long stop model could then have the jurisdiction to reduce the £160,000 to a figure which is proportionate to the

£100,000. That could be to a sum more like £100,000 or less. Some commentators have observed that it would be simpler and less costly for the court to have the jurisdiction to simply make a proportionality ruling at the outset in which it declared that the costs would not be allowed at say more than £90,000.

75. However, we have considered this approach and the majority of us consider that this would not be an acceptable way to proceed. It would result in a form of summary justice that would be unfair and too arbitrary.

The Benefit of a Practice Direction

76. The new rule on proportionality should be supported / supplemented by a new PD.

77. This view takes account of the disadvantages of having a new PD which are discussed below. Despite those disadvantages, on balance it is our collective view that a new PD should be promulgated to accommodate and assist practitioners in the application of the new proportionality test.

78. There are clearly disadvantages with having a new PD. They can be summarised as follows:

    (a) More rules and PD's usually results in new and fresh arguments about the meaning of the new rules / PD and so satellite litigation may arise about the limits and extents of the PD.
    (b) If too prescriptive it can result in unintended consequences by fettering the broad and hitherto unfettered discretion of the costs judge when assessing costs.
    (c) Parties may engage in arguments about the effect of the PD and very often an over prescriptive approach (through the use of a PD) may result in parties arguing about matters that have been missed or not addressed in the PD – so the PD is a catalyst for argument.
    (d) The PD could be misapplied and may lead to time and costs being spent in seeking to apply or distinguish them from the case in hand.

(e) The Costs Practice Direction is already a substantial document. It may be thought counter intuitive to increase the size of the PD with yet more material when the ultimate exercise is to simplify procedure in this area.

79. Notwithstanding the above disadvantages it is our collective view that the advantages of a new PD outweigh the disadvantages by some margin.

80. The advantages of a new PD for proportionality are as follows:

(a) Given the fact that the new test will by definition be untested it is important that the CPR provides where it can suitable and helpful guidance on its application. It is not like the introduction of a rule that has been developed in the light of earlier practice or procedure.
(b) The introduction of a new clear and concise PD is likely to result in less satellite litigation about the application of the new test than if there were no PD at all. If some boundaries / sign posts / pointers were set by the PD it will provide less scope for arguments over application of the new test.
(c) A PD will help to ensure that there is some consistency in the approach to the new test by the courts and parties applying the new test. Without a PD the likelihood is that courts / judges will develop their own approaches which result in inconsistency which is plainly very undesirable.
(d) Proportionality as a concept is a nebulous one and it cries out for clarification where that can be provided.
(e) The need for clarity. Solicitors must be in a position to be able to give their clients clear, predictable and reliable advice at the outset of the claim as to the possible ramifications of proportionality. A PD which gives some direction as to the application of proportionality is likely to help in this regard.

Content of a new PD

81. Any new PD should be kept as short and succinct as practicality allows for.

82. It would be unhelpful and counterproductive to have an exhaustive PD which seeks to provide guidance / pointers to cover all or every conceivable possibility that may arise under the new test.

83. There are some obvious points that a new PD could accommodate:

a) The fact that the test is intended to be a longstop (assuming Option A or C is adopted). Without that indication the overall intention of the new rule is likely to be lost.
b) To that end, the PD should set out the basic procedure that should be applied when assessing costs to which the new test will apply.
c) The PD should state how the new test is to be applied once engaged.
d) There are a number of phrases that will need clarification, for example 'reasonable relationship to' and 'additional work'. How will reasonable relationship be defined and what will additional work be measured against?

Application of the New Test

84. The PD should provide assistance / guidance / pointers as to the application of the new proportionality test in whichever alternative model is adopted.

85. Some of us took the view that it would be helpful if the PD contained some examples of situations in which the test could be / could not be applied. Others disagreed.

86. So for example, it might be said that the long stop (under Option A or C) should be applied to all cases where the costs as assessed (so after reasonableness (Option A) and reasonableness and proportionality (Option C) applied) exceeded the damages. Some suggested that it could be applied where the costs exceeded a certain percentage of the damages, for example by over 20% more than the damages. However, others pointed out that this is unlikely to work in practice where for example damages were say £2,000,000 and costs were £1,500,000. It is likely to be said that the costs were still too high and disproportionate and yet they would not under this approach be captured by the proposed PD.

87. Others contended for a long stop which was defined by reference to say "*20% above the minimum necessary costs*". The disadvantage of this approach is the difficulty in determining what is really meant by the "minimum necessary costs". The 20% is also arbitrary.

88. Others said that the PD could state that where costs were no more than a certain percentage of the damages, they should be presumed to be proportionate and vice-versa.

89. Others contended for a list of circumstances in which it would never be appropriate to apply a proportionality long stop (whether under Option A or C or the application of proportionality under Option B) whatever the juxta position between the costs as assessed as being reasonable and the level of the damages. The following were some examples of such scenarios:

    a) Lower value claims where unavoidable costs might be disproportionate. Although we observe that with the introduction of a fixed costs regime in lower value claims this exception is likely to be less important.
    b) Where the court has sanctioned the costs in a court approved budget.
    c) In considering the sums in issue the court may have regard to both the amount claimed and the amount recovered.
    d) Claims where the behaviour of the parties has caused an increase in costs.
    e) Conduct might include the case being unreasonably defended, late admissions, breach of PAP or time limits, delay, frivolous and fraudulent claims.
    f) Test cases – where points of principle are decided for wider application.
    g) Claims involving Protected Parties.
    h) Claims involving multi parties, whether claimant or defendant
    i) Social welfare and housing claims (Lord Justice Jackson was originally looking into the feasibility of fixed costs within housing disrepair claims, as this has not materialised, an element of proportionality should be encompassed within these cases).
    j) Insolvency claims which often involve considerable and detailed investigations into fraud.
    k) Cases involving foreign law or jurisdictions
    l) Cases of exceptional complexity

90. At the very least the PD should be drafted in such a way as to enable the judge assessing the costs to have regard to the above factors and any other relevant circumstances to take into account.

91. The differing views amongst us turned primarily on whether the PD should identify the case categories (some or all) referred to above specifically, or whether it should be drafted in such a way that would enable a judge to have regard to those cases without specifically identifying them.

92. Some of us took the view that the current rule as drafted (proposed) provides sufficient juridical basis for a court to take into account the kind of circumstances which the examples in paragraph 38 represent. The rule requires the court to have regard to the:

> *"(a) the sums in issue in the proceedings;*
> *(b) the value of any non-monetary relief in issue in the proceedings;*
> *(c) the complexity of the litigation;*
> *(d) any additional work generated by the conduct of the paying party; and*
> *(e) any wider factors involved in the proceedings, such as reputation or public importance."*

93. The majority of us felt that the PD could be drafted to create a balance between avoiding a long and possibly non exhaustive list of examples and a PD which contained sufficiently broad indicators that enabled a Judge to have regard to all of the circumstances of the case and to accommodate the examples in paragraph 49 above.

94. Some suggested paragraphs are as follows:

> *"When the court is exercising its discretion under the [new rule] the court is entitled to have regard to the following factors:*
>
> *(a) In any proceedings there will be costs which will inevitably be incurred and which are necessary for the successful conduct of the case. Solicitors are not required to conduct litigation at rates which are uneconomic. Thus in a modest claim the proportion of costs is likely to be higher than in a large claim, and may even equal or*

*possibly exceed the amount in dispute.[*this is an existing rule but on balance we considered it remains relevant under the new test].

(b) *Costs which are reasonable and even necessary will be disallowed under [the new rule] if they are disproportionate within the meaning of [new rule].*

(c) *In applying the test of proportionality the court will have regard to rule 1.1(2)(c). [already in but important to mention it]*

(d) *A fixed percentage cannot be applied in all cases to the value of the claim in order to ascertain whether or not the costs are proportionate.*

(e) *There is an overriding obligation on the parties to conduct litigation in an economic and proportionate manner.*

(f) *The court is entitled to have regard to costs benefit considerations and the attempts made at the outset and during the proceeding by the parties to maintain a proportionate legal spend.*

(g) *The degree to which the parties planned and sufficiently budgeted for the costs incurred.*

(h) *Whether the costs claimed have been approved in a court approved budget.*

(i) *The court must take into account any costs management orders made in the proceedings.*

(j) *The court must take into account the parties attempts to settle the proceedings by alternative means whether by mediation, ADR or Part 36 proposals.*

(k) *The court must take into account the conduct of the parties and in particular whether the conduct of the paying party has unnecessarily exacerbated the level of work and activity that the receiving party was required to undertake.*

(l) *There are some categories of cases that are more likely to result in costs exceeding the amount in dispute or value of the subject matter of the proceedings. Examples might include test case litigation, claims involving protected parties, claims where, cases involving multiple parties, cases brought in the wider public interest; cases involving foreign law; cases of exceptional complexity."*

95. The PD could include a provision such as “the court should have regard to all of the circumstances”. This would give the court full flexibility.

96. It may be necessary to include within the PD a reminder by way of specific provision to the effect that *“Proportionality prevails over reasonableness”.* This will depend upon the model adopted.

97. The PD could contain a statement along the following lines so as to enable the court to accommodate the above considerations without necessarily spelling out the factors individually:

> *“When determining whether the costs are proportionate under the [the new test] and when determining what if any reduction should be made to the reasonable costs on the grounds of proportionality, the circumstances of each particular case will determine the strength of any given factor within CPR [new rule] and the relative weight to be given to it in relation to the other factors.”*

98. Some of us felt that the broad nature of the above guidance may fuel satellite litigation.

99. One suggestion was that the concept of “rationality” should be introduced so that proportionality was tested against whether there was a “rational relationship” between the costs incurred and the factors set out in the new rule.

Paying Party’s Costs

100. Consideration should be given to making an express provision within any new PD that when the court is assessing the receiving party’s costs the court is entitled to have regard to/should have regard to the level of the paying party’s costs whether generally or in respect of categories or items of costs.

101. If a paying party is coy about disclosing the level of his costs then it may be possible for a presumption to arise against the paying party that the costs he incurred were in excess of those he contends should be paid to the receiving party.

102. With the requirement of estimates and budgets it might be thought unnecessary to include specific provisions along these lines on the assumption that both parties budgets/estimates will be made available to the court and that they could be interrogated by the court where necessary.

Reasonable Bystander Test

103. In Musa King v. Telegraph, the Senior Costs Judge, Master Hurst, said this:

"*One way of testing the proportionality of the costs is to ask whether a litigant, paying the costs out of his own pocket, would have been prepared to pay that level of costs in order to achieve success. For the purpose of the test the Claimant must be deemed to be a person of adequate means. That is someone whose means are neither inadequate nor super abundant (see Francis v Francis & Dickerson [1956] P.87). If such a person were informed by his solicitors that the cost of bringing the case to a satisfactory conclusion with an award of damages of £130,000 plus a judgment in his favour was likely to be £317,523 (the actual base costs in this case) it is inconceivable that the claimant would wish to go ahead*."

104. There was no universal acceptance of this approach amongst us. The approach may be apposite to a commercial case where the parties willingly enter the litigation with evenly matched resources. However, in many cases, and in particular personal injury cases, the claimant is not only under resourced, but will often face a well resourced defendant who deliberately puts the claimant to disproportionate expense as part of its overall case strategy. It would be unfair in such event for the above test to apply.

105. However, some of us took the view that it would be a helpful guiding principle to include into a PD about the application of proportionality either during the assessment (Option C) or at the end (Options A, B and C). This is because it provides a tangible premise from which the court can sensibly work. It is a question that can be asked and answered in all categories of cases and it accommodates the differences between monetary claims and non monetary claims.

106. So the PD could contain something along the following lines:

"in applying proportionality [under the new rule] the court is entitled to have regard to whether a reasonably resourced litigant in the position of the receiving party would have paid from his own pocket to achieve the outcome achieved."

107. The disadvantages of the approach is that it invites an examination into a concept which itself creates more of a burden and responsibility for the court than many would be willing to entertain in costs assessments. There is a challenge here too as to whether this wording would be compatible with the principle that there should be no hindsight when applying the new test.

108. We all agreed that in applying the test of proportionality under the new rule, it would wrong for the court to apply hindsight. This could also be made clear in the PD.

Rebuttable Presumption

109. There was some support for the proposition that in circumstances where the costs as assessed based on reasonableness exceeded the damages in a monetary claim then there should be a rebuttable presumption that the costs are disproportionate. However, there was a consensus of opinion between us that this would not be a satisfactory way of proceeding.

110. For example it might be said that:

"Costs are presumed to be disproportionate if all or any of the following are satisified:

(a) the costs exceed the amount that a reasonably resourced litigant would have incurred from his funds to achieve the outcome obtained;

(b) the damages recovered are likely to be exhausted by the shortfall in recovery of costs on assessment.

111. The advantages of this approach is that it sets a starting point benchmark as when costs may be considered to be disproportionate which some judges may find helpful when determining whether the costs are disproportionate under the second stage above.

112. The disadvantage of this approach is that it assumes costs will be disproportionate if they exceed the damages. This is not a proposition that we were prepared to accept should be applied across the board. We have already explained why the reasonably resourced litigant test is unlikely to work in practice or be applicable across the sphere of litigation with which we are concerned.

113. A further suggested rebuttable presumption relates to the costs budgets/estimates filed. It may be possible to have a provision within the PD which expressly provides that costs are presumed to be proportionate if they have been sanctioned in a court approved budget. Where costs exceed the estimates/budgets filed by a margin of more than, say 20% they could be presumed to be disproportionate..

114. The advantage of this approach is that it reinforces the need for accurate budgets to be provided to the court. It reinforces the importance of solicitor/client budgeting. As the presumption is rebuttable a receiving party will have the opportunity to explain an increase in a budget and so will not be unjustly penalised for having justifiably exceeded a budget/estimate.

ADR

115. It is well established that a party who unreasonably declines to pursue mediation or other ADR may be deprived of the costs to which they would normally be entitled. This approach will clearly continue under the new costs regime, as Sir Rupert Jackson intends. In the new system, such reductions of costs could be explained simply under general reasonableness grounds, or under the new proportionality test or any combination of the two. One option to consider for the PD is for ADR issues to fall primarily within the Proportionality test. In other words, when assessing reasonableness the main question for the court is whether the work done and cost of a step was reasonable, given that the case was being pursued under the court litigation system. However if the court wanted to look more widely and say - this party should not have continued to litigate at all because there was a better and more proportionate dispute resolution system available - that would be the time to invoke proportionality. This would presumably involve reducing the costs awarded to the level which could have been claimed if the more proportionate resolution had been pursued.

116. This would have the advantage of creating a clear point of difference between the substantive reasonableness and proportionality tests. It could be adopted whichever of the options discussed earlier in this paper is pursued, but could be of particular significance even if the limited "long-stop" approach to Proportionality (Option A above) is chosen.

Show Cause hearings

117. It might be possible for rules to accommodate a costs show cause hearing as part of the courts active case management. This will provide a platform for the parties to identify early concerns as to the incidence of costs. If persuaded of the concerns the court could require one or other of the parties to show cause as to the approach taken. This way the costs are managed in advance of them being incurred.

Reasons

118. We consider that it is important that any PD requires the costs judge to give reasons for any finding that the reasonable costs are disproportionate. Similarly, where the judge does reduce the reasonable costs to a proportionate level reasons must be given for the reduction and the amount of the reduction.

Assessment of individual items

119. It was our collective view that the court should have the jurisdiction to apply the new test of proportionality not only to the costs as a whole, but also, where appropriate to individual items or classes/categories of costs. This is in the context of both the application of any longstop (Options A and C) or in the application of proportionality generally (Option B and C).

120. We considered this approach allows for greater flexibility in the courts armoury when applying the new test and it allows the court to identify and centre on categories of costs rather than only the whole of the claim. There may be for example one particularly large element of legal spend which tilts the balance between what is and what is not proportionate as a whole. The answer may lay in the better and improved case and costs management which ought to flow from

the wider Jackson reforms. Approval for significant individual item spend could be placed on the agenda before the expense is incurred.

Summary Assessment

121. The new proportionality test should be applied in the same way to summary assessments as it is to detailed assessments. The PD could make this clear.

Fixed Costs Cases

122. The new rule on proportionality should not apply to cases to which the CPR fixed (base) costs apply.

123. We are all agreed that this should be made clear in PD or conceivably in the Rule itself.

Specialist Costs Judges

124. There were some of us who contended that it would be desirable for the PD to direct that all cases in which the new proportionality test is to apply should be heard and determined by a costs judge or (regional or SCCO).

125. However, on balance we concluded that whilst desirable this is not likely to be practicable. It could well be that delay will be caused by the transfer of such cases to appropriate courts. Further, such is the widespread remit of the new rule it is important that it becomes applied by all judges assessing costs, including those carrying out summary assessments.

Stakeholder event

126. We were of the unanimous view that practitioners are likely to welcome the opportunity of a stakeholder event to build a better understanding on how the new test would operate.

4 October 2011

Technical Aspects of Jackson Implementation Party – Proportionality Working Group.

Civil Justice Council Working Group

CHAPTER 2– SANCTIONS FOR THE CLAIMANT'S PART 36 OFFER

Terms of Reference

1. The Working Group was asked:

   - *"To consider and propose options for the operation of the additional Part 36 sanction/reward under Part 36 in the areas set out above;*

   - *To provide written advice to MoJ by the end of September 2011, on the advantages and disadvantages of each proposed option and indicate where there is a unanimous view on the best option;*

   - *To report on any other significant issues identified by the working group in relation to the operation of the proposed additional Part 36 sanction/reward and where possible to propose options to resolve these issues, providing written advice to MoJ by the end of September on the advantages and disadvantages of each proposed option, and indicate where there is a unanimous view on the best option."*

2. The Working Group was also asked to express its view on four specific issues raised by the Ministry of Justice following its consultation:

   - Whether there should be a reduced sanction for higher value claims;
   - How the proposed sanction should apply to claims for a non-financial remedy;
   - How the proposed sanction should apply to mixed claims;
   - How the proposed sanction should apply to liability only offers.

Background

3. The Ministry of Justice summarised the Jackson proposals as follows:

   "Sir Rupert proposed that an additional sanction/reward equivalent to 10% of the total damages awarded by the court should be payable by respondents who

reject a claimant's offer but do not beat it at trial. He proposed that in cases where the court made a non-monetary award, it should calculate the value of the award on the basis of the evidence received at trial and order payment of 10% of that value. He proposed two further modifications. Firstly, that the court should have discretion to award an additional amount of less than 10% of the value of the claim where there are good reasons to do so. Secondly, that there may be a claim value above which an additional uplift of 10% of the value of the claim would provide too great a reward to a claimant – so creating a perverse inventive to proceed to trial merely to obtain the uplift – and be too much of a penalty for a defendant."

4. Lord Justice Jackson subsequently suggested in his response to consultation on his proposals that if a tapering system to modify the impact of the 10% enhancement on damages was appropriate in some cases, it might operate as follows:

"Total damages + value of non-monetary award	*Percentage increase*
Up to £500,000	*10%*
£500,001 to £1 million	*£50,000 + 5% of excess over £500,000*
Above £1 million	*£75,000 (with no further increase)"*

5. The Final Report set out three goals which these proposals to reform sanctions for a Claimant's Part 36 offer are designed to achieve:

    - *'a more level playing field as between claimants and defendants'*;
    - *'more cases will settle early'*;
    - '*The various rewards and gains which the claimant will make should enable him to pay the success fee, and still be no worse off than he is under the present regime of recoverable success fees*.'

The current position

6. Under the Jackson proposals, the sanction for failing to beat a Defendant's Part 36 offer or for late acceptance of such an offer is the same as it is now, namely payment of the Defendant's costs from the last day of acceptance. This is a strong incentive for Claimants to accept such offers, either within the 21 days allowed or as soon as possible thereafter. It is also an incentive for Defendants to make realistic offers at an early stage.

7. By contrast the sanctions imposed on a Defendant who fails to beat a Claimant's offer are considered by most, although not all, of the Working Group to be far less effective, namely:

    - Enhanced interest on damages at up to 10% above base. However, such interest only applies to past loss and there is doubt as to whether it applies at all if the Part 36 offer relates only to liability.

    - Indemnity costs. The only difference between indemnity costs and costs on the standard basis is the burden of proof, although it does also remove the proportionality test.

    - Enhanced interest on indemnity costs, again at up to 10% above base rate.

8. However, it is noted that the Defendant does also suffer the sanction of having left the case open longer than necessary with extra costs to pay to the Claimant in respect of additional work carried out by the Claimant's lawyers. Failure to beat an offer does thus penalise the Defendant to that extent. The Claimant also has control over when to issue proceedings. Elapsed time may increase the costs and the Defendant has no means with which to control this, save for refusing interim funding or making its own Part 36 Offer, but this may be difficult without having sight of all the evidence.

9. Since the rules were changed in April 2007, there is no additional Part 36 sanction on a Defendant who accepts a Claimant's Part 36 offer late. These sanctions only apply if the Claimant obtains a judgment which is at least as favourable as the offer made. The Defendant does not need the court's permission or the Claimant's agreement to accept an offer late and can do so at any time prior to judgment unless it has been withdrawn (in which case it ceases

to have effect). By contrast, CPR 36.10(5) provides that if a Claimant accepts a Defendant's Part 36 offer late, he is automatically required to pay the Defendant's costs incurred since the last day for acceptance, unless the court orders otherwise.

10. A Defendant benefits from making a realistic Part 36 offer because of the costs containment and costs risk transfer benefit that it provides. A Claimant only benefits from making a realistic Part 36 offer if he beats it on judgment. The current benefits may in the court's discretion be additional interest on damages and additional interest on costs. If ordered, these belong to the Claimant, subject to his retainer with his solicitor, but arguably they may not be perceived by a Claimant as a transparent, personal incentive for the Claimant to make a realistic Part 36 Offer and then to beat it on judgment.

The Future

11. The Working Group agreed that it was very difficult to predict how the proposed sanction, whether damages-based or costs-based would work in practice. The Jackson reforms, particularly the ending of recoverability, are so profound that it is impossible to predict with any certainty the behaviours of litigants or their lawyers under the new regime. In particular, it is impossible to predict whether market factors will mean that clients will or will not in fact pay success fees to their lawyers out of damages. Predictions of the future by the various interest groups inevitably impacted upon their approach to the questions raised for the Working Group.

12. Many members of the Working Group involved with personal injury litigation on both sides were concerned about early 'tactical' Part 36 Offers by either party where they are made without evidence or disclosure of evidence in support. Those members of the Working Group acting for Claimants in personal injury claims also note that some defendant insurers make pre-medical offers on all their cases, presumably because they have made a market decision that in the round they will save money by applying this approach. An individual claimant cannot approach his claim in the same way. The individual risks on such cases have to be considered. Some members of the Working Group representing Defendants in personal injury claims were, however, concerned that the

proposals for enhanced sanctions for a Claimant Part 36 Offer would lead to 'Part 36 Wars'.

Damage-based sanction or costs based sanction?

13. This is a fundamental issue at the heart of the Part 36 proposals. Should the sanctions applying to a Defendant if a Claimant beats their own Part 36 offer at trial be calculated by reference to costs or damages?

14. The members of the Working Group were not able to agree whether there should be a damages-based sanction or a costs-based sanction, but the majority favoured a costs-based sanction.

15. It was felt that the choice between a costs-based sanction and a damages-based sanction was a matter of policy and the majority of the Working Group recognise that proposing a costs-based sanction departed from the recommendations of Lord Justice Jackson.

16. Part 36 has always been a costs regime, although the Court does have the power to award additional interest on damages at an enhanced rate under CPR 36.14.3. It is also a departure from the usual principle that damages are compensatory and are assessed to reflect loss, rather than to punish. We therefore consider it would be helpful to set out the pros and cons as we see them of both methods.

17. Damages-based sanctions:

    The pros raised included:

    1. This is obviously a very substantial new weapon for the Claimant in medium or high value claims (supposing that any cap or taper is not set too low) so it would certainly achieve the objective of Lord Justice Jackson and the Ministry of Justice to incentivise a Claimant to make a realistic Part 36 Offer.

2. It achieves the objective of providing a Defendant with a more significant incentive to accept a realistic Part 36 offer

3. It provides a fund which might mitigate against the loss of the recoverability of trial success fees (one of the aims of introducing the new claimant based reward was to provide some alternative mechanism for the recovery of a success fee – Final Report paragraph 3.16 of chapter 41), although, as the sanction is linked to damages and the amount of the success fee is linked to costs, it is less likely to closely match the potential liability than a costs-based sanction.

4. At the same time it is easy for litigants to understand.

The cons raised included:

1. Whatever safeguards are in place (see below) the result, particularly in large damages claims, may be a windfall for the claimant.

2. As a consequence, in the larger cases in particular (and we have to bear in mind that the regime is going to apply to all cases and not simply for example personal injury cases) the result could often be a recovery by the claimant that is very disproportionate to the costs incurred. The only way of avoiding this is either to impose an arbitrary cap/taper or to introduce another unwelcome and potentially uncertain judicial discretion to reduce.

3. Conversely, in smaller claims a 10% uplift on damages may not be a sufficient sanction to incentivise settlement, or to reflect the additional success fee that may be payable by a client following a trial (e.g. a Fast Track personal injury case, although this might change if fixed costs are introduced throughout the Fast Track).

18. Costs-based sanctions:

The pros raised included:

1. It is consistent with the existing Part 36 regime.

2. It clearly provides a fund which might mitigate against the loss of the recoverability of trial success fees (one of the aims of introducing the new claimant based reward was to provide some alternative mechanism for the recovery of a success fee - Final Report paragraph 3.16 of chapter 41).

3. The costs-based approach can be of universal application to financial, non-financial claims and mixed claims. It avoids any of the complications for practitioners and, critically, clients which a damages-based sanction would generate.

4. The costs-based approach avoids unnecessary windfalls for the claimant and has an in built degree of proportionality given that it is based on assessed costs.

The cons raised included:

1. Whether a costs-based reward would be a sufficient weapon for the claimant, and incentive for the defendant to settle when compared to an award based on damages. This presumably could be overcome by simply providing for an appropriate level of surcharge or extra interest on costs. It was suggested that in order to be effective it will need to be prescribed at a sufficiently high rate (we discussed by way of example 25% per annum above base rate), rather than a discretionary rate of interest with a cap as at present. However, concerns were raised by some of the Working Group that 25% is not supported by any empirical evidence and could produce windfalls especially in low value cases where costs almost always exceed the damages (although that may change if fixed costs are introduced throughout the Fast Track) .

2. Lord Justice Jackson has expressed a clear view that such sanctions should be applied to damages rather than to costs and a costs-based sanction might be viewed as a method re-introducing recoverability of additional liabilities by the back door.

3. A damages-based sanction is clearly damages and belongs to the client, subject to any agreement for payment for part, or all, of the additional

sum to the lawyer. Although sums paid by way of costs also belong to the client, subject to any agreement with the lawyer, this is not so obviously transparent to the client. If a costs-based sanction was introduced, this might be overcome by careful use of terminology, but there is a risk that in practice this would be seen as 'belonging' to the lawyer rather than to the client. It is noted that this already arises with regard to the current Claimant's Part 36 Offer sanction of interest up to 10% above base in any event. The current Law Society Model Conditional Fee agreement provides that interest on costs belongs to the Claimant's solicitor. The Law Society model CFA will clearly have to be revised in any event once the Jackson reforms are introduced, but concern was raised by some that in practice Claimants will not receive the interest on costs but will still be required to pay a success fees out of damages.

4. A costs-based sanction might create some risk of putting a solicitor in conflict with his client if his retainer with the client allows the solicitor to keep the costs-based sanction as this might incentivise a solicitor to proceed to trial even though the client might be happy to accept the pre-trial damages offer. However, such action would presumably be in breach of relevant conduct rules.

19. In principle most, although not all, of the Working Group considered that the costs-based sanction was the most appropriate for at least the following reasons:

a. Rewards and penalties under Part 36 should focus on costs and interest (Part 36 has always been a costs-based regime) and not be about the subject of the dispute (e.g. is it for damages or for non-financial sums or orders/declarations). Once we depart from the core principle of Part 36 we risk introducing incentives to parties to conduct litigation in a way which may increase damages and/or disincentivise them to conduct litigation in a way as to minimise their opponent's costs and thus their own potential risk.

b. The damages-based approach cannot easily be applied to non-financial claims. In particular:

(i) The experience that one member of the Working Group in both the Eastern Caribbean and Germany is that trying to attach a notional or

Court determined value to a claim is complicated and can produce results that are challenged in satellite litigation (see the comments summarised in Chapter 62 of Jackson's Interim Report).

(ii) It would place the Claimant and the Defendant in a position where they were looking at the risks and rewards of their respective Part 36 offers on potentially very different bases, which cannot be an aid to them engaging in and achieving a settlement.

(iii) It inevitably means that there are different regimes for different kinds of Claimant.

c. The complication in b(iii) above becomes even worse when one considers mixed claims for both damages and other remedies, for example specific performance (and in that respect one member of the Working Group has personal experience of the Eastern Caribbean regime proving to be difficult to apply and leaving clients uncertain if not confused).

d. Damages-based sanctions are not related to the amount of work undertaken and therefore do not incentivise the early making or acceptance of Part 36 Offers.

Application of Costs-Based sanction

20. The Working Group considered various options for costs-based sanctions. These included:

20.1. A prescribed uplift on the amount of base costs incurred after the date of the Part 36 Offer. The advantage of this is that the sanction would increase depending upon the amount of the costs incurred after the offer. On the other hand this might be seen as reintroducing recoverability of success fees by the back door. Also specifically linking it to the amount of base costs is more likely to lead it being seen as 'costs' for the lawyer, rather than as money belonging to the client, subject to the terms of the retainer;

20.2. An amount of additional damages calculated by reference to the amount of costs after the date of the Part 36 Offer. This would make it clear that the

additional sum belonged to the client, subject to the terms of his retainer with the lawyer. However, it would introduce the concept of damages into the costs-based regime of Part 36, which most of the Working Group were keen to avoid;

20.3. A prescribed amount of enhanced interest on costs incurred after the date of the offer. This has the advantage of increasing depending upon the amount of the costs after the offer, but is perhaps less likely to be seen as 'costs'. This was the mechanism preferred by most, although not all, of the Working Group. If accepted, the Working Group agreed that the terminology in the Rules should make it absolutely clear that interest on costs belongs to the client, subject only to the terms of their retainer with their lawyer (but subject to the comment above that there has been no apparent problem with the existing sanction of interest of up to 10% above base). However, some members of the Working Group felt that unless this was specifically addressed, there was a real danger that the solicitor would keep any interest recovered and the claimant would not be able to use it to meet the liability to pay the success fee.

20.4. Reintroduce recovery of success fees in these very limited circumstances capped at 25% of the damages. However, most of the Working Group considered this would be incompatible with Government policy and the abolition of recoverability of additional liabilities.

21. If the Ministry of Justice were to agree to follow the recommendation of the majority of the Working Group for a costs-based sanction, rather than the damages-based sanction recommended by Lord Justice Jackson, there are three sub-options for implementation.

Option A1 – Costs-based sanction biting on judgment only

22. Most, although not all, of the Working Group were therefore attracted to a solution involving significantly enhanced interest on costs under CPR 36.14(3)(c). At present this is a discretionary award capped at 10% above base rate and this is widely seen as an inadequate sanction. However, enhanced interest of a prescribed rate of say 25% above base rate would be a significant sanction. This would create simplicity across the entire range of claimants' cases, avoid

complications and unnecessary judicial discretions to resolve the problems with non-money claims, and there will be no need to argue over the cap/tapering in relation to the damages based sanction (to cater for the larger cases) because the sanction will be related to costs which would necessarily be proportionate. In this way the regime would operate symbiotically with the new emphasis on proportionality in relation to costs. However, some members of the Working Group felt that there should also be a cap on the amount of the enhanced interest.

Option A2 – costs-based sanction biting on acceptance of Claimant's Part 36 Offer pre-trial

23. Only a tiny minority of civil proceedings proceed to judgment, and it is possible that if the sanction applies only to such cases it will not have a significant impact on behaviour to encourage early offers and early acceptance of offers.

24. A minority of the Working Group therefore considered that the sanction should apply where such an offer is accepted late, as well as when it is beaten by the Claimant at judgment, by way of an equivalent of CPR 36.10(5) for Claimants' offers. The costs-based sanction would give the Claimant an incentive to make such offers early and the Defendant an incentive to accept as soon as possible (if not within 21 days). This may encourage early settlements as of course this will have more bite if the offer is made early on in the proceedings, and an even greater bite if it is made before proceedings are issued. However, some of the Working Group considered that this could over reward an early tactical Part 36 Offer with no disclosure of evidence for the Defendant to consider where the claim settles many years later.

25. Most of the Working Group considered that the costs-based sanction should only bite on a judgment for the Claimant which is more advantageous than his own Part 36 Offer (as proposed by Lord Justice Jackson) because success fees in most cases only currently escalate to 100% at trial, therefore to apply the sanction to other situations could result in a 'windfall'. If applied to negotiations/mediation/Joint Settlement Meetings they felt it would drive adverse behaviours on all sides. If some of the sanctions for the Claimant's Part 36 Offer apply when an offer is accepted before judgment is entered, that may incentivise

the Defendant to proceed to trial and take the chance that the offer may not be beaten.

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Option A3 – costs-based sanction applying to non-personal injury cases only

26. The Working Group also considered whether a costs-based sanction should apply for all claims other than personal injury claims, and whether a damages-based sanction could be applied only to personal injury claims.

27. A separate costs regime for personal injury (fixed recoverable costs) has existed for nearly a decade and the 'MoJ Portal' (i.e. The Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents and associated electronic claims portal) has a separate costs regime.

28. However, most of the Working Group did not favour distinguishing between personal injury cases and other litigation in this way as it would create a separate Part 36 regime for personal injury cases and the majority view was that for simplicity it was preferable for there to be a single regime for Part 36 for all kinds of litigation.

Application of Damages-based sanctions

29. We turn now to the specific questions raised for the Working Group in respect of the Jackson proposal and in this respect assume that, notwithstanding the caveats set out above, damages-based sanctions are introduced.

30. If a damages-based sanction were to be introduced, although this would be against the recommendation of most of the Working Group, there was a large measure of agreement within the Working Group in respect of all the questions raised, other than that of whether there should be a taper and/or a cap to the sanction.

How the proposed sanction should apply to claims for a non-financial remedy

31. The Ministry of Justice asked us:

"Whether an additional amount of linked to the amount of costs awarded is a viable alternative remedy for non-financial claims (this would be an additional amount payable to the claimant rather than interest on costs)?"

32. The Working Group noted that claims for a pure non-financial remedy are fairly unusual. In most cases, damages are sought in addition or in the alternative so are usually 'mixed claims'.

33. Most of the Working Group agreed that some equivalent mechanism should be provided for non-financial or mixed claims. It is in the interests of justice to provide a broadly equivalent remedy to that for financial claims. It is also as necessary to encourage settlement in such cases, with appropriate sanctions if sensible offers are rejected, where possible. However, these must be a minority of cases so dealing with these should not jeopardise a sensible mechanism that would work for the majority. In any event, many cases which have as their predominant aim a non-financial remedy still have at least some damages elements to them.

34. Some of the Working Group disagreed and did not believe that any such provision should be made for non-financial claims as they are relatively small in number and the additional complications are such that it should not be attempted.

35. The Ministry of Justice also asked:

"If so, which of the two options would be preferable:
(a) An additional amount linked to the value of the award (as for monetary claims);
(b) An additional amount linked to inter partes costs"

36. The Working Group agreed that option (a) will lead to uncertainty, is difficult to achieve in practice and will inevitably lead to satellite litigation. Experience abroad suggests that trying to link the additional amount to the judicially determined value of a claim, not itself expressed in monetary terms, could be at best a proposal that would take many years to bed down (as with the German model – a member of the Working Group notes that there is still a degree of

confusion about the relevant rules in Germany, with each court circuit applying the rules in different ways) or at worst arbitrary and provoke satellite litigation (note for example the experience with the Eastern Caribbean CPR).

37. The Working Group therefore agreed that option (b) is preferable. The Ministry asked:

    "how should the uplift be calculated? (e.g. if as a percentage of costs, what percentage and which costs?)"

38. The Working Group considered that a costs-based sanction as outlined under Option A (i.e. of enhanced interest on costs of a prescribed sum of say 25% above base rate, subject to agreement as to the appropriate rate)) should be used for non-financial claims.

How the proposed sanction should apply to mixed claims

39. The Ministry also asked us:

    "to consider how the additional sanction should operate in relation to mixed money and non-money claims."

40. The Working Group considered whether a combination of damages-based sanctions for the damages element and costs-based sanctions for the non-financial claims could be utilised, but concluded that this was over-complex and might lead to some unfortunate and unpredictable outcomes in practice.

41. The Working Group therefore agreed that in relation to mixed claims, a costs-based sanction as outlined under Option A (i.e. of enhanced interest on costs of a prescribed sum of say 25% above base rate) should be used for non-financial claims.

How the proposed sanction should apply to liability only offers.

42. The Ministry said:

"We understand that where a split trial on liability is determined in favour of the claimant and where a prior Part 36 offer has been made, the court will generally postpone the determination of costs until such time as the damages have been determined. This allows the court to take the Part 36 offer into account. It seems therefore that an offer relating to liability or contributory negligence would fall to be decided at the outcome of the trial and does not raise any special issues."

43. The Working Group agreed. A payment on account of costs would normally be ordered, and that should continue, but there is no reason why the additional sanction cannot be resolved on trial or earlier settlement of the quantum claim.

44. We were asked by the Ministry:

    "to consider whether there are any particular difficulties arising from offers relating to liability/contributory negligence only and if so to propose options for how such difficulties can be resolved in relation to both monetary and non-monetary claims."

45. The Working Group agreed that, so far as liability only offers are concerned, the 10% enhancement on damages broadly replicates the current position that after the trial of any issue a 100% success fee is payable on all costs. Indeed, the current penalty might be considered disproportionate in a case where the liability costs are low, but the quantum costs are very high. Under the proposed new rule a straight percentage increase in damages is much fairer to both sides (although many of the Working Group would prefer a uniform costs-based sanction, so, if implemented, care would have to be taken to ensure that this applies effectively to liability only settlements).

46. It is assumed that it is intended that only one award of an additional 10% of damages can be made in each case (even if separate Part 36 offers are made in respect of liability and quantum). This should be provided for by the Rules. However, this would provide no enhanced sanction for a Claimant's Part 36 Offer on quantum in a case which has had a split trial on liability.

47. Most, but not all, of the Working Group noted that the alternative costs-based sanction (enhanced interest on costs) could be more easily applied in respect of the costs of different parts of the claim (e.g. in respect of the liability costs if a

Claimant's Part 36 Offer on liability is beaten by the Claimant and then also on quantum costs if a Claimant's Part 36 Offer on quantum is beaten by the Claimant) and is therefore a more elegant and practical solution to the issue of applying sanctions where there are split trials.

Whether a damages-based sanction should bite Claimant's Part 36 offers pre-trial

48. Although the 10% enhancement on damages, subject to the final decision on any taper and/or cap, goes some way to meeting Jackson's objective 1 (levelling the playing field) and objective 3 (providing a claimant who has entered into a CFA with an additional sum of damages with which to meet a trial success fee), it is less effective in meeting objective 2 (encouraging early settlement).

49. As the proposed 10% uplift only applies to case determined at trial and regardless of when the Claimant's offer is made, the Claimant receives the same award and the Defendant suffers the same penalty, whether the offer is made at the protocol stage or as late as 21 days before trial. This means that there is no incentive for the Claimant to make the offer early. Nor, if the 21 days for acceptance without penalty have expired, is there any incentive for the Defendant to accept the offer sooner rather than later other than to avoid increased base costs.

50. The Working Group therefore considered whether a mechanism for encouraging earlier acceptance of offers of settlement would be to provide that the enhancement on damages be staged with the enhancement based on the number of "trigger points" passed between the Claimant's Part 36 offer and acceptance/judgment. For example, the trigger points could be:-

    - Expiry of the 21 day period for acceptance.
    - 3 months before trial.
    - Judgment.

51. The Claimant could then receive, say, an enhancement for each trigger point passed between the making of the offer and acceptance/judgment up to a total of

10%. If this were to be introduced the sanction would have to apply where such an offer is accepted late as well as when it is beaten at judgment by way of an equivalent of CPR 36.10(5) for Claimants' offers.

52. However, this proposal does not in any necessarily encourage a Claimant to make an offer early in the first place. It could also backfire:

52.1. the Defendant might think that he can leave the offer on the table when it is first made, and think seriously about accepting it only when the second trigger point is approaching;

52.2. the Claimant might delay making the offer until 3 month mark has passed;

52.3. will only a lesser penalty apply if the Claimant's Part 36 offer is rejected and is unbeaten at summary judgment? If so, would that put some Claimants for applying for summary judgment in borderline cases.

53. Introducing the new CPR 36.14 sanction into CPR 36.10(5) (i.e. what happens when an offer is accepted late) may therefore make an already complicated idea even less workable. If some of the sanctions for the Claimant's Part 36 Offer apply when an offer is accepted before judgment is entered, that may make the offeree <u>less</u> incentivised than otherwise to accept the offer on the table rather than risk going to trial and avoiding the sanction if the Claimant does not beat his own Part 36 Offer.

54. Most of the Working Group therefore disagreed with this approach and considered that if damages-based sanctions are preferred the only enhancement on damages should be the proposed 10% enhancement (subject to such taper and./or cap, if any, as may be decided) if the Claimant's Part 36 Offer is beaten by the Claimant on a judgment.

Whether there should be a reduced sanction for higher value claims (Options B1- B3)

55. The Ministry of Justice asked us:

"To consider whether a reduced amount (i.e. less than 10% of the value of the award should be applied above a certain claim value and what the trigger point(s) for a reduced amount should be."

56. They also said:

"MoJ are attracted to a system of a reducing percentage uplift linked to the value of the claim, and in particular to the system proposed by Lord Justice Jackson in his response to the consultation paper.

- *The working group is asked to consider this option in particular together with any of the other options suggested by respondents to the consultation which the working group consider should be considered in the alternative or which build on this proposal;*
- *The working group is asked to put forward realistic optional solutions which set out*
    - *the trigger point at which a reduced additional amount of less than 10% of the award value should apply;*
    - *whether there should be a tapered reduction or a single reduction;*
    - *what percentage reduction(s) in the additional amount should apply."*

57. The Working Group were not able to agree on whether there should be a taper or cap or what it should be. Three options are set out below as Options B1-B3.

Option B1: no taper/cap on damages-based sanction

58. Some of the Working Group:

58.1. Were concerned that a taper and/or cap, in seeking to protect paying parties from an unfair burden, may fail to meet the policy objective outlined by Lord Justice Jackson in the Final Report to compensate the receiving party, particularly in respect of success fees they may have to pay out of the compensation.

58.2. Considered that it would be preferable to avoid complicating the Part 36 regime when the objective should be simplification. Part 36 over the years has been bedevilled by complications and ambiguity leading to a huge amount of case law and uncertainty, which hinders settlement negotiations, and accordingly the argument for the 10% to apply across the board regardless of the value of the claim is a strong one for pragmatic reasons and desirable in the interests of simplicity and transparency. Clients on both sides of the claim can be advised with certainty on the sanction.

58.3. Do not agree that an additional 10% uplift on damages might create a perverse incentive for Claimants to proceed to trial. If the Defendant thinks it likely that the Judge will award the Claimant the sum offered or more, then the Defendant's remedy is to accept the offer. If the concern is that Claimants might proceed to trial where there is only a small chance of beating their own offer, because the rewards for doing so are so great, then the Defendants' remedy is to make a Part 36 offer which is more realistic and which the Claimant is unlikely to beat. Very few Claimants will proceed to trial for a small chance of a great reward if the likelihood is that they will not receive that reward and will instead pay all of the costs of the trial out of whatever they are awarded. Moreover, as under the current CPR 36.14(2), the court will apply the penalty for failing to beat a Part 36 offer "unless it considers it unjust to do so", so in those rare cases where the application of the above proposal would do injustice to the Defendant, the court has the power to correct this**.** (However, increasing the scope of, and the degree of reliance on, the "unjust" exception may make the Part 36 regime less certain in its operation than at present, thus undermining its efficiency as part of a regime of incentives and deterrents. At present the exception is invoked in circumstances other than those listed in CPR 36.14(4) only in extremely unusual cases.**)**

58.4. Agreed that the Rules need to provide a mechanism for valuing for this purpose future loss payable by way of a periodical payments order. This would have to be achieved by capitalising the value of annual periodical payments in accordance with an agreed formula.

58.5. But if, notwithstanding this, the Ministry of Justice decides upon a taper and/or cap, these members of the Working Group:

58.5.1. Agreed that in fixing any taper and/or cap, evidence of the amount of success fees of solicitors and counsel in taking such multi-track personal injury cases to trial should be considered (and it is noted that the figures which the MOJ relied upon expressly excluded any claims above £100,000). If there is to be a taper and/or cap, the trigger point for any reduction to the 10% must be set high enough to ensure that it still allows a recovery that will allow a claimant to take a meritorious case to trial and recover extra damages equal to the success fee that would have been payable. Trial success fees are usually agreed or fixed under the present Rules at 100%. It seems unlikely that capped additional damages of £75,000 for taking a £1 million plus damages case to trial with leading and possibly junior counsel and solicitors will meet the success fees payable by the client, so leaving the successful claimant (who in personal injury cases will inevitably be a victim of catastrophic injury) significantly out of pocket even though he has beaten his own Part 36 Offer to settle the case. It is, however, noted that outside personal injury litigation CFAs are much less common.

58.5.2. Agreed that if there is to be such a taper/cap then to give effect to the policy objective of ‘a level playing field’ similar provisions ought to apply to a Claimant’s maximum liability to a Defendant if the latter makes an effective Part 36 offer (i.e. capping the liability of the Claimant to pay the Defendant’s costs if he fails to beat a Defendant’s Part 36 Offer). Further, or in the alternative, the effectiveness of a Defendant’s Part 36 Offer could be reduced commensurately by a provision that effectively prevents an early tactical part 36 offer (as is discouraged by the Multi-Track Code pilot scheme except as the last resort after discussions have failed). However, it is accepted that this would further complicate Part 36 and care would need to be taken to ensure that all sanctions are appropriately curtailed in seeking to reach a ‘level playing field.’

58.5.3. Recommended that possible alternative mechanisms to cap the additional damages to prevent possible injustice to Defendants, but

which would still meet the policy objective to leave Claimants no worse off despite having to pay trial success fees out of damages, would be:

a) to provide that the enhancement on damages arising from the failure to beat a Claimant's Part 36 offer be capped at the sum equivalent to the Claimant's recoverable costs (fixed or assessed). Costs would be defined as meaning lawyers' fees (solicitors and Counsel) plus VAT, but not disbursements. The effect of this would be that the most which a Claimant could recover by way of enhanced damages is the sum which covers them for a 100% success fee which they may be required to pay out of those damages if they are represented under a CFA and the case has gone to trial (or otherwise merits a 100% success fee). The enhanced 'costs' would still belong to the claimant, not the lawyer, subject to the agreement for costs between lawyer and client (in other words a private paying claimant would keep the benefit; a claimant with a CFA may have to pay some or all to his lawyer under the terms of the CFA). However, this might be considered to be simply reintroducing recoverability by the back door.

b) to provide that the 10% increase applies, save where the additional damages exceed a prescribed sum, say £100,000, whereupon the Court should have discretion as to whether or not to award sums in excess of this (although it is noted that this further extends the Court's discretion in large claims which may create further uncertainty in settlement as parties cannot be sure what the outcome will be in practice).

Option B2: taper and cap damages-based sanction as per Lord Justice Jackson's proposal

59. However other members of the Working Group believe that a taper and/or cap as proposed by Lord Justice Jackson is appropriate as:

59.1. If the new sanction is damages rather than costs related, some kind of cap and/or taper will be needed to prevent the claimant receiving an unjustifiable windfall, and (in very high value cases) the new sanction being out of all proportion to the Claimant's costs.

59.2. Because of periodical payments, it is almost impossible to quantify the actual settlement value to which 10% uplift could be applied. The uplift could apply to the lump sum award only, but there will then be issues as to what heads of claim are dealt with by way of lump & periodical payments (e.g. future loss of earnings).

59.3. Even if the full value of the claim on a conventional lump sum basis is capable of being agreed, applying a flat 10% uplift is likely to lead to some claimants being over rewarded. It also might lead to a perverse incentive on the Claimant to go to trial to obtain the sanction.

59.4. The sanction should not be the same for every value of claim as the impact of this would be to encourage the wrong kind of behaviour. As the value of claim increases the more disproportionate the penalty might become without a taper.

59.5. In so far as it might be said that the penalty is intended to compensate for the loss of recoverable trial success fee (usually 100%) some made the observation that it is not necessarily the case that 100% success fees would be claimed at trial.

59.6. Absent any taper or cap, an unrestricted sanction risks being perceived, effectively, as bringing back recoverability of success fees by the back door which would contradict the central reform to recoverability. The cap of £75,000 as mooted by Lord Justice Jackson maintains the balance between the parties and delivers proportionate cost and cost penalty in a way that does not upset the objective of collaboration and good case management.

59.7. An uncapped uplift will drive satellite litigation and costs wars over conduct issues.

Option B3: cap at £100,000 damages-based sanction, but no taper

60. Although it is not a position that all members of the Working Group agreed, if there is to be a damages-based sanction, but that is to be capped, there was some degree of consensus that Lord Justice Jackson's proposal of a taper and £75,000 cap might not be sufficient to achieve the policy objective of providing an additional fund to pay trial success fees, particularly in contested catastrophic personal injury cases. However, 10% of additional damages (with no taper) but capped at £100,000 might be sufficient for these purposes in most, although not all, such cases, whilst limiting the enhancement on damages to the first £1 million would largely avoid the periodical payments problem and the risk of 'windfalls' (i.e. much higher damages than are needed to pay success fees even in catastrophic injury claims).

61. So far as commercial litigation claims are concerned, these are not as often undertaken under conditional fee agreements, so a potential £100,000 sanction is seen as a serious penalty, but without distorting the litigation to as great an extent as an uncapped sanction might do.

Inter-relationship with QOCS

62. Finally, the Working Group all agreed that the inter-relation between QOCS and Part 36 needs to be carefully considered.

CHAPTER 3 – QUALIFIED ONE WAY COST SHIFTING

1. INTRODUCTION AND ISSUES CONSIDERED

Defining Qualified One-way Costs Shifting

1. We were asked to develop practical options to assist in the implementation of qualified one-way cost shifting (QOCS). Currently there is two-way costs shifting in civil litigation in England & Wales, meaning that the successful party may recover costs from the unsuccessful party, regardless of which of them was claimant or defendant. This is often referred to as the "loser pays" principle.

2. Under one-way costs shifting however, only one party (generally the claimant) may recover its costs when successful. Where the claim fails and the other party succeeds (generally the defendant), that other party will not be able to recover costs (from the claimant).

3. QOCS is a variant of this. When a qualification applies – the Q of QOCS – the position reverts to a two-way costs shifting rule and hence the claimant may be liable for the (successful) defendant's costs.

4. QOCS was initially recommended by Sir Rupert Jackson in his final report (December 2009) and refined by the Government in its post-consultation response (March 2011). Predicting the future behaviour of litigants and their advisers in any new costs regime may be a difficult and uncertain exercise. We have borne this in mind and sought as far as possible to attempt to minimise areas of uncertainty when seeking to make proposals with regard to QOCS.

The Jackson recommendation about QOCS

5. Sir Rupert recommended that QOCS should apply to personal injury and clinical negligence claims. He recommended that it should also apply to other claims where there was an asymmetrical relationship between the parties (which might include for example defamation and judicial review).

6. He proposed that QOCS could be governed by a test adapted from section 11 of the Legal Aid Act 1999. He indicated that this could be the basis for a procedural

rule, observing[1] that *"a provision along the following lines* [could] *be added to the CPR:*

"Costs ordered against the claimant in any claim for personal injuries or clinical negligence shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:

(a) the financial resources of all the parties to the proceedings, and

(b) their conduct in connection with the dispute to which the proceedings relate."

7. We accept there is clear logic in importing this sort of provision from the legal aid arena. In practice however there may be questions as to its application to future claims for personal injury which may extensively (if not uniquely) be funded privately and in which as a consequence there may be different drivers for satellite litigation seeking to test whether the proposed QOCS 'shield' may be as robust as the legal aid 'shield' was in the past.

The Government response to QOCS and its policy aims

8. The Government's response to consultation, published in March 2011, accepted the rationale for QOCS and stated the intention to introduce it first in personal injury and clinical negligence claims only. There was an indication that it might be expanded to other areas of litigation in the future[2]. Those might well be areas where the asymmetry identified by Sir Rupert exists, but are presently outside the scope of this paper.

9. The underlying policy with regard to QOCS, as set out in the Government response and subsequently by the Ministry, is that it should apply generally to all claims within scope and that it is intended to negate the requirement that the claimant be protected by After The Event (ATE) Insurance against adverse costs, the premium for which is presently recoverable from the unsuccessful defendant[3] as an additional liability.

10. Furthermore, the Ministry's policy regarding QOCS is that it should also be reasonably clear to parties and their advisers from the outset that the making of a

[1] Final report paragraph 4.7 at pages 189 – 190.
[2] See paragraph 11 of at page 7 of the response:
http://www.justice.gov.uk/downloads/consultations/jackson-report-government-response.pdf
[3] Clauses in part 2 of the Legal Aid, Sentencing and Punishment of Offenders Bill will, when implemented, provide that the cost of ATE insurance will no longer be recoverable between the parties. This reform also stems from Sir Rupert's recommendations.

costs order against a claimant should be the exception rather than the rule but that provisions governing QOCS should operate *"where the claimant has acted fraudulently, frivolously or unreasonably in pursuing proceedings"*[4]. There is also a stated intention to prevent or deter speculative claims.

11. We can see some tension in practice between costs orders being the exception and the need for meaningful deterrence, which we shall return to later.

Terms of reference – QOCS behaviours

12. The section of the Legal Aid Act 1999 on which Sir Rupert's test above is based begins with the words *"Except in prescribed circumstances …"*.

13. Essentially the thrust of the work we have undertaken is to examine what those prescribed circumstances might comprise in behavioural terms. Our principal terms of reference as provided by the Ministry are listed below and are, in effect, restricted to considering limb (b) of Sir Rupert's test. We were invited:

- *to consider and propose options for the factors which should guide the behavioural aspects of QOCS,*
- *to provide written advice to MoJ … on the advantages and disadvantages of each proposed option and indicate where there is a unanimous view regarding the best option;*
- *to report on any other significant issues identified by the working group in relation to the behavioural or other aspects of QOCS and where possible to propose options to resolve these issues.*

14. We were asked in addition to facilitate an event – an experts workshop – at which to discuss our proposals with a range of experienced practitioners and interested stakeholders. This has been arranged for the end of October 2011.

15. The Ministry helpfully provided us with short summaries of what it saw as the key behavioural factors surrounding QOCS, these being:

a. the trigger point for unreasonable behaviour such that the claimant should

[4] Taken from paragraph 11 of the Government response (above).

lose costs protection under QOCS;

b. *how should a frivolous claim be defined for the purpose of QOCS – it is clearly not sufficient that a claim is unsuccessful but what would an appropriate test be? For example, where a claim is dismissed on summary judgment, is struck out or where a wasted costs order is made?;*
c. *does there need to be a definition of a fraudulent claim for the purpose of QOCS and if so what should that definition be;*
d. *what should the position regarding costs be in claims withdrawn post proceedings – currently the claimant is generally liable to pay the defendants costs in such cases, which it is understood is intended to encourage early settlement and deter unnecessary claims;*
e. *the timing of applications to the court for QOCS to be disapplied on conduct grounds.*

Financial aspects of QOCS beyond our terms of reference

16. There are two reasons for not considering the financial aspects of QOCS – i.e. limb (a) of Sir Rupert's test adapted from the Legal Aid Act 1999.

17. First, that they are outside our express terms of reference. Second, that the Ministry has indicated that it will take forward these matters separately with stakeholders. There may be some prospect that an additional paper on the financial aspects of QOCS may be available at the event planned for end October 2011.

18. We note the further activity to develop limb (a) of the test and hope that the two areas can be readily combined to produce comprehensive, fair and effective proposals on QOCS as shortly after the planned stakeholder event as is realistic.

Non-standard claims

19. We have generally presumed that unless specified otherwise the typical personal injury claim which Sir Rupert had in mind and therefore which the Government response considered - was a unitary action, generally featuring a single claimant pursuing a single defendant (such as a road traffic accident in which only the claimant is injured). In practice of course there are significant departures from this simple model which need to be considered.

- First, there may be a counterclaim by the defendant if he or she were also injured. How will QOCS apply and to whom?

- Second, the claim could involve both personal injury and other losses, for example property damage. The question of non-monetary relief could also arise. How will QOCS apply and to what aspects?

- Third, special consideration may need to be given as to the application of QOCS in multi-party claims in general and for group litigation orders (GLOs) in particular.

- Claims for occupational disease may represent a further set of potentially non-standard cases. Litigation behaviours and drivers across disease claim types may very well be different to that in the archetypal unitary personal injury claim arising from an accident. The Government response does not specifically refer to the application of QOCS to disease cases.

20. For the purposes of this paper and for the avoidance of doubt we have assumed as a matter of policy intention that the term "personal injury" used in the context of QOCS is intended to be widely interpreted[5]. We therefore understand it to cover: road traffic, employers' and public liability claims, clinical negligence, occupational disease and multi-party / group litigation involving these sorts of harms. We will examine several of these areas in section 5 below.

Terminology

21. It has been indicated immediately above that "personal injury" should be widely interpreted.

22. It is intended that the phrase "QOCS applies" shall mean that the unsuccessful claimant remains protected against a costs order.

[5] CPR 2.3(1) provides as follows.
'claim for personal injuries' means proceedings in which there is a claim for damages in respect of personal injuries to the claimant or any other person or in respect of a person's death, and 'personal injuries' includes any disease and any impairment of a person's physical or mental condition;

23. This might initially appear confusing, since if the claimant is protected then the applicable costs rule is clearly one way costs shifting, without any qualification. It would then follow that in the event that a *Qualification* (as defined in Rules) were to be brought to bear, it could be said that 'QOCS would apply' and hence the claimant would lose protection with the result that the position reverts to two-way costs shifting.

24. It is our view however that practitioners and stakeholders involved in the Jackson review and the refinement of its recommendations by Government understand well the first use and meaning of "QOCS applies" as set out above (which is our preferred approach). Indeed it would probably be unnecessarily confusing to seek to unravel this understanding at this stage.

25. The converse of this is that the phrase "QOCS (protection) is lost" shall mean that the unsuccessful claimant could be liable to a costs order (subject always the financial aspect at limb (a) of in Sir Rupert's proposed wording).

2. QOCS AND PART 36 OF THE CIVIL PROCEDURE RULES

26. The link between QOCS and CPR Part 36 is, in our view, of central importance. It is essential that Part 36 operates clearly and effectively to promote fair and early settlement of claims. We therefore deal with it first and, unavoidably, at some length.

27. It has been noted above that the behavioural trigger for the loss of QOCS protection is described by Sir Rupert as *"conduct"* and by the Ministry as acting *"fraudulently, frivolously or unreasonably in pursuing proceedings"*.

28. Evidently neither formulation expressly covers a claimant's response to a defendant's Part 36 offer. That said, Sir Rupert examines the interaction of QOCS and Part 36 at paragraphs 4.10 & 4.11 in chapter of 19 of his final report. These are set out in full below.

4.10 <u>Incentives to accept reasonable offers.</u> Having regard to the various submissions and arguments advanced in the course of Phase 2, I propose the following scheme:

If defendant fails to beat claimant's Part 36 offer, then, in addition to the current consequences, damages will generally be increased by 10%.

If the claimant fails to beat the defendant's offer, then the existing consequences as set out in CPR rule 36.14(2) will generally apply.

My proposal in relation to the first scenario (defendant fails to beat claimant's offer) will be developed in chapter 41 below[6]. As to the second scenario (claimant fails to beat defendant's offer), the defendant will have adequate protection: the court will be likely to make a costs order against the claimant in respect of the post-offer period in circumstances where (a) the claimant was acting unreasonably in rejecting a proper offer and (b) the costs in respect of the pre-offer period plus the damages recovered by the claimant provide sufficient funds out of which the claimant can reasonably be expected to pay at least some costs.

4.11 A further advantage of this reform is that all personal injury claimants and clinical negligence claimants, whether legally aided or not, will come under a similar costs shifting regime. This will contribute towards the simplification of the rules which I have advocated in chapter 4 above.

A critical policy question

29. We take the view that the passage above, whilst extremely helpful, is not determinative of one critical question which is largely a matter of policy rather than technical procedure. This question may be formulated as follows:

    - Whether the rejection by a claimant of a defendant's Part 36 offer which was not subsequently beaten should of itself be regarded as "unreasonable" conduct as a matter of course?

30. <u>If the answer to this question is yes</u>, then the effect of Part 36 in the QOCS setting must be a straightforward black and white test. The claimant achieves costs protection by beating the offer[7] but loses it if the offer is not beaten.

[6] This scenario is considered at chapter 2 of this report.
[7] What is referred to here as beating an offer is merely a convenient shorthand for the test set out in CPR 36.14(1)(a) i.e. *"a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer".* From 6 October 2011 this test is to be interpreted purely in monetary terms.

31. This clear advantage of this outcome is that it is consistent with the ordinary application of Part 36 principles. Its obvious disadvantage is that it potentially re-introduces an adverse costs liability against the claimant in receipt of any offer, and in so doing may re-introduce a requirement for ATE insurance protection (thereby cutting across another policy aim of the overall reforms).

32. If the answer to this question is no, then the effect of Part 36 in the QOCS setting must be more nuanced and the sharp objective test of linking costs consequences to beating the offer would no longer apply in full. There would be elements of subjectivity which would involve enquiries either as to the nature of the offer and/or as to the nature of the rejection.

33. The advantage of this outcome that it protects the claimant to a greater degree, given the necessity of a further enquiry into the nature of the rejection. The main drawback is the inevitable consequence of such an enquiry: namely that it risks satellite litigation on exactly this point. A further technical disadvantage may be that this sort of nuanced approach to Part 36 would appear at first sight to run counter to the thrust of recent authorities, proposals and doctrine which in recent years, following the decision in *BAA v Carver*[8], have sought to sharpen application of the Part 36 test.

What should the policy be?

34. We took the view that it was not appropriate for us to decide this policy question here. However there are two strong indications from the Ministry as to its own response. First, the November 2010 consultation paper states, at paragraph 138 that:

QOCS would not override the system of costs sanctions set out at Part 36 of the CPR … which encourage the parties to settle claims without the need for a trial. So for example, a claimant who has refused the defendant's Part 36 offer which the claimant then does not beat at trial, would continue to pay the defendant's costs arising after the date of the offer. The policy rationale for this is that a party should pay the additional costs caused to their opponent by his or her unreasonable behaviour in not accepting the opponent's reasonable offer.

[8] [2008] EWCA Civ 412

35. Second, the briefing paper prepared by the Ministry for this Working Group notes that

A losing claimant would not be protected from paying the defendant's costs where …

- *where the claimant has refused a defendant's offer made under Part 36 of the Civil Procedure Rules then does not go on to equal or beat it at trial – in this case the claimant would generally be liable to pay that part of the defendant's costs from the date on which the offer could have been accepted together with any other sanctions imposed by the court under Part 36.*

36. Some of the Working Group were of the view that Sir Rupert's report supported the primacy of Part 36. That view would appear to be reinforced by the following sentence of his paragraph 4.10 (ii), as quoted above:

If the claimant fails to beat the defendant's offer, then the existing consequences as set out in CPR rule 36.14(2) will generally apply.

37. In addition it could also be argued that the thrust of the first sentence of an earlier paragraph, 4.8, would also tend to this conclusion:

4.8 I do not think it should be necessary in most cases to require a detailed enforcement procedure to determine liability under this provision. In the great majority of cases it should be determined at the conclusion of the case whether an order should be made and, if so, the amount should be determined summarily. Furthermore the making of a costs order will be the exception, rather than the rule.

38. Others in the Working Group were of the view that the final report should be interpreted as in favour of the primacy of QOCS. The indication above that a costs order would be an exception could tend to support this view. Moreover, the following passage in 4.10

… the court will be likely to make a costs order against the claimant in respect of the post-offer period in circumstances where (a) the claimant was acting unreasonably in rejecting a proper offer …

might suggest the need for an enquiry into the nature of both the rejection and of the offer.

39. We have explained the key policy question and the possible outcomes at some length here. This is necessary given the critical interaction between Part 36 and QOCS where a defendant makes an offer which is not beaten. The table below illustrates this eventuality.

Illustrative scenarios

The table sets out the various ways in which a claim may turn out to be unsuccessful. The assumptions here are

(i) that the claimant is pursuing an injury (or clinical negligence or disease claim) which he values at £15,000, and

(ii) that there are no financial or "conduct" grounds for departing from QOCS, apart from Part 36.

The table identifies four possible outcomes.

	Defendant made no Part 36 offer	Defendant made Part 36 offer of £10,000
Claimant withdrew[9] or otherwise lost on liability	(a)	(b)
Claimant succeeded only on part of the claim and won or settled for £7,000	(c)	(d)

These scenarios would have the following costs consequences. For purposes of simplicity in setting out options (a) – (d) below we have disregarded any other factors which could potentially affect QOCS, i.e. fraudulent or frivolous or unreasonable behaviour and/or financial considerations.

(a) Claimant loses without defendant making a part 36 offer.

[9] Withdrawal being before proceedings are issued. We examine discontinuance elsewhere.

QOCS applies (meaning the claimant is protected) and no order is made against him as to costs.

(b) Claimant loses, but defendant made a part 36 offer.

The claim has failed: the fact that there has been a Part 36 offer should make no difference when compared to (a).

One could try to make a policy argument to the effect that the claimant had the opportunity to settle and did not and should therefore be deemed to have acted unreasonably and should face costs consequences (effectively the first possible starting point identified above).

But if this were to be followed, then it would apply whether the defendant made an offer of £10,000 or £10. Every defendant in every case could therefore make a derisory offer, which clearly was not Sir Rupert's intention in this factual setting[10]. It would also be such a common situation that claimants would surely need ATE insurance to protect against the risk, which once again cuts across the policy goal behind QOCS.

Therefore in this outcome it is proposed that that QOCS applies; the claimant is protected and no order is made as to costs.

(c) Claimant succeeds on a limited basis, without defendant making a part 36 offer.

General principles should apply. The claimant has succeeded, albeit on a limited basis, so in principle the defendant should pay the claimant's costs[11]. There is a one-way costs shift (without qualification).

(d) Claimant succeeds on a limited basis, but defendant made a part 36 offer.

[10] See page 191, at footnote 25 to paragraph 4.10.
"It has been suggested to me that such a regime is open to abuse by defendants, in that they could make an offer of £10 in every case. In my view, a stratagem like this would be doomed to fail. A miniscule offer is in effect no offer."

[11] What if the defendant here were to seek to argue a reduction in costs on proportionality grounds? One possible response may be that the mere fact that the claimant has recovered only a small fraction of what was claimed should not, of itself, be a ground for disallowing costs on proportionality grounds. The defendant would have had a much simpler and more effective option available thought the claim, i.e. to make a small Part 36 offer.

Here, the claimant has failed to beat the defendant's offer. It is suggested that this is the main scenario to consider for the purposes of Part 36 and QOCS.

40. The analysis which follows deals solely with outcome (d) above and there are effectively three options to consider:
    - QOCS trumps part 36
    - Part 36 trumps QOCS
    - Part 36 trumps QOCS but only up to the level of damages and/or costs recovered

Part 36 Option 1 – QOCS trumps Part 36

41. This was supported by some in the Working Group because it appears to afford the claimant the greatest protection against adverse costs.

42. This option holds that Part 36 does not create any specific exception to the QOCS regime. Therefore the key test is not whether claimant beat the offer[12] or not, but whether he acted unreasonably or frivolously (as defined for QOCS generally) in not accepting the offer. As stated earlier, this approach would necessitate an enquiry into the quality of the rejection and that of the offer.

43. The usual outcome here would then be that the defendant would be liable for costs up to the date for acceptance of the Part 36 offer (subject to set-off, below) but thereafter QOCS would apply and, because it trumps Part 36, there would usually be no order for costs against the claimant after the offer was made.

44. This approach would appear to give claimants maximum protection - assuming refusal of an offer is not of itself unreasonable conduct – and for this reason it was supported by some of the Working Group.

45. However, some of the certainty of the Part 36 regime may be lost here because the sharp objective test of whether the offer was beaten becomes ex hypothesi secondary to the more subjective test of acting (un)reasonably. In other words, the ordinary consequences of a claimant failing to beat the Part 36 offer do not

[12] What is referred to here as beating an offer is merely a convenient shorthand for the test set out in CPR 36.14(1)(a) i.e. *"a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer".*

flow automatically in each and every instance – they only arise if the rejection of the offer was unreasonable.

46. Under this option, the defendant would appear still to be better off having made the offer than not, in so far as the prospect of recovering some costs via the loss of QOCS would arise (which it would not had the offer not been made, since the basic assumption is that the claimant has succeeded in part).

47. In the event that QOCS protection was lost under this option, the working premise would be that the defendant would be able to effect a set off of costs. The nature and extent of any costs set off will be examined separately later in this section.

48. Those who supported this option argued strongly that if it were not adopted the parties would not be on an equal footing in accordance with the overriding objective. The situation they articulated was that the claimant could receive a 10% increase in his damages if he managed to beat the Part 36 offer at trial but stood to lose 100% of his damages and remain liable for his disbursements and some or all of his costs if he did not beat the Part 36 offer.

<u>Part 36 Option 2 – Part 36 trumps QOCS</u>

49. The approach here is that after the date from which the rules in Part 36 apply all its consequences flow naturally and QOCS a claimant loses QOCS protection – i.e. the claimant is potentially at risk as to costs.

50. As has been already noted, this appears to be the option first favoured by the Ministry in its November 2010 consultation paper CP13/10 at paragraph 138 (**emphasis** added):

*"**QOCS would not override the system of costs sanctions set out at Part 36** of the CPR which encourage the parties to settle claims without the need for a trial. So for example, a claimant who has refused the defendant's Part 36 offer which the claimant then does not beat at trial, would continue to pay the defendant's costs arising after the date of the offer."*

51. This points to the sharp objective test in CPR Part 36 being applied. We note that from 6th October 2011 the *"more advantageous"* test of beating an offer means better in money terms by any amount, however small.

52. Under this option it would appear that there is no need to consider either the unreasonableness of the rejection or the reasonableness of the offer. Neither is relevant if the bright-line test of CPR Part 36 is to be solely determinative of a two-way costs shift operating after the offer has been made.

53. This option could leave claimants exposed to a potentially significant costs liability if they fail to beat an offer, especially one made early in the claim. It could give rise to strong incentives on claimants to settle too early (or to under settle), and moreover the size of this risk would surely necessitate ATE insurance of some kind, undermining the QOCS policy aim.

54. Put in these terms, the key problem is that this option brings back into play a notionally **unrestricted** two-way costs shift once an offer has been made.

55. This lack of restriction could in theory lead to a claimant being worse off having made a partial recovery - outcome (d) - compared to having lost entirely - outcome (b) - which would appear perverse.

56. In reality however there would likely be consideration of the financial circumstances of the claimant (proposals about which are in any event being developed separately by the Ministry) which would avoid this result, and/or there could be a restriction of the two-way costs shift after the offer. Essentially this latter refinement could be achieved by instead applying option 3, which retains an element of QOCS protection.

<u>Part 36 Option 3 – Part 36 Trumps QOCS but only up to the level of damages / costs recovered</u>

57. This a hybrid option. The starting point would be to apply all the ordinary costs consequences of failing to beat a Part 36 offer. As observed already, this would appear to accord with both Sir Rupert's proposal at 4.10 (ii) at page 190 of his final report:

"If the claimant fails to beat the defendant's offer, then the existing consequences as set out in CPR rule 36.14(2) will generally apply."

58. It also accords with the Ministry's preferred policy approach, which has been examined in some length above and is also set out under Part 36 option 2 here.

59. The effect of this hybrid approach would be that the claimant is liable for the defendant's costs from 21 days after the offer (the last date on which it could have been accepted). The next step, and where this option differs from that immediately above, would be to limit this liability by linking it to either the damages and/or the costs - or both - recovered for the claimant's benefit.

60. This prospect is clearly acknowledged by Sir Rupert in the passage already quoted at 4.11 in chapter 19 of his report:

As to the second scenario (claimant fails to beat defendant's offer), the defendant will have adequate protection: the court will be likely to make a costs order against the claimant in respect of the post-offer period in circumstances where (a) the claimant was acting unreasonably in rejecting a proper offer and (b) the costs in respect of the pre-offer period plus the damages recovered by the claimant provide sufficient funds out of which the claimant can reasonably be expected to pay at least some costs.

61. Views in the Working Group were split on the prospect of using pre-offer costs in this way (which is not to say that a damages set off was wholly uncontroversial). Some accepted in full the analysis in the passage above. In their view the pre-offer costs should be set off against defendant's post offer costs in the manner described.

62. Others argued that the pre-offer costs should be ring-fenced against any set off and argued that the claimant has won under this scenario in respect of the pre-offer period (albeit that the damages are not to the level of the offer) and so should in principle retain his costs for that period. It was also emphasised that the passage in the report talks of the claimant paying *"some costs".* That could be

taken as indicating a *contribution* to the defendant's post offer costs rather than meeting them in their entirety[13].

63. A further technical argument was raised in respect of setting off pre-offer costs. In order for costs to be recoverable in the first instance, the claimant must, pursuant to the indemnity principle, have a liability to pay them to this solicitor. The claimant might therefore have no pre-offer costs to use by way of set-off, depending upon the terms of the retainer. If, for example, the terms of a Conditional Fee Agreement were to provide - in the future - that "win" also means to beat a Part 36 Offer, then the claimant would have no liability to pay pre-offer costs to the solicitor and therefore there would be none available to the defendant to set off. If, however, the claimant were to retain a liability to pay the solicitor pre-offer costs (as under the usual current terms of a Conditional Fee Agreement), but these are retained / set off by the defendant, the claimant would be left with the liability and no recovered costs to meet it. This could create a continued need for a claimant to take out ATE insurance. There may also be VAT complications in respect of the costs bill which is not recovered.

64. It may be helpful at this stage to summarise the resulting position on costs under this hybrid option (which is very close if not identical to that set out in the Government consultation paper[14]). Both costs and damages are set off in this example,

(i) QOCS applies up the time of the offer, so the defendant remains liable for the claimant's pre-offer costs

(ii) Part 36 applies thereafter and the claimant is notionally liable for the defendant's post-offer costs

(iii) These respective costs liabilities should be set-off[15] against each other and

[13] The separate activity by the Ministry in connection with the financial aspects of QOCS is likely to have relevance to this point.

[14] http://www.justice.gov.uk/downloads/consultations/jackson-consultation-paper.pdf and see paragraph 141 at page 49
"The operation of Part 36 under QOCS could alternatively be modified so as to limit the level of any Part 36 costs sanctions payable by the claimant to the amount of damages recovered. This would protect claimants from having to pay any part of their own funds (for example the equity in a property) towards meeting the costs payable under Part 36."

[15] Set off could be achieved in accordance with CPR Part 44.3(9). However some members of the Working Group took the view that a costs set off could give rise problems in assessing the related VAT position.

- if there is a net costs liability in favour of the claimant, the defendant meets this along with the amount awarded (ex hypothesi lower than his Part 36 offer), or
- if there is a net costs liability in favour of the defendant, this is deducted from the amount awarded and any balance paid to the claimant (with the possibility that the award could be exhausted by the costs liability)

(iv) If the claimant's net costs liability exceeds the award, QOCS applies to protect the claimant from liability for the excess – each side walks away and no payments are made.

65. If pre-offer costs were not set off, the defendant would pay the costs at (i) and then recover its costs at (ii) from the award of damages to the extent of that award. It was noted that pre-offer costs are presently paid and not set off where the claimant is legally aided, unless specific provision to the contrary is made by the court. In his report Sir Rupert confirms that a claimant, under a QOCS regime, should generally be given a similar level of protection against adverse costs orders as that which operates under legal aid.

66. The main advantages of this hybrid option (i.e. full set off) are that:

(a) it represents a principle-based approach to resolving the interaction of QOCS and Part 36
(b) in so doing it preserves the conventional and widely-understood costs consequences of Part 36 and thereby avoids any need for a subjective enquiry into the quality of the either the rejection or the offer (which would bring the risk of satellite litigation)
(c) it would limit a claimant's notional liability for costs only to the sums arising to his benefit in the claim with the consequence that it meets the policy goal of minimising the need for ATE protection, as has already been noted above.

67. Some of the Working Group favoured this hybrid option because of these reasons.

68. The key drawback of the hybrid option is that it allows for the possibility of the claimant recovering nothing as a consequence of the loss of QOCS protection.

This is clearly not a happy outcome in a matter in which a claimant has been successful. When coupled with the proposed additional sanction for Part 36, the overall combination would mean that a claimant stands to gain 10% of damages if his offer is beaten, but could stand to lose 100% of the damages if he fails to beat the defendant's offer (and could potentially be left with some liability for costs, VAT and disbursements[16]).

69. We were unable to assess how likely such an outcome might be if this option were adopted. However, on the basis of the data available to Sir Rupert such an outcome seems likely only in a very small percentage of cases. Were such an outcome to be widespread as a result of this approach there could be a risk not only to access to justice but also to the reputation of the civil justice system.

70. A further potential disadvantage of this hybrid approach is that it will not be clear from the outset to claimants and their advisors what the claimant's liability for adverse costs might be. The prospect of set off of costs and damages and the possible exhaustion of the award would have to be signposted for claimants. (Alternatively, some felt this was an advantage in that it would be clear from the outset that the claimant's liability for adverse costs would ordinarily be limited to setting off against damages and pre-offer costs).

71. This prospect could drive a need for ATE insurance and in that respect cut across policy aims. It is neither not clear that the market will respond and even if it did, the premium for such protection would no longer be recoverable[17]. It cannot be assumed that the ATE insurance market would respond, not least as there might be insufficient recoveries available to met any ATE premium (plus IPT) and, further, given the uncertainties regarding whether ATE insurers would be paid for insuring any risk, whether of disbursements or adverse costs, with the operation of a set-off.

72. Some of the Working Group were concerned that the prospect of incurring any liability for adverse costs would deter a majority of potential claimants from bringing forward their disputes.[18]

[16] Although under present ATE arrangements the damages are generally protected so that these sorts of liabilities described are generally covered. The premium is of course, recoverable as the law presently stands.
[17] The comments in the preceding footnote apply.
[18] We were informed for example that AJAG had submitted research suggesting that 77% of

Final remarks on Part 36 & QOCS

73. In conclusion on Part 36 & QOCS, a majority of the Working Group was minded to favour the hybrid option 3 above (with most favouring a full set off, but some preferring to limit the set off to damages only). Some however were minded to support option 1. For the majority, option 3, fits in broad terms within the policy articulated by the Ministry, appears to protect most personal injury claimants to a broadly acceptable level, and operates for the most part in accordance with the general principles of Part 36.

74. Should the approach here find favour, we would suggest that it will be more readily understood if it is set out clearly in rules and guidance in terms similar to those used above. Given that damages (and possibly pre-offer costs) may be engaged under this option, it may be helpful for that to be dealt with explicitly when the policy as regards the financial aspects of QOCS is being considered.

75. Once the Ministry has given further thought to the operation of the proposed caps on success fee uplifts and/or in damages-based agreements (at 25% in each case) it is very likely to be necessary to examine further how those provisions might interact with the proposals here on part 36 and QOCS.

SUBSECTION 3 - QOCS AND LITIGATION CONDUCT

76. The Government response proposes that QOCS protection would be *lost "on behaviour grounds - where the claimant has acted fraudulently, frivolously or unreasonably in pursuing proceedings[19]."* We examined this stated policy and considered other points which may have a bearing on conduct.

Fraudulent claims

77. We unanimously agreed that:

- the bringing of a fraudulent claim should cause the loss of QOCS protection

claimants would be deterred from bringing claims due to an adverse costs risk.

[19] See reference at footnote 2 above.

- an appropriate definition of "fraudulent" for these purposes would be advisable in order to prevent satellite litigation on the point[20]
- the most straightforward approach is to recommend that that the definition of fraud for these purposes is that a judge (trial judge or costs judge) has made a finding of fraud in the pursuit or conduct of the claim[21] on the usual civil standard for proof of fraud, and
- fraudulent behaviour so found by a judge will invalidate any legal expenses insurance policy which the claimant may have.

78. The effect of the last point above is that the defendant successfully alleging fraud will not be able to recover costs other than from the claimant him or herself, subject to his or her means.

79. This might on the face of it seem unfair – that the defendant has incurred irrecoverable expense because of the fraud. However, it is very probably no different to the current position, under general two-way costs shifting, where a fraudulent claimant has misled the court, his or her advisers[22], and his or her legal expenses insurers.

80. In short, the loss of QOCS protection in claims in which fraud has been proven to the civil standard was not controversial. Such cases, however, will be relatively few when compared to the overall number of personal injury, clinical negligence and disease claims.

Struck out claims

81. The power to strike out claims is set out in CPR Part 3.4(2), which is reproduced below:

> *(2) The court may strike out a statement of case if it appears to the court –*
>
> *(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;*

[20] Note paragraph 165 of the Government response:
"Most [respondents] *agreed that QOCS should not apply where a case had been brought fraudulently, but there was concern that the courts rarely made a finding of fraud so that without a tight definition there may be an increase in such claims."*

[21] Or possibly a judicial finding of: contempt, or that the claimant has attempted to pervert the course of justice, or otherwise wilfully mislead the court.

[22] In the unlikely event that the advisers were complicit in the fraud costs could be sought against them.

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order.

Most of the Working Group was of the view that a distinction should be drawn between on the one hand claims struck out for abuse – (a) and (b) above - and on the other scenarios which could be described as "technical" strike outs, say for some form of failure to comply with directions – (c) above.

82. The former does not appear to have been covered by Sir Rupert but was thought to be straightforward. Given that the matter has been subject to a judicial finding of abuse of process, there is thought to be a compelling argument that such behaviour should be classified as "unreasonable" for the purposes of QOCS.

83. Nevertheless and for the avoidance of doubt (and of satellite litigation) we would recommend that the point in the preceding paragraph is covered expressly in any rules guidance or practice direction relating to QOCS. Such provision would be preferable to treating these cases implicitly as a subset of general unreasonable behaviour.

84. The latter category may be more problematic. As a matter of policy, any costs response to such behaviour should not invite satellite litigation by way of technical challenge. That could arise if QOCS protection was lost as a matter of course in the case of the sort of technical default or failure to comply envisaged here. Such an outcome should be avoided as far as possible. Therefore, most of the Working Group was of the view that the myriad sorts of technical procedural compliance points should be dealt with by way of the test of unreasonableness for QOCS purposes[23].

85. It is recognised that this approach – leaving the matter to judicial discretion – may leave a degree of uncertainty and therefore the prospect of some satellite

[23] In this way defaults of the type set out in 3.4(2)(c) amount, essentially, to a subset of the general unreasonableness test for QOCS purposes. Hence protection could be lost if the non-compliance was sufficiently serious in the circumstances, But It is most definitely not implied that a defendant should have to apply to strike out a claim under 3.4(2)(c) in every case where he seeks to disapply QOCS.

litigation. Nevertheless, the majority thought it on balance to be preferable to setting out a prescriptive or exhaustive list of the possible types and degrees of procedural defaults which might arise to be considered for QOCS purposes. However, some indicative examples and/or relevant factors could be provided in any practice direction relating to QOCS (which a complements the point made above at paragraph 80.)

Frivolous or unreasonable claims or behaviour

86. As is the case with the topic immediately above, these matters are by their nature more subjective in their appreciation and likely to be areas for debate and discussion depending on the facts and scenarios envisaged.

87. On the one hand, the Government response (quoted at the beginning of this section) indicates unequivocally that such behaviours and claims are within the scope of qualification sufficient to cause the loss of QOCS. Further evidence of this is provided by behavioural factors (a) to (e) listed in the previous section of this paper.

88. On the other, Sir Rupert's final report tends towards a more principle-based approach rather than to detailed consideration of all the possible circumstances which might or might not trigger the loss of QOCS protection:

"I do not think it should be necessary in most cases to require a detailed enforcement procedure to determine liability under this provision. In the great majority of cases it should be determined at the conclusion of the case whether an order should be made and, if so, the amount should be determined summarily. Furthermore the making of a costs order will be the exception, rather than the rule. Nevertheless, the formula suggested above[24] will enable the court to make a costs order in three specific situations where such an order would be appropriate: (a) where the claimant has behaved unreasonably (e.g. bringing a frivolous or fraudulent claim); (b) where the defendant is neither insured nor a large organisation which is self-insured; or (c) where the claimant is conspicuously wealthy[25]."

[24] The reference here is to Sir Rupert's proposed test for QOCS which is quoted in the opening section of this paper.
[25] Final report paragraph 4.8 at page 190.

Behaviour Option 1 - a high benchmark for disapplying QOCS for unreasonable / frivolous conduct

89. This would meet the policy objective that a costs order against a claimant would be the exception rather than the rule, and would as a consequence reinforce the underlying policy that ATE insurance would not generally be required by claimants. It would also prevent significant satellite litigation on conduct points.

90. This approach might require some re-emphasis of the egregious nature of the conduct necessary to cause the loss of the protection of QOCS: the use, for example, of phrases (whether in a rule, practice direction or guidance) such as manifestly unreasonable or plainly frivolous might be considered appropriate.

91. Opinion in the Working Group was divided on this approach. Those who supported it did so for the reasons given here. It was argued also that benchmark for a finding that a frivolous claim has been brought must remain at the current high level to avoid satellite litigation, provide claimants with certainty about costs at the outset and to avoid the need for ATE insurance. Reliance should be placed on existing case law defining what amounts to bringing a frivolous claim. For the same reasons, it would follow that any finding of unreasonable conduct must mean similarly serious conduct, i.e. sufficiently serious to have the case struck out.

92. Those who were against it argued either that the test proposed the Government and Sir Rupert did not need any further refinement, or in the alternative that any refinements could themselves give to satellite litigation.

93. Others argued that a high threshold would not necessarily create the deterrent to unreasonable and frivolous conduct that in their view was required to balance the protection that QOCS provides. The point made by those representing defendants was that they were concerned that a high threshold might operate to restrict their ability to raise “conduct” arguments to cause the loss of QOCS protection in cases in which they suspected fraud, significant exaggeration, or purely speculative claiming.

Behaviour Option 2 - a low threshold for disapplying QOCS for unreasonable / frivolous conduct

94. This could risk significant satellite litigation by defendants seeking to recover costs via the loss of QOCS. It would also stimulate the need for claimants to have ATE protection, which seemed to a majority to cut across the policy aim in question.

95. It could give rise to further problems with access to justice, in that claimants could be reluctant to pursue claims because of the uncertainty around having to meet the defendant's costs. This uncertainty could make it difficult for practitioners advising claimants at the outset of their claims. It could also be the case that claimants with meritorious cases could be tempted to accept under settlement instead of commencing proceedings because of the costs risks and uncertainties.

96. In addition to these risks to the policy goals, a significant practical barrier to this approach is that it likely to be extremely difficult in practice to draft guidance on the operation of a low threshold test for the loss of QOCS protection.

97. For these reasons this option is not generally favoured across the Working Group.

Behaviour Option 3 – no change to the proposal for QOCS and judiciary to interpret

98. This approach is based on simply adopting the proposed drafting set out by Sir Rupert and which has already been quoted in this paper. It has the benefits of simplicity and of meeting the main policy aims of the introduction of QOCS.

99. The absence of any further comment on the provision means, however, that the interpretation and operation of QOCS would of necessity be left to judges on a case-by-case basis.

100. That could bring with it a risk of inconsistency in approach until there is guidance from higher courts. It might also admit some satellite ligation pending such guidance (although that was not necessarily thought to be at any greater

level than might result from other procedural changes outside of these terms of reference).

101. Some of the Working Group supported this approach. It was also suggested that the judiciary, perhaps via the Senior Courts Cost Office, might consider how decisions about QOCS on these matters might be disseminated promptly and effectively.

102. Others in the Working Group argued against leaving this to discretion. In their view, the benchmark should remain at a high objective level as set out here in behaviour option 1 above. They argued that to leave these decisions to be considered on a case by case basis would depart from the clarity of Sir Rupert's recommendation and would introduce uncertainty. Further, it might give rise to problems when advising on costs liability at the outset and could reinforce the need for ATE insurance and encourage satellite litigation.

SUBSECTION 4 - QOCS AND FIXED RECOVERABLE COSTS

103. The working assumption is that as a matter of policy QOCS should apply to all personal injury claims, including clinical negligence and disease cases. We see no principled reason why it should not apply to claims of these types which are subject to rules setting out fixed recoverable costs or staged fixed costs.

104. Hence it follows that QOCS provisions should apply to matters in which costs are presently fixed. The two current examples are the stage fixed costs set out at CPR Part 45 VI under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents and the provisions for fixed recoverable costs (often known as "predictable" costs) set out in CPR Part 45 II.

105. It is however important to point out that both schemes quoted above are largely confined to pre-issue resolution of cases. It follows in theory at least that a potential costs liability to the defence does not arise and hence QOCS is not strictly at play.

106. Costs are also fixed for fast track trial costs under CPR Part 46. Once again as a matter of principle we would suggest that QOCS should apply.

107. In the small track however, the prevailing costs regime is not one of costs shifting. For that reason we would suggest that QOCS is not relevant in claims within this track.

108. We would make two final points on QOCS and fixed costs. First, the Ministry's recent consultation document CP 08/2011[26] sought views on extending the approach set out in the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. If this were taken forward, we would recommend that QOCS should apply to any areas or types of claim brought into this approach. Second, if fixed (recoverable) costs were to be introduced throughout the fast track for all injury claims (as recommended by Sir Rupert[27], we would similarly recommend that QOCS should apply to these matters.

109. We simply call for a consistent approach to QOCS should new areas of fixed costs for injury claims (including clinical and disease cases) be introduced. We make no comment as to any detailed costs rules nor as to the levels of fixed recoverable costs which might apply in those areas.

SUBSECTION 5 – APPLYING QOCS TO NON-STANDARD CLAIMS

The nature of the problem

110. At paragraphs 19 & 20 above we alluded to non-standard claims. We drew a contrast with the typical unitary personal injury action which it seemed to us that Sir Rupert and the Ministry generally had in mind. In the briefing paper which it provided for us, we were asked to consider the application of QOCS to "atypical cases" and "mixed claims" in particular.

111. These are broad and potentially wide ranging categories and we consider the key issues and main types of such cases below. For the most part, our approach is to describe the broad principles which may apply rather than to set out proposals for detailed and exhaustive rules.

The scope of QOCS

[26] "Solving disputes in the county courts: creating a simpler, quicker and more proportionate system" http://www.justice.gov.uk/downloads/consultations/solving-disputes-county-courts.pdf
[27] Final Report, chapter 15 pages 146 – 168.

112. It has been noted that the MoJ's intention is to introduce QOCS *for "personal injury claims, including clinical negligence"* in the first instance. We have already indicated that our working assumption is that "personal injury" in this context should be widely interpreted[28]. This means the term should cover all of the following:

- road traffic accident claims
- employers' liability accident claims
- public liability accident claims
- product liability claims
- clinical and dental negligence claims
- public nuisance claims, to the extent that the harm complained of results in an injury, and
- multi-party actions and group litigation orders which bring together claims of the above types.

113. This is not an exhaustive list by any means but is simply an attempt to list the main claims types for the avoidance of doubt. Although not strictly necessary to do so, it is worth highlighting that this list is not, and in our view should not be, limited to claims arising from activities for which compulsory liability insurance is required.

114. Regardless of the nature of the injury complained of, we were of the view that the level of damages for the injury should be above the limit for the small claims track before QOCS applies. The reason is straightforward: the small claims track is in essence not one in which two way costs shifting applies and therefore it is unnecessary even to consider QOCS as relevant.

115. Generally, we would not anticipate that there is likely to be much dispute over the definitions of the types of claims above. If, however, further clarity were required in that regard we would propose the adoption of well-understood definitions, for example such as the definitions of:

- a claim for personal injuries in CPR 2.3(1)
- road traffic injury claims, set out in CPR 45.7(4) and in the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents 1.1(10), and

[28] And would refer again to the definition of "claim for personal injuries" in CPR 2.3(1).

- employers' liability accident claims set out in CPR 45.20.

116. The wide interpretation of personal injury claims here may lead to some policy decisions on scope arising in marginal cases. For example, should multiple food poisoning claims arising in the course of a package holiday fall within QOCS? Adopting our broad interpretation above, the conclusion would in all likelihood be that they should.

QOCS and counterclaims

117. We suggest that the most practical solution is to counterclaims is first to apply the basic principle of QOCS. This is that costs protection (balanced with the repeal of the recovery of ATE insurance premium) should apply to personal injury claims because there is an asymmetry of relationship between the parties.

118. Therefore in the case of an action featuring a claim and a counterclaim, QOCS should apply separately and in turn to both, assuming that both parties to the action are acting as individuals claiming against another who has the benefit of liability insurance and as a consequence of which there is an asymmetry of relationship.

119. The near-stereotypical example of claim and counterclaim will be found in the case of a road traffic accident in which each driver is injured and seeks damages from the other. QOCS may be applied separately and in turn to their respective claims.

120. There may appear to be some risk of complication where there are competing Part 36 offers made by each side in such a case, especially if the outcome is one in which each side succeeds partially. We do not however believe this is necessarily more complex that might arise at present in such claims. We would also suggest if the hybrid option outlined above for Part 36 and QOCS were adopted this could provide the simplest solution for this sort of case, because the hybrid option retains the objective 'beating of the offer' test[29].

[29] A set off of costs & damages might also apply after the operation of QOCS in relation to both parts of the action.

121. In respect of counterclaims – as with non-standard claims in this subsection generally – we would firmly recommend the adoption of general principles capable of application to most cases rather than the crafting of detailed rules and guidance in an attempt to for cater every possible permutation.

QOCS and multiple defendants

122. Once again we approached this area from first principles. The test of whether QOCS applies is simply a question of deciding whether the claim is one for personal injury (as per our assumed definition and scope). Therefore the fact that there are two or more defendants should not generally be relevant.[30]

123. Sir Rupert observes that *"the defendant is almost invariably either insured or self insured*[31]*"* when describing standard injury claims. We agree and would further suggest that most multiple defendant personal injury claims will, almost by definition, feature either insured or self-insured defendants. To the extent that this holds for all defendants then it appears self-evident that QOCS should apply.

124. A difficulty may arise if one (or more) of the defendants is neither insured nor self-insured. Should QOCS apply here? Should a test be based on whether a majority of the defendants is or is not insured? We are not attracted to such a test. The resources of the defendant – if neither insured nor self-insured – are the subject of consideration by the MoJ as part of policy regarding the financial aspects of QOCS.

125. As a matter of practice, it is highly likely that any named defendant, if not insured or self-insured, will be considered by the claimant's solicitor to be in some other way 'good for the money'. Otherwise there would surely be little point in pursuing such a defendant in the first place, since the prospect of any meaningful recovery if the claim succeeds would be remote.

[30] It should be recalled that the sole policy consideration for QOCS was the removal of the need for ATE recoverability. This does not necessarily apply to the same extent in multi-defendant cases.
[31] Chapter 19 Final Report at paragraph 1.2.

126. Following this reasoning, the application of QOCS in respect of the claim against the uninsured defendant must logically be part of the overall consideration of its means and resources. The question then would fall to be considered within the framework of how the resources of the parties affect the application of QOCS. As has already been noted, this is essentially limb (a) of the proposed rule for QOCS. This is outside our terms of reference and is being considered separately by the Ministry.

127. Two further significant questions may arise.

- First, how should QOCS apply to personal injury claims in which an insolvent or defunct company or enterprise (or insurer) may figure among the multiple defendants?
- Second, how should QOCS apply as between the defendants?

128. The first question arises for instance where an insolvent or defunct enterprise is sued in an occupational disease claim which relates to exposure to harm involving many defendants over a long period. This is not the only such example, but it is probably the most common.

129. Despite the lack of obvious resources here, there may nevertheless be merit in pursuing such a defendant for the purposes of seeking indemnity from its insurers. The claim may currently be brought under the Third Party (Right Against Insurers) Act 1930, which will be replaced by the 2010 Act of the same name when its provision are commenced[32]. Under this mechanism the claimant may secure payment from the policy which was taken out by the defunct or insolvent defendant.

130. It is our view that even though this mechanism is more complicated than the pursuit of a claim for damages arising as a result of an accident, the matter remains in essence a claim for personal injury as defined. Applying first principles, we would propose QOCS should apply to this sort of claim against one of several defendants[33]. It must follow therefore as a matter of principle that QOCS should also apply to a similar claim where a single defendant alone is pursued in this way via either of the 1930 or 2010 Acts.

[32] There would appear to be no material difference for the purposes of QOCS.
[33] Subject to the point made in the final sentence of paragraph 120 above.

131. Where the defendant and its insurer are both insolvent – whether or not the case involves multiple defendants – there may be certain circumstances in which claims for personal injury are protected by the Financial Services Compensation Scheme[34] (FSCS). These broadly relate to areas in which insurance against liability for personal injuries is compulsory as a matter of law. The obvious examples are motor insurance and employers' liability insurance.

132. Considering once again the first principles of QOCS in this context, we are attracted to the conclusion that QOCS should apply to personal injury claims protected by the FSCS. This is a tentative conclusion only, and we would recommend that further detailed analysis of the operation of the FSCS and the extent of its protection is undertaken in order to validate our proposal here.

133. The second question is how QOCS applies as between multiple defendants? It is highly likely that these claims will be for contribution between defendants under Part 20 CPR.

134. We take the view that claims between defendants should not generally give rise to QOCS protection. The prevailing rationale is that it would seem artificial to shoe horn contribution claims into the definition of personal injury for QOCS. The fact that the underlying action brought by the claimant was one for damages for personal injury is very probably of little relevance as between defendants. Moreover, in practice these sorts of contribution claims are usually actions between one insured or self-insured entity and another, so there is not the asymmetry of relationship sufficient to trigger QOCS.

QOCS in clinical negligence claims

135. The Ministry's stated policy is to apply QOCS to clinical negligence claims. The reasons for adopting this approach in this sphere are identical to those which have been advanced in support of its introduction for conventional personal injury claims. There do not appear to be any clear and

[34] http://www.fscs.org.uk/

compelling policy reasons for making a distinction in respect of clinical negligence claims.

QOCS, multi-party claims and group litigation orders

136. We have already expressed our view that as a matter of principle these sorts of claims and actions should fall within the scope of QOCS to the extent that personal injuries are involved.

137. The topic was not raised as a specific issue in the consultation which followed Sir Rupert's final report. In that he analysed this type of claim in detail, at Chapter 23. The approach he took accords with the views of the majority of the Working Group (set out in the preceding paragraph), so we propose simply to adopt his proposals and to set them out here in full.

138. In so doing we would underline that members of the Working Group clearly recognised the sometimes acute tension between the *"competing arguments"* noted out below at 3.2. Those, however, are a matter of policy with regard to group or collective litigation and hence are outside the remit of this paper.

3. ANALYSIS RE COSTS SHIFTING

3.1 <u>Personal injury claims.</u> If my recommendations in chapter 19 above are accepted, qualified one-way costs shifting will be the norm for personal injury claims. This regime would therefore be imported into group personal injury actions.

3.2 <u>The competing arguments.</u> The arguments advanced during Phase 2 range between two principal positions: (i) there should be no costs shifting or one-way costs shifting; and (ii) there should be full costs shifting. Justification for the first position is that this is necessary to promote access to justice; otherwise the collective claimants would be deterred by fear of adverse costs liability. Justification for the second position is that full exposure to adverse costs is necessary to deter frivolous claims.

3.3 The middle way. As recognised by many of the submissions, there is a possible middle way. Whilst two-way costs shifting provides a necessary discipline in many (perhaps most) collective actions, there are cases where claimants simply cannot accept the risk of unlimited liability for adverse costs.

3.4 Having weighed up the submissions and the arguments in Phase 2, I propose the following costs regime for collective actions:

(i) The starting point or default position in personal injury actions is qualified one-way costs shifting and, in all other cases, is two way costs shifting.

(ii) At the certification stage the court, after considering the nature of the case, the funding arrangements and the resources of the parties, may direct that a different costs regime shall operate.

Whatever costs regime operates, however, the general rule in CPR rule 48.6A should apply: the individual litigant is only liable for his proportion of the common costs.

3.5 The advantage of this regime is that it contains the necessary flexibility that many respondents have suggested is necessary. Furthermore, where a claim is weak or lacking in merit, the court will no doubt insist that two-way costs shifting should prevail.

QOCS and mixed claims

139. The first question is what is a "mixed claim" for these purposes? The briefing paper provided by the MoJ comments as follows.

Mixed claims

There will be claims that are only part personal injury (for example personal injury and other causes of action such as for an injunction or specific performance in housing disrepair/actions against the police and personal injury and damage to property in relation to vehicle damage in a road traffic accident case).

If it were practical MOJ would be minded to apply QOCS for the personal injury element only of a mixed claim. The working group are asked to consider whether this is a practical option and if so how this would operate.

In the alternative, MOJ consider that QOCS should only operate where the claim includes a substantial element of personal injury, so as to preclude claimants from seeking to include or maintain a claim for personal injury where they might not otherwise do so or where the personal injury element could be settled. The threshold might be set at a certain personal injury claim value or at a specific proportion (for example 25% or 50% of the claim value). The working group are asked to consider what an appropriate threshold might be for these purposes and how the element of personal injury might be quantified as a proportion of the whole

140. It may appear axiomatic, but as a matter of clarification we did not regard a claim for damages for pain and suffering arising from an injury presented alongside a claim for consequential loss of earnings as a "mixed claim" for the purposes of QOCS. Nor did we generally regard a claim for property damaged in the incident which caused the injury as a "mixed claim".

141. However, there were differing views within the Working Group views in respect of certain claims in which the property damage or other losses arising from the incident causing the injury might be said to be the substantially dominant or overriding reason for pursuing the claims. We shall return to this point below with regard to credit hire.

142. A majority took the view that a "mixed claim" for the purposes of QOCS should be one in which damages for personal injury are sought alongside some other non-monetary remedy, which is connected to the circumstances of the injury. A practical example could be a claim arising out of housing disrepair and in which the claimant is seeking to remedy the defect and is also pursuing damages for an injury arising from the defect. Another example might be found in cases of nuisance giving rise to injury and in which relief to bring an end to the nuisance is claimed in addition to damages.

143. Whatever approach is taken to defining "mixed claims" for the purposes of QOCS several possible options could apply.

(i) <u>Exclusion.</u> Under this option, mixed claims would simply be outside the scope of QOCS. The main advantage of this approach is that the test is

straightforward and easy to apply. The key disadvantage is that there is no leeway by which to allow the injured claimant seeking an additional non-monetary remedy to avail himself from QOCS protection. This could engage a need for ATE insurance against adverse costs even in respect of the injury element of the claim and hence could hence fall foul of the policy aim in respect of ATE.

(ii) Inclusion. Clearly this is the opposite approach. Under this variant, the claimant would be fully protected by QOCS in respect of all potential adverse costs liability. Thus QOCS would extend to the non-damages remedy sought by the claimant. This would extend the protection beyond that which we believe is contemplated in the first instance for QOCS. At its worst, it could lead to very minor injury claims being asserted as the norm in claims which are primarily for non-monetary redress simply in order to protect that claim from the two-way costs shift that would otherwise apply. That could risk removing the deterrent effect of two-way costs shifting in, for example housing disrepair claims where very minor injury is involved. Whether this is an advantage or otherwise is likely to be a highly subjective judgment. We would wish to point out that in the time available the Working Group focused on personal injury claims in the main – these being the 'lead' area for QOCS – and did not have the benefit of detailed input from specialist housing practitioners.

[Neither of the approaches above would accord with the MoJ's preferred policy for mixed claims (see above) hence others were considered.]

(iii) Separation. This option would see QOCS applying to the costs related only to the injury element of the mixed claim. It would therefore achieve the aim of applying QOCS widely to injury claims generally and would most closely meet the MoJ policy, above. However, it would necessitate an assessment or apportionment of the costs as between the mixed elements of the claim. This sort of an apportionment could also be a slightly artificial exercise which has no relevance to how the matter was pursued but which is purely adopted for QOCS purposes. Some thought that the prospect of such an assessment could promote satellite litigation about which parts of the costs related to which part of the mixed claim.

Alternatively, others thought that this assessment could be dealt with adequately at CMCs and pre-trial hearings.

(iv) Threshold. This approach would be based on a test applied in order to establish whether or not the main objective of the claim was to secure damages for personal injury. This would be a purposive approach to QOCS, which has advantages in that it would bring into scope a wide range of claims, which (to adopt a loose formulation) are mainly for personal injury. However, if it was adopted, then QOCS would apply to the whole of the mixed claim, which would go beyond the MoJ's stated policy here. This option would also bring into play the disadvantages of (ii) above[35] but would avoid the disadvantages of (iii). Moreover, any qualitative threshold test is very likely to be subjective or discretion-based, which again brings the prospect of satellite litigation. A further disadvantage is that a quantitative threshold test, which would be based on allocating a notional monetary value to the non-injury aspect, would require the an artificial comparison exercise of exactly the type we have discarded elsewhere in this paper, most notably for example in respect of the additional sanction for Part 36 offers.

(v) Issues. This would take an entirely different approach to the options above. Rather than looking at the relative weight of the injury and non-injury elements, the test would seek to consider what are the main issues in the mixed claim[36]. The benefit of this is that that once applied, it would then be open for the question of QOCS to be decided using any of the options above depending on all of the circumstances of the case. As this is therefore a more flexible test than other approaches, that inherent flexibility could perhaps give rise to some risk of satellite litigation. This is probably unavoidable.

144. The principal attraction of the issues test immediately above is that it could apply to a wide range of mixed claims. For example, motor insurers are

[35] Threshold option (iv) differs from exclusion option (ii) in that in (iv) there would be an enquiry as to whether securing damages for personal injury was the main objective of the mixed claim. In (ii) however a mixed claim involving an element of personal injury is automatically within the scope of QOCS.

[36] It is accepted that the drafting of a test based on consideration of the main issues in mixed claims may be difficult in practice. One possibility therefore could be to provide for a broad test in Rules, supplemented by guidance in a Practice Direction indicating the factors relevant to the application or otherwise of QOCS to mixed claims.

concerned that substantial credit hire claims (running it is said to tens of thousands of pounds) could be protected by QOCS where pursued alongside[37] a modest claim for soft tissue injuries. They argue that this is not the aim of QOCS and suggest these cases are often pursued perhaps more for the benefit of the commercial hire company than the individual and as a consequence the matter is not one in which there is the asymmetry of relationship sufficient to justify QOCS protection.

145. Clearly this is a controversial argument. The counter-argument holds that these are not truly "mixed claims" – the hire is a consequential loss arising from the loss of use of the very vehicle in which the claimant was injured, even if to a modest extent. It further holds that the claimant is required to pursue all losses arising from the same cause of action in one claim; which is primarily one for personal injuries and related consequential loss, the relative weight of which is not significant for these purposes. A final point argued here is that as the claimant is likely to be liable in contract for the credit hire charges, the matter is not one which can be said to be run for the benefit of the hire company and in that way the relationship remains asymmetrical.

146. This topic has been set out at some length for two reasons. The first is because of the concern expressed by motor insurers with regard to this sort of "mixed claim" (if indeed it is strictly speaking a "mixed claim") and the second is to illustrate the wide range of factors and drivers to litigation which could be examined under the option of a conduct test for applying QOCS to "mixed claims".

QOCS and withdrawn claims

147. The Working Group was of the view that there is no impact on claims which are withdrawn pre-proceedings. The reasoning is that the pre-action stage is simply an area in which two-way cost shifting does not apply, so there is no adverse costs liability at this stage. Therefore there is neither a

[37] The Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents distinguishes between damages for personal injury and "vehicle related damages", which includes credit hire. The distinction is drawn for the purposes of deciding at the outset if the injury claim falls within the Protocol. At later stages of the process the vehicle related damages, including credit hire, may be brought together with the injury claim and pursued inside or outside the Protocol process.

need for ATE protection within the present regime, nor for QOCS protection under the broad changes proposed for future claims by the Ministry and of which this paper is a small part.

148. Current practice is that ATE is often taken out at this stage. Once the cost of this is no longer recoverable between the parties it is likely that ATE insurers will no longer scrutinise significant numbers of injury cases at the pre-action stage. It is possible that the absence of this 'filtering' by insurers could lead to some increase in the presentation of claims of limited intrinsic merit.

149. Of greater concern is the position after proceedings have been commenced, where withdrawal is more correctly designated as "discontinuance"[38]. As with much of the analysis in relation to QOCS generally, the likely options in these circumstances are based on two extremes and a discretionary or hybrid approach. The broad nature of each of the three possibilities is fairly straightforward in concept:

(i) Protection - QOCS protection applies and is not affected by the discontinuance, or

(ii) Exposure - QOCS is lost as a result of the discontinuance and the claimant is at risk in respect of adverse costs, the extent of which will need to be clarified, or

(iii) Conduct - an assessment of the reasonableness or otherwise of the conduct in discontinuing is required in order to decide whether QOCS should apply or not.

[38] It may be worth setting out in full here the present rules – i.e. under two-way costs shifting – which apply to discontinued claims.

Liability for costs - 38.6

(1) Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant.

(2) If proceedings are only partly discontinued –

(a) the claimant is liable under paragraph (1) for costs relating only to the part of the proceedings which he is discontinuing; and

(b) unless the court orders otherwise, the costs which the claimant is liable to pay must not be assessed until the conclusion of the rest of the proceedings.

(3) This rule does not apply to claims allocated to the small claims track.

(Rule 44.12 provides for the basis of assessment where the right to costs arises on discontinuance and contains provisions about when a costs order is deemed to have been made and applying for an order under section 194(3) of the Legal Services Act 2007)

150. The main advantage of the first would be that it provides the greatest protection to claimants and therefore meets the policy goal of limiting the need for ATE protection against adverse costs. The clear disadvantage with this model is the complete absence of deterrence against speculative or unmeritorious claims because there is no costs sanction brought to bear against the claimant.

151. Obviously the reverse is the case with the second. The loss of QOCS protection may bite and provide deterrence, but against that there could be a need for ATE protection because of the adverse costs liability. It is worth noting that the underlying hypothesis here is that the claimant has recovered nothing as a result of discontinuing. Therefore, unlike in the scenario in which the claimant has failed to beat a Part 36 offer, there are no funds in the case – no damages, no pre-offer costs – available to meet the potential liability.

152. This second option would therefore appear to engage either a claimant's other financial resources or ATE insurance, the premium for which will not be recoverable. Either that makes it this option unattractive because the policy should be not to expose claimants in this manner. Or it may make it attractive if the policy aim is to introduce this sort of interest for claimants in these circumstances. Clarity on the policy goal here is in our view required if this option is to be considered further. This is a topic on which the project examining the financial resources of the parties with regard to QOCS will need to consider.

153. The other issue within in this second option is the extent of any liability for adverse costs following the discontinuance. Generally, it would be reasonable to assume that the loss of QOCS during the currency of a claim would apply on a prospective basis, i.e. only to the costs incurred by the defendant after the date on which QOCS protection was lost. In the case of a discontinuance, however, the claim is brought to an end as a result of the discontinuance and therefore no costs are incurred beyond it. It would follow that the only realistic manner in which to apply the loss of QOCS following discontinuance would be retrospectively, which seemed to us likely to raise significant practical problems[39].

[39] One particularly extreme example raised was that a claimant might prefer to continue to trial and lose rather than to discontinue under these circumstances.

154. For example, this retrospective reach of the loss of QOCS could make it far from clear for those advising claimants to set out the likely costs position with clarity at the outset of claims. Another concern is that any retrospective reach of QOCS here would appear out of necessity to introduce an unwelcome element of hindsight (the enquiry might for example be as to what was the date on which the claimant ought reasonably to have known he should discontinue); to say nothing of whether it would be fair and just as a matter of principle to apply a retrospective approach in this way.

155. Given that the third option here, based on conduct, includes the loss of QOCS as a result of the discontinuance, it is clear that the same points of concern arise in respect of it.

156. We are therefore unable to reach a clear and comprehensive view on the approach to QOCS in discontinued claims. In conclusion however we would raise several points which we believe may merit further consideration.

- Examining QOCS at the point of discontinuance may be similar to looking at a wrong end of the telescope.
- The better approach may be to provide for any challenges, by the defendant, to QOCS to be introduced at the earliest possible stage(s) in order to avoid an approach based on retrospective analysis and hindsight.
- <u>If such a challenge succeeds</u>, the claimant is from that point at risk as to adverse costs.
  - the extent of that risk could, in the case of failure to beat a Part 36 offer, be limited to any damages recovered and could possibly be set off against pre-offer costs (although the latter is not a unanimous or majority proposal)
  - if ATE insurance was purchased to protect against this risk, the premium would not as a matter of policy be recoverable (even if such cover were available)
  - should a discontinuance following the loss of QOCS trigger adverse costs liability and if so, should it be limited to the costs incurred after the date on which QOCS protection was lost?

- If the defendant's early challenge to QOCS fails, the defendant would have to meet the costs, but should there be a further sanction for making the challenge, or is this costs liability plus the loss of any future two-way costs shift – because QOCS was confirmed - sufficient sanction?
  - if there were such a sanction, the assumption would be that it lies in costs but how would it be described?
  - should a discontinuance following unsuccessful challenge to QOCS attract any costs consequences whatsoever?