Civil Justice Council

Response To Ministry of Justice Commissioning Note entitled "*Implementation Of Part 2 Of The Legal Aid, Sentencing And Punishment Of Offenders Act 2012: Civil Litigation Funding And Costs – Issues For Further Consideration By The Civil Justice Council*"

June 2012

Qualified One-way Costs Shifting in personal injury claims

– summary table of 'triggers' for loss of protection

	Section of this report	Impact on QOCS	CPR provision	Comment
Fraud	3a	Lost	• A new provision may be required	Fraud must be pleaded and proven to the civil standard
Failure to beat a defendant's Part 36 offer	5	Lost	• New section of Part 36	The post-offer costs liability to the defendant is limited to the amount of damages recovered
Claim struck out	3c	Lost	• Part 3.4(2) • A new provision may also be required	Protection is automatically lost for strike outs for reasons in 3.4(2) (a) and (b) but not necessarily for (c)
Claim discontinued	6	Preserved	• Changes will be required to Part 38.6	Preserving QOCS protection for discontinued cases may cause defendants to apply more frequently to strike cases out (above) so as to bring a costs risk to bear
Appeals	6	Preserved	• A new provision may be required	
Mixed claims	4	Variable	• A new provision may be required	The first question of policy is whether the protection is provided on an all or nothing basis? If it is not, then the precise basis on which protection may be afforded to some elements of the claim and not to others needs to be settled.

Introduction

1. In late May 2012 the Ministry of Justice (MoJ) invited the Civil Justice Council (CJC) to provide further assistance and advice in respect of Qualified One-way Costs Shifting (QOCS) which is to be introduced, at least in the first instance, for claims for damages for personal injuries. The CJC reconvened its 2011 Working Group which had reported on QOCS and other matters. The Group met twice in June and a range of more focused discussions also took place so as to involve a breadth of stakeholder interests.

2. The present advice to the MoJ needs to be read in conjunction with the Group's 2011 report and the MoJ's Commissioning Note, which itself served as the terms of reference for the current activity. Both those papers are available on the CJC website. Part of the Commissioning Note is produced below with numbering and emphasis having been added for ease of reference later in this advice.

> *Qualified one way costs shifting*
>
> *As previously announced, a regime of qualified one way costs shifting (QOCS) is being introduced in personal injury cases. This was proposed in Lord Justice Jackson's report, and was covered in the MoJ's consultation on implementing the reforms. Further consultation and consideration took place under the auspices of the Civil Justice Council (CJC) and discussions have been ongoing with stakeholders. Following that work, the Government has made the following provisional decisions, with further work requested from the CJC as set out below.*
>
> 1. ***QOCS will operate in all personal injury cases*** *so that claimants are not generally at risk of having to pay the defendant's costs if the claim fails.*
>
> 2. ***QOCS will apply to all claimants, however funded, and whatever their means****; there will be no financial test of the claimant's means. The MoJ would welcome the CJC's further advice on whether there should be a requirement for a minimum payment by a losing claimant;*
>
> 3. ***QOCS will not apply to fraudulent claims*** *(for example involving a fraudulent means or device),* ***or in claims which are struck out****. The MoJ would welcome the CJC's further advice on what behaviour should lose the protection of QOCS (including, for example, the making of*

unreasonable applications in the course of the claim), and how this should be defined and evidenced, particularly where dishonesty is involved (for example, through the use of a fraudulent means or device). The MoJ is particularly keen to discourage dishonest claims, in particular where the claim is exaggerated, either in terms of the injury sustained, or in the circumstances in which the injury was sustained. The MoJ considers that preventing QOCS applying in respect of all of a claim where there is dishonest exaggeration will allow honest claims to be pursued, while discouraging unmeritorious claims.

4. *In **mixed claims** (combined claims covering personal injury and non-personal injury) QOCS will only apply to the whole claim if the claimant has an interest in the non-personal injury element of the claim, which is either integral or directly consequential to the personal injury claim. However, the MoJ is concerned to avoid a situation where the costs protection offered by QOCS is used for aspects of a claim in which, for example, insurers pursue a subrogated claim to recover insured losses. The MoJ would welcome the CJC's further advice on what is integral or directly consequential to a claim, and whether a workable distinction would be between claims for insured and uninsured losses.*
5. *If a claimant fails to beat a defendant's offer under Part 36 of the Civil Procedure Rules (CPR), the **Part 36 principles will apply but only up to the level of damages recovered**.*
6. ***QOCS protection will be allowed in claims that are discontinued during proceedings and for appeal proceedings** brought by defendants. The MoJ would welcome the further advice of the CJC in relation to whether there is a need for QOCS for claimant appeals, and in what circumstances (for example, in relation to permissions to appeal where there are significant issues at stake).*

3. The passages highlighted in bold above serve to emphasise the key strands of the Government's preferred policy with regard the implementation of a regime of QOCS as part of its reforms to the overall principles applying to the costs of civil litigation in England and Wales. It is important to bear in mind that as a matter of policy the Government intends (as did Sir Rupert Jackson in his final and preliminary reports) that QOCS should operate as a balance to the removal of the

recoverability between the parties of the costs to claimants of making provision against a liability for adverse costs. Such protection was generally provided either by ATE insurance or by a membership organisation. Sections 46 and 47 of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 will, when implemented, mean that the costs of this protection will no longer be recoverable by successful claimants.

4. The internal numbering, 1 – 6, inserted above to part of the MoJ's Commissioning Note (CN) provides a straightforward structure for this advice. Rather than providing a narrative summary of this short paper we have instead set out a précis of our thinking in the table which precedes the text of this advice.

Section 1 – Scope of QOCS

5. The scope of the protection afforded by QOCS is a question of policy for the Ministry. The CN provides, unequivocally on the face of it, that *"QOCS will operate in all personal injury cases".* This raises the question of the definition of personal injury cases.

6. In our report last year we recommended that personal injury cases should be widely defined, so as to achieve the policy goal of affording costs protection - absent recoverable ATE insurance and membership organisation funding - in significant numbers of cases. We said:

> *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. 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.*

7. In a footnote to this passage we referred to the definition in Part 2.3 of the Civil Procedure Rules (CPR), which reads as follows and which we once again recommend for the purposes of QOCS:

> *'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*

8. One specific question of scope which arose during our recent discussions was the classification, for QOCS purposes, of a claim in negligence against a lawyer or adviser which relates to the alleged mishandling of a personal injury claim.

9. While this is clearly not a 'claim for personal injuries' as defined above, there would nevertheless appear to be the asymmetry in the relationship between claimant and defendant (here, the adviser) which Sir Rupert considered as a necessary (and perhaps sufficient) justification for the imposition of QOCS. Furthermore, in loose terms the new action could be said in some way to involve a personal injury dispute, albeit at an underlying level.

10. For these reasons in the main **we would recommend** that the MoJ takes soundings from relevant stakeholders in order to decide whether these claims are

or are not to benefit from QOCS protection. In making this recommendation we were guided by passages in Chapter 9 (paragraphs 5.5 – 5.14 which are reproduced as appendix 1 to this advice) of Sir Rupert's final report. We believe that a positive decision on the status of these cases for QOCS purposes is necessary both as a matter of clarity and in order to prevent litigation - whether satellite or otherwise - on the point.

Section 2 – Means tests, minimum payments and QOCS

11. This section is comparatively short, since the Working Group was unanimously of the view that these issues are properly a matter of policy and for the Ministry to decide.

12. With regard to means tests the CN states clearly that *"there will be no financial test of the claimant's means".* At the conference at which our 2011 report was debated the same point was put somewhat more colourfully: *"QOCS for all, or no QOCS at all."*

13. The Ministry's position in the CN confirms its earlier indications. For example the Minister, Lord Wallace of Tankerness, said during the report stage debate on the LASPO Bill on 14 March 2012 (at column 304 of that day's Lords Hansard):

> *"The noble Lord … asked about the financial test for QOCS. We agree that, for personal injury cases, there should not be an initial financial means test. We are in discussion about whether there should be a financial contribution, although we recognise the arguments that there should not be."*

14. We have assumed that the absence of a means test is the Ministry's policy only in respect of personal injury claims. If QOCS were to be extended to other types of litigation - consideration of which is beyond our remit - we would simply point now that the question of assessing the claimant's means might form part of those future deliberations.

15. It may be worth recalling that means was, in essence, one of the two broad categories of exceptions to QOCS which Sir Rupert set out in his final report. The other was "conduct", which is the focus of this advice and was the focus of our 2011 report.

16. It seemed to us that if there is to be no consideration of the claimant's means then there should be no consideration either of the defendant's means. It would follow from this that uninsured defendants facing personal injury claims would be precluded from arguing that they should benefit from what would amount to QOCS in reverse (where the claimant would stand to lose the QOCS shield because the defendant was impecunious) as consequence of their status alone.

17. There was also unanimity within the Group that the matter of minimum payments by claimants is a question of policy and therefore once again for the Ministry. Certain of our members did make the point that the question might in substance be one of minimal rather than minimum payments.

18. Although there was consensus that this is a matter of policy, and as such strictly beyond our remit, there were differences between those of our members who expressed a view on the merits of imposing a regime of minimum (or minimal) payments on claimants who sought to benefit from QOCS.

19. The majority opinion was that this regime would risk discriminating against the very poorest members of society with valid injury claims and that that could impact on access to justice. This broad majority view had cross-stakeholder support and was endorsed by those representing claimants and defendants alike. **If we were to make any recommendation** in this respect it would be that means-testing of, and minimum payments by, claimants would not be supported.

20. A minority however argued that some form of payment (whether minimum or minimal, and which would presumably have to be mean-tested in its application) would not only give claimants a genuine interest in the (adverse) costs risks of their claim but also that it might provide a meaningful degree of deterrence against spurious claims and especially those made against public sector organisations.

21. A practical point was also raised, this being that the experience of collecting legal aid contributions under pre-1999 arrangements would appear to suggest that there could be significant cost associated in collecting relatively modest sums from claimants who benefited from costs protection. In short, the majority of us took the view that any cost-benefit analysis of the collection of contributions would be very unlikely to provide clear evidence in support of its introduction.

Section 3 – QOCS, fraudulent claims and struck out claims

22. QOCS will not apply in these circumstances. The MoJ's policy as stated in the CN is clear and there is very little to distinguish it materially from the position adopted in Chapter 3 of our 2011 report, the relevant section of which is reproduced as appendix 2 to this advice.

Subsection 3a - fraudulent claims

23. All agreed that fraudulent claims should lose QOCS protection. The CN also refers to *"dishonest claims".* Where an entire claim is wholly fictitious and is pursued with the intent of deceiving the defendant and the court then the terms fraud and dishonesty may be used interchangeably.

24. It may be helpful to define fraud in this context in similar if not identical terms to those expressed in *Brighton & Hove Bus v Brooks* [2011] EWHC 2504 (Admin). This is a contempt case which expressly approved the approach in the earlier case of *Walton* v *Kirk* [2009] EWHC 703 (QB). Paragraph 86 of *Brooks* sets the following test:

> *… in each case the insurers had to prove* ***beyond reasonable doubt*** *the following four matters:*
>
> *i) that the statements and representations relied on were made;*
>
> *ii) that they were false;*
>
> *iii) that they were likely to interfere with the course of justice in some material respects; and*
>
> *iv) that at the time they were made, the maker had no honest belief in their truth and knew of the likelihood that they would interfere with the course of justice.*

25. **We would recommend the above test in the context of QOCS** and fraudulent claims, subject only to one amendment: that the burden of proof (highlighted in bold above) should be to the civil standard, i.e. on the balance of probabilities.

26. **We would further recommend that fraud should be specifically pleaded** If the defendant (or its insurer) wishes to argue that it should cause claimant to lose the protection of QOCS. This requirement is no different from the current requirement that fraud be pleaded if alleged in relation to the claim generally.

Subsection 3b – exaggerated claims

27. The CN however refers in addition to *"preventing QOCS applying in respect of all of a claim where there is dishonest exaggeration"*, which would appear to introduce a degree of subtlety. Implicit in this formulation is that QOCS might still apply to parts of a claim, perhaps to those parts of the claim which were genuine and not subject to dishonest exaggeration? Are there therefore degrees of exaggeration which might be relevant for QOCS purposes? Could one talk perhaps of mere innocent exaggeration, or alternatively putting a claim on its best terms?

28. The point above is not made flippantly, but instead to point out the difficulties inherent in any bright-line test which might apply in an area which is by its very nature subjective in its appreciation. In the very recent case of *Fairclough Homes v Summers* [2012] UKSC 26, the Supreme Court considered the related topic of whether substantially fraudulent claims may be struck out as an abuse of process. The court held that it had the power to do so, as a matter of inherent jurisdiction and under the CPR. Lord Clarke said (at 41) that

> *The express words of CPR 3.4(2)(b) give the court power to strike out a statement of case on the ground that it is an abuse of the court's process. It is common ground that deliberately to make a false claim and to adduce false evidence is an abuse of process. It follows from the language of the rule that in such a case the court has power to strike out the statement of case.*

29. That said, the court declined to exercise the power in the case before it and gave several reasons for reaching that conclusion, which can be found at paragraphs 50 – 56 of the judgment and which are reproduced as appendix 3 to this advice.

30. The *Summers* cases differs from the scenario set out in the MoJ's CN in that there was proven dishonesty. The CN indicates that the MoJ is *"particularly keen to discourage dishonest claims, in particular where the claim is exaggerated"*. Therefore, had the QOCS regime applied to *Summers*, the claimant would have lost his protection because of the fraud trigger (section 3a immediately above). That part of the MoJ's stated objective which deals with dishonesty would therefore have been satisfied.

31. Mere exaggeration, absent proven dishonesty, is more problematic. The circumstances which could arise would be where, say, the defendant has

concerns as to the veracity of the claim or its value but does not have sufficient evidence to support the pleading of fraud. In these circumstances there are two possible solutions:

- either the defendant protects him or herself by making a Part 36 offer which, in the round, reflects its perception of the risks of the claim, or
- some form of test is applied to the extent or degree of exaggeration which, if satisfied, would cause the loss of QOCS and thereby give the defendant protection.

32. We find the second option instinctively unattractive because of the subjectivity of the test and the risk of satellite ligation on the point. In fact, we were unable to devise a workable test which would target non-dishonest exaggeration for the purposes of QOCS.

33. This leads us the conclusion that dishonesty must be pleaded and proven in order to cause the loss of QOCS for 'fraud' (as set out in section 3a here). Mere exaggeration should not be enough.

34. In practice, we can envisage a reasonably close inter-relationship between the fraud trigger (above) for loss of QOCS protection and the loss of protection which arises where the claimant fails to beat the defendant's Part 36 offer (for which see section 5 below). The two respective provisions might operate in claims handling and litigation in the following manner:

- if the claimant has a genuine claim which is exaggerated - even if it is polluted by fraud - then the defendant can (and arguably should) put the claimant at risk of losing QOCS protection by making a Part 36 offer
- there is no requirement to plead fraud even if the defendant thinks the claim may be tainted but has a genuine element to it
- if the claimant fails to beat the Part 36 offer then QOCS protection will be lost (see section 5) and the claimant will notionally be liable for the defendant's costs from date of the offer (see CPR 36.14(2)(a) for the precise formulation of the exact date)
- the fraud trigger could also operate in conjunction with (but quite separately from) the Part 36 trigger in an appropriate case
    - where invoked, fraud must be pleaded (see subsection 3a above)

- the combined effect would be that the claimant would have to pay the defendant's costs from the date of the Part 36 Offer (because of the failure to beat it) and, because of the fraud trigger, the defendant could also have the right to seek its costs in relation to the period **before** the offer.

Subsection 3c – struck out claims

35. The MoJ's CN states that *"QOCS will not apply … in claims which are struck out".* This reflects our 2011 recommendations, which themselves were based on CPR Part 3.4(2):

    (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;
    (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.

36. When approaching this matter last year we drew a distinction between substantive strike outs - clauses (a) & (b) - and 'technical' strike outs - clause (c). We recommended that the former should cause the loss of QOCS, but not necessarily the latter. We were concerned at the prospect of swathes of satellite litigation if the myriad sorts of procedural non-compliance caught by clause (c) were to trigger the loss of QOCS protection.

37. Hence in our view QOCS protection should not be lost as a result of the mere fact that a claim has been struck out. As a consequence, **we would recommend that the test for losing QOCS protection when a case is struck out should be broadly aligned with clauses (a) and (b) of CPR Part 3.4(2)** above. Therefore claimants may be ordered to pay costs where their claim discloses no reasonable cause of action or where is otherwise an abuse of the court's process (or is otherwise likely to obstruct the just disposal of the proceedings)

38. In respect of clause (c) strikeouts, we would simply repeat our advice from 2011 in which we said that it would be neither workable nor desirable to attempt to set out a prescriptive or exhaustive list of the possible types and degrees of procedural defaults which might arise to be considered for QOCS purposes. We

also added that some indicative examples and/or relevant factors could be provided in any practice direction relating to QOCS.

39. There will always be cases in which there is argument whether an individual claim amounts to an abuse under 3.4(2)(b) – this is inevitable howsoever the test is framed. The recent decision of the Supreme Court in the *Summers* case (above) provides some useful guidance: it is clear that dishonest exaggeration of a claim might amount to abuse which could in principle lead to the loss of QOCS protection. That said, the presentation of the claim in *Summers* would trigger the loss of QOCS because of the proven dishonesty, as explained at paragraphs 23-26 above. In that way the defendant is protected and the exaggeration need not be considered for these purposes, regardless of whether or not it might amount to an abuse.

Subsection 3d – striking out and behaviour

40. The overall effect of this section and of section 5 below (dealing with Part 36) is that claimants will lose QOCS protection if they are proven to be fraudulent or if they do not beat a Part 36 offer. This is consistent with the Commissioning Note's aims.

41. Claimants will also lose QOCS protection if the claims is struck out under Part 3.4(2) (a) or (b). This is also consistent with the CN's aims.

42. In cases in which the defendant cannot prove fraud, but suspects it (which may capture some cases of exaggeration referred to at paragraph 31 above) it seems to us inevitable that there will be greater numbers of applications by defendants to strike out claims. This appears to be particularly likely where the defendant is unable to make an offer under Part 36 and cannot as a consequence protect him or herself in that way.

43. This is perhaps not desirable of itself. An increase in applications could be minimised by introducing a general test of unreasonable behaviour or unreasonable exaggeration. However, as has already been pointed out (at paragraph 32), doing that would give rise to a serious risk of satellite litigation. It therefore seems to us that the likely increase in these applications may be a necessary and unavoidable consequence of these reforms.

Section 4 – Mixed claims

44. The question of mixed claims - as last year's experience demonstrated – once again proved to be one which was susceptible to questions of fine definition and which was controversial within the group.

45. The CN states clearly that MoJ seeks to avoid QOCS protection applying to all aspects of such a claim and quotes the example of subrogating insurers. Expanding from this sole example to a deliver a principled approach in line with thrust of the policy which underlies the relevant paragraph in the CN has proved to be challenging.

46. Before examining the detail of possible approaches a preliminary matter arises: that of the definition of mixed claims. We raised this in our 2011 report and noted that there appear essentially to be two types of mixed claims:

    - type 1 is the truly mixed claim, in which damages for personal injury are sought alongside a non-monetary remedy in the same action (housing disrepair and public nuisance being suitable examples)
    - type 2 is the typical claim in which monetary damages for personal injury is the only remedy sought, but, as is extremely commonplace, different elements of the award sought will be for the benefit of the claimant and also for others, such as subrogating insurers (typically in respect of the costs of repair of damage to claimant's vehicle).

Type 1 mixed claims

47. We must point out that in the short time available we did not consider type 1 in detail. The view taken in outline only was that in such cases both the damages and the other remedy are sought both by and for the claimant him or herself. If QOCS is to be widely interpreted so as to provide broad protection - which, as indicated at paragraph 6 above we would submit to be the preferred approach – then it would follow that QOCS would apply to all costs aspects of a type 1 mixed claim. We would tentatively suggest that there is probably no need to split the QOCS protection and allocate its benefit only to the personal injury element. The reasons for this tentative conclusion are

    - first, that the action involves a genuine claim for personal injury, and

- second, given that the same defendant is involved in both elements of the claim, there will necessarily be the appropriate asymmetry of position as between claimant and defendant which is at the heart of the justification for QOCS generally (see paragraph 9 above).

48. A slight risk in the approach above is that sham claims for damages for personal injury claims might begin to appear in otherwise straightforward cases of disrepair or nuisance (etc). The point of doing that would be to benefit - unfairly - from QOCS protection in respect of the non-monetary remedy at the heart of the case. We suggest that the courts will be able to control against this potential risk with their present powers, but the position will need to be monitored.

Type 2 mixed claims

49. Essentially, the starting point is that a personal injury claimant should benefit from QOCS protection. What is the position as regards organisations or companies which provide him or her with goods, services or money as a consequence of the accident and which go to meeting his or her losses and needs arising from the accident and which may therefore be recoverable from the defendant and its insurer?

50. The proposition in the MoJ's CN is that the scope of QOCS is to be limited in some way. Since in our view QOCS is to be interpreted as a wide concept (see paragraphs 6 and 47 above) it would therefore appear logical to seek to define any exceptions to the regime rather than to repeat, in perhaps different language, things to which the protection will to apply.

51. The CN adopts the approach of re-casting the protection in respect of type 2 mixed claims as follows

> *QOCS will only apply to the whole claim if the claimant has an interest in the non-personal injury element of the claim, which is either integral or directly consequential to the personal injury claim*

52. We understand this approach, but for the reason set out above we would prefer to seek to define the limitations of QOCS rather than to refine its scope.

53. In essence, the CN appears to take the view that as a matter of policy organisations which provide services and goods to claimants which go to meeting the claimant's losses should not benefit from QOCS. The following passage, to which emphasis has been added, is instructive:

*"However, the **MoJ is concerned to avoid a situation where** the costs protection offered by **QOCS is used for** aspects of a claim in which, for example, insurers pursue **a subrogated claim** to recover insured losses."*

54. It would therefore appear that the MoJ's policy, correctly interpreted, is that QOCS should not apply to subrogated losses or similar items which give rise in the hands of the provider to a right of recovery as part and parcel of the claimant's own claim for personal injuries. The obvious examples, in road traffic injury claims at least, are subrogated insurance claims - whether for vehicle damage, property damage, private medical treatment or rehabilitation – and services provided by a credit hire organisation.

55. It is then a question of reducing this policy aim to a form of words which properly captures the restriction of QOCS. It is important to remember when considering this further that the CN, again by implication, admits the possibility that QOCS will apply only to parts of a claim. It sets out a condition at 4 above *"…QOCS will only apply to the whole claim **if** …".*

56. Should that condition **not** be fulfilled, then QOCS will **not** apply to the **whole** of the claim and it must follow QOCS would apply either to part(s) of the claim, or to none of it. However, we are dealing by definition with claims for personal injuries in which subrogated losses and other services will arise in a high proportion of cases. It would be strange in the extreme if the mere existence of these very common losses caused the loss of QOCS protection in its entirety.

57. The conclusion should therefore be that QOCS applies in part, and the subrogated losses and other services are excluded from its ambit. This analysis might lead to the policy being stated along the following lines.

58. QOCS shall not apply to such elements of a claim for damages for personal injuries as are pursued, in substance if not in strict form, for the benefit of a third party (examples being a property damage insurer, or a credit hire provider) in respect of indemnity and/or services provided by the third party to the injured claimant as a consequence of the accident.

59. Two significant points should be borne in mind is if QOCS is indeed to be split along the lines alluded to in the CN and as further explained in the section.

    (i) That the claimant has only one cause of action in respect of all of heads or items of loss, regardless of whether the losses are borne by him

personally or have been met to some degree by the provision of money, goods or services.

(ii) That in splitting QOCS the court will of necessity be drawn to make some form of allocation of the costs of this single cause of action as between those elements which are inside and outside the scope of the protection afforded by QOCS.

60. For the avoidance of doubt we would suggest that is made clear that sums recovered by the State under legislative provisions - most notably recoverable benefits and NHS treatment charges which are collected by the Compensation Recovery Unit - would pass entirely outside the QOCS rules.

61. It is relatively common for employers to continue to pay earnings while an employee is absent from work and recovering from the injuries which gave rise to the claim. There is very often a contractual obligation on the employee to seek to recover these payments and to account to the employer for them. Many among the Working Group were of the view that these contractual loss of earnings claims merited protection under QOCS. It is, however, very difficult indeed to draft a principled exception to QOCS in such a way so as not to draw in these payments. On the face of it, these contractual loss of earnings claims would be caught by the exception test we have set out at paragraph 58 above. This is a cause for serious concern.

62. This difficulty is illustrated by another option which we considered, which was to draft the exception test so that QOCS protection turned on whether the services or goods or indemnity provided to the claimant were arranged before or after the accident. Those arranged before would benefit from QOCS protection, those arranged after would not.

63. While this would have the advantage of bringing contractual loss of earnings claims in scope, it has the significant disadvantage that subrogated insurance payments would also be brought in scope and that is clearly against the MoJ's policy intention as stated in the CN. (Awards in respect of gratuitous care which are notionally to be accounted for by the claimant to the provider of the service – very often a family member – are likely to be analogous to those for contractual loss of earnings.)

64. It might be thought that the ‘arranged before or after’ test would operate to exclude claims for credit hire from the scope of QOCS protection. This could well be the case initially, but there has to be a concern that if this test were adopted the provision of credit hire services would simply mutate into something pre-arranged, perhaps in a separate section of motor liability or breakdown/recovery insurance policies.

65. Another possible approach which might assist would be first to isolate road traffic accident claims. In these cases, a test could be developed which separated out claims for vehicle-related damage, which would include credit hire and the provision of a replacement vehicle. Those would not generally benefit from QOCS protection whereas other elements of the claimant’s losses would.

66. The main advantages of this approach are that it is clear, relatively easy to apply and reflects to a great extent the definition at 1.1(6) of the Pre-Action Protocol for Low Value Road Personal Injury Claims in Road Traffic Accidents. A further advantage is that it keeps subrogated claims outside the scope of QOCS, which is consistent with the MoJ’s aim in the CN. It would also exclude credit hire claims from QOCS protection (which is either an advantage or disadvantage, depending on one’s point of view).

67. The obvious disadvantage of this approach is that it is not of general application in personal injuries litigation. It is limited to road traffic accident claims only, albeit that these are the most numerous type of injury claim. Other disadvantages are that in eschewing the subrogation test then the pursuit of other insured losses (medical insurance costs, for example) would fall to be protected by QOCS. That might possibly be tempered by the consecutive application of the vehicle-related damage test first and a subrogation test second.

68. As may be deduced from passages above, the treatment of credit hire for the purposes of QOCS caused us great difficulty. The starting point has to be a matter of policy for the MoJ as to whether these claims are or are not to benefit from QOCS protection. The matter might benefit from a positive statement by the MoJ, given that the CN is silent on the issue.

69. It is our view that the reasoning in the passage in the CN which we have numbered 4 and quoted in the introduction to this advice tends to support credit hire being outside the scope of QOCS protection. The vehicle-related damage test set out above would also lead to this outcome.

70. We take the view – expressed very strongly in discussion by some of our members – that this is the correct approach. The relationship between the provider of credit hire services and the defendant (invariably its insurer in reality) simply does not present the asymmetry which is necessary for QOCS protection.

71. To some extent, this question of credit hire might be similar to the question of CCFAs being used by subrogating insurers against local authorities. Sir Rupert Jackson said of that in his final report

> *It is, in my view, absurd that insurance companies can bring claims against local authorities using CCFAs*

We can envisage that some might perhaps paraphrase this in the present context as follows

> *It is, in my view, absurd that* credit hire providers *can bring claims against* road traffic insurers *using* QOCS

72. A further and final point of note with regard to credit hire claims is that the Office of Fair Trading is currently considering referring credit hire (which it terms as the provision of replacement vehicles) and other issues in the private motor insurance market to the Competition Commission. If it were to make this reference, then it may be that the credit hire sector could be subject to some regulatory change and could see alterations to existing business models.

73. We would nevertheless suggest that this does not remove the need for the MoJ to make a positive decision in the short term as to credit hire and QOCS. We have set out our views on this point above and have put forward a number of proposals.

A radical solution for type 2 mixed claims?

74. The fundamental problem, as has already been pointed out and which is especially acute in the case of credit hire, is that drafting a principled test or rule which limits the scope of QOCS is not only a difficult and complex exercise but also that it in so doing there is a real risk of providers (not only of credit hire) immediately changing behaviours and business models in an attempt to bring matters back within the scope of protection.

75. A radical solution to the problems of type 2 mixed claims could be to dispense with principle altogether. A list of all the various types of claim and heads of loss would need to be drawn up, and in respect of each and every item a decision taken as to whether it merits QOCS protection or not. While this would provide certainty, we are not attracted to it because of the loss of a principled approach. In reality, we suggest that it will prove almost impossible to list everything and there will inevitably need to be a reversion to the question of principle in any event.

Further issues with mixed claims

76. The two key points as regards type 2 mixed claims are

- the development of a test of principle which defines the appropriate exclusions to QOCS, and
- a positive decision about which side of line credit hire claims sit.

77. A number of other important issues also arise. These are dealt with very briefly below. We would be pleased to assist the MoJ and, if required, the Civil Procedure Rule Committee in considering these points further.

(i) change of status

What should the costs / QOCS position be where a claim is commenced as a non-personal injury case and subsequently becomes a mixed claim because the an injury has become evident and is included? One might equally ask what the position should be where the reverse occurs?

These questions are probably only relevant to type 1 mixed claims. The problem should not arise in type 2 mixed claims because the approach there (subject to all of the issues set out above) is to split the QOCS protection and so doing would appear to provide a solution where a claim for damages for injury or indeed any other head of loss were to be included at a later date.

(ii) ATE impact

We understand that most ATE policies at present cover the claimant's cause of action rather than particular elements of the case as pleaded. Even in the absence of recoverable ATE in the new regime for civil litigation costs, what is likely to be the position as regards any residual cover being available for those elements of the claim which fall within the scope of QOCS?

(iii) Costs rules - who pays and what are the mechanisms?

This is related the question of ATE (above). The premise is that the providers of services and indemnity etc in type 2 mixed claims do not benefit from QOCS protection in respect of the claims made by the claimant for the services etc which they provided.

It follows from that that two-way costs shifting should apply and that the defendant, if successful, should be able to enforce against the provider of services etc in respect of the costs which relate to those elements of the claim. This inevitably involves an enquiry as to the allocation of costs across the elements of the claim.

This is problematic since the claimant is obviously the litigant and one would expect any costs order to be made in his or her name. But the whole point about QOCS and type 2 mixed claims is to limit the claimant's liability. The aim is to place the type 2 losses outside QOCS protection. This is probably only meaningfully achieved where the provider of the type 2 service is to be liable for the (adverse) costs risk associated with its pursuit. A mechanism for achieving this in practice therefore has to be found, and it may lie in non-party costs orders.

We would suggest enforcing against the provider should be made clear in any relevant rules or practice direction, as should the exact mechanism for doing this (as we have said above, it may be that a new mechanism needs to be provided).

An initial view - and it is only that - is there may well be a need for an additional factor to be added to CPR Part 44.3(4). This would be a clause which would allow the court to take into account that those elements of the claim were pursued for the benefit of the third party etc as set out above at paragraph 58.

The link to the ATE insurance point is that it might follow from this subheading (iii) that ATE policies in the future - if the market were to develop this way, which is unclear - might cover the claimant in respect of those elements of the claim protected by QOCS. This would be to split the claimant's cause of action for ATE purposes and it is **very** important to note that we understand that ATE polices **do not** currently operate on this basis.

However, if they were to in the future, then ATE protection may well boil down to protecting against adverse costs incurred where QOCS is lost because of a strike out or failure to beat a Part 36 offer (and not in respect of fraud, since the loss of QOCS for fraud will cause the avoidance of any ATE policy).

(iv) Unintended consequences

The Working Group was genuinely concerned about the possible unintended consequences of attempting to address the question of type 2 mixed claims (and credit hire in particular). We have alluded above to the risk of business models changing in order to circumvent any rule.

We were also acutely aware of not unnecessarily exposing claimants to adverse costs risks (which then creates a need for ATE, the cost of which will no longer be recoverable …) if the test for the loss of QOCS protection in these claims is either drafted or interpreted in a wide manner.

78. The precise wording of procedure rules which may be required to set out the arrangements described in this section on mixed claims would of course be a matter for the Civil Procedure Rule Committee.

Section 5 – QOCS and Part 36 offers

79. The policy set out in the CN is helpfully clear and brief and reflects the view of the majority of the CJC Working Group in its 2011 report. We said there that the "*majority favoured the normal principles of Part 36 taking precedence over QOCS, with a set off of damages operating as a control mechanism."* We cannot see any difference between that view and the MoJ's CN which states (emphasis added) that:

> *If a claimant fails to beat a defendant's offer under Part 36 of the Civil Procedure Rules (CPR), the* ***Part 36 principles will apply but only up to the level of damages recovered****.*

80. This policy achieves the aim of providing a way for a defendant to make, within the overarching QOCS regime, an offer to settle which still has meaningful costs consequences. Its effect is straightforward in that the test for the loss or retention of the QOCS shield is simply whether or not the offer (ex hypothesi refused by the claimant) was beaten; or, more correctly, was *"more advantageous"* to the claimant. These two words should be interpreted in accordance with CPR 36.14A:

> *… in relation to any money claim or money element of a claim, 'more advantageous' means better in money terms by any amount, however small, and 'at least as advantageous' shall be construed accordingly*

81. Adopting this interpretation therefore, QOCS and Part 36 do not interact via any form of reasonableness test. There is no need whatsoever to examine the conduct of either party in making the offer or rejecting the offer. The costs consequences flow automatically depending on whether or not offer has been beaten. The matter is one of simple arithmetic and is entirely devoid of subjectivity.

82. **We therefore recommend** that the MoJ's preferred policy is taken forward and its link to 36.14A is made clear.

83. An important potential consequence of this policy is that a claimant's damages (ex hypothesi of an amount below that which was offered) could, in theory, be eroded in their entirety by the costs liability to the defendant for its post-offer costs. It is perhaps worth repeating here an observation from our report last year on this possibility:

"This is clearly not a happy outcome in a matter in which a claimant has been successful."

84. It seemed to us that there is no clear solution within Part 36 alone which could be adopted to deal with this outcome, however remote or unhappy it might appear. To seek to accommodate a solution there - i.e. within Part 36 - would perhaps reintroduce some discretion. That would entirely cut across the direction of travel of changes to Part 36 in recent years, whether in the rules themselves (see 36.14A above) or in case law such as *Gibbon v Manchester City Council* [2010] EWCA Civ 726.

85. Notwithstanding, those representing claimants proposed that there could be a cap on the extent to which damages might be eroded in this way. Such a proposal does not figure in the MoJ's CN and it is included here for completeness. Their contention is that the policy (that Part 36 principles will apply without restriction and up to the level of damages recovered) could encourage early low Part 36 offers which might deter claimants from proceeding, perhaps to the extent that they might under settle their claims. They suggest an alternative which they strongly prefer – of capping the claimant's costs liability at a percentage of damages to ensure that successful claimants would recover something. It was noted that the suggestion of a 25% cap on damages erosion in this context was made at the event on 31st October 2011 and it was suggested also that doing that might then bring the claimant's cost liability relating to QOCS and Part 36 in line with the new sanction for defendants.

86. There might be other possible ways to temper this possibility. Any detailed analysis of those would be beyond our present remit but we would offer two ideas in brief: a practical judicial solution and a hypothetical market solution.

87. The practical judicial solution would be to recognise that costs are always subject to discretion, as set out in CPR 44.3 below.

(1) The court has discretion as to –

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) If the court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

However, that discretion would be overridden where the claimant fails to beat the defendant's Part 36, and QOCS protection would be lost so that the claimant is liable, in principle, for the defendant's post-offer costs as a result of Part 36 taking precedence. The discretion in 44.3 could then come back into play if or when the judge were to decide the amount of costs which should actually be paid in the case in question. This possible solution is not without difficulties which would require further consideration, since

(a) it could open up a further area of dispute, which would, absent discretion, simply not arise, and

(b) the exercise of the discretion might need to be done in a summary fashion, so as to avoid yet further costs.

88. The possible market solution might lie in the ATE insurance market responding to this risk (of damages being swallowed up by the liability for post-offer defence costs) by offering products to protect against it. There are very obvious barriers to this solution, which include both policy matters (the premium for this specific ATE protection would not be recoverable between the parties) and technical issues (the absence of data and experience on which to rate the risk). We nevertheless include it here for completeness. We suspect it may be more of an option in theory than in practice.

89. The practical judicial solution outlined above could well be of general application to any of the circumstances set out in this advice in which QOCS protection is lost: it need not be limited to failure to beat the Part 36 offer (this section of this paper). If it were adopted in this general manner then it would certainly be preferable as a matter of clarity for there to be specific provision made for this eventuality within CPR 44.3.

Section 6 – Discontinuances and appeals

90. Again, we start with the position as stated in the MoJ's Commissioning Note, which is that

> *QOCS protection will be allowed in claims that are discontinued during proceedings and for appeal proceedings*

This is straightforward and was generally agreed by the group when it first considered the points.

91. The policy as set out by the MoJ would amount to a substantial change to the provisions of Part 38.6(1) in respect of personal injury claims. At present, this rule provides that:

> *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.*

92. Following initial discussions a difference of views emerged which, in essence, amounted to those representing defendants and insurers arguing that they would face significant risks if QOCS protection were to be allowed as a matter of course in the manner set out in the CN.

93. Those arguments are probably beyond the narrow remit which we were given in the CN and, in any event, were not favoured by a majority. It is nevertheless worth examining the main points which were put forward in support.

94. First, that allowing QOCS protection in claims which are discontinued after proceedings would disadvantage defendants since they would have been put to irrecoverable cost as a result of the now-discontinued claim. That is indeed the case, but the outcome is consistent with the general policy aim of QOCS protecting claimants who are not, in broad terms, successful.

95. If, as is argued for, a claimant lost QOCS protection when he or she discontinued then he or she would be liable for the defendant's costs. This arrangement could have the strange effect of locking claimants into litigation which they wished to discontinue. By going on and securing a loss at trial the claimant would benefit from QOCS protection which, under the proposition put forward, would not apply were the case to be discontinued.

96. Pursing litigation so as to lose and doing so simply to secure costs protection is surely in no-one's interests.

97. A possible gloss on discontinuances was put forward by insurers and is included here for completeness. The suggestion offered was the introduction of a mechanism by which the defendant could make an offer to a claimant, informing them that should they wish to discontinue then they could do so in the next 21 days (for example) without running the risk of losing QOCS protection. The offer would point out that should, however, the claimant discontinue after the expiry of this period, the defendant would be free to make an application to the court for the removal of the QOCS protection.

98. The second main argument advanced here was that if QOCS were to extend to appeals there would be a risk of large numbers of 'tactical' and risk-free quantum appeals. The concern expressed is that claimants who would otherwise have lost QOCS protection because they failed at first instance to beat a Part 36 offer would appeal as a matter of course. The majority of the group was not attracted to this argument and instead preferred the straightforward approach as set out in the CN. There are in fact a number of barriers to such appeals:

    - first, solicitors and barristers will not be keen to do unnecessary work when it is highly unlikely that they will get paid for it
    - second, an appeal will be allowed to proceed only if permission is granted, which is evidence in itself that there are reasonable prospects of the appeal succeeding and it should therefore merit QOCS protection
    - third, an appeal is unlikely to be risk-free, since it invites the possibility of a cross-appeal by the other side.

99. It was generally the view that a robust permission stage - at every step of the appellate process - should act as a suitable filter and control against 'tactical' appeals with little intrinsic merit.

100. A separate point with regard to appeals is that the CN appears to hint at a distinction, for QOCS purposes, between appeals by claimants and by defendants. We struggled with the grounds for drawing any such distinction and preferred to treat all appeals in a similar way. The very simplest proposition in respect of QOCS and appeals would be to revert to first principles, i.e. that QOCS

applies if the claim is one for personal injuries as defined, whether at first instance or at any subsequent appellate stage.

101. Such a provision may be thought to raise the prospect of personal injury test cases pursued before the Court of Appeal or the Supreme Court on basis of QOCS protection. While this would certainly be novel it is nevertheless a direct and natural consequence of the adoption of the QOCS regime as recommended by Sir Rupert Jackson and now adopted by the Ministry. If this prospect appears to be a somewhat chilling one for paying parties, it must however be set against the other face of the QOCS reform: that ATE insurance premiums (or the price paid for securing adverse costs protection from a membership organisation) will no longer be recoverable in these claims or appeals.

102. **We would therefore recommend**, albeit by a majority, that QOCS should apply to appeals where the dispute can be properly classified as a claim for personal injuries under CPR 2.3 (as set out in section 1 above).

Section 7 - Translating the QOCS Policy into Rules

103. It was not within our remit to propose drafting changes to the CPR to implement QOCS - that will be a matter for the Rule Committee in due course. However the Working Group was mindful of the dangers of any policy gaps in this area which might lead to the Rule Committee having either to resolve policy points at the drafting stage or, worse, to issues being left unclear and needing to be resolved through litigation.

104. In his final report, Sir Rupert proposed (paragraph 4.7 at pages 189-190) that the basic test for QOCS should broadly follow the well-established formulation used to define costs protection for legally-aided clients, namely that costs awarded against a claimant

> *"shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including the financial resources of all the parties to the proceedings and their conduct in connection with the dispute to which the proceedings relate"*

105. Any test framed in this way would clearly import a wide judicial discretion under a test of what is reasonable (whether by way of amount or as to conduct).

106. It is striking how far the policy on QOCS has now moved since publication of the Final Report in December 2009. First there is very likely to be no financial test for QOCS and second the circumstances in which conduct issues should lead to loss of cost protection have been carefully and precisely defined, always with a view to minimising uncertainty and the risk of challenge.

107. The view of the Working Group is that the original overall test of reasonableness proposed in the Final Report is no longer the best vehicle to deliver the final detailed policy on QOCS. It would be strange indeed if the Rules stated that the test was what was reasonable, and then defined exactly what was or was not to be treated as reasonable. In our view, it would be preferable for the Rules to specify directly when a claimant may be liable for costs. Any other approach risks opening the door to a further and unspecified discretion to award costs, the extent of which would inevitably be the subject of satellite litigation.

108. In light of the Ministry's policy statements to date and the issues discussed in this advice and our 2011 report on QOCS, in summary it appears to us that the

Rules need only ensure, however worded, that costs may only be awarded against a claimant in the following three situations:

(i) where the claimant is guilty of fraud in pursuing the claim (section 3a above)

(ii) where the claimant had no reasonable grounds for bringing the claim or the claim was otherwise an abuse of the court's process (or is otherwise likely to obstruct the just disposal of the proceedings) (section 3c above)

(iii) where the claimant fails to beat a Part 36 offer (section 5 above)

109. It is also important to note that our approach, based on these three broad qualifications (the Qs of QOCS), does not appear to require a two-stage approach as originally envisaged by Sir Rupert – namely special QOCS rules to determine first whether any award of costs should be made against the claimant and secondly to determine how much it is reasonable for the claimant to pay.

110. Instead in the rare circumstances where QOCS protection is lost under the above tests it is lost entirely and existing costs principles can apply to determine quantification of those costs. See our 'practical judicial solution' set out at paragraph 87 above.

111. If in the future QOCS is extended to other areas and it is decided that financial resources should form part of the test, then it may well be appropriate for QOCS rules to govern the amount of the liability, but that issue does not need to be addressed in this stage of the reforms.

29th June 2012

Appendix 1 - extract from Chapter 9 of Sir Rupert Jackson's final report

(the numbering of the original has been retained but footnotes have been omitted)

(ii) Commercial, construction and similar litigation

5.5 In my view there is no place either for qualified one way costs shifting or for recoverable ATE insurance premiums in the context of commercial, construction or similar litigation. The parties are generally in a contractual relationship and there is symmetry in their legal positions. It is often a matter of chance which party is claimant.

5.6 The present ability of a party involved in commercial litigation to insure against adverse costs at the expense of the other side is, I would suggest, neither logical nor grounded in any discernible social policy. Indeed the ability of one party to so insure subverts the purpose of the costs shifting rule. It may be argued that when a small or medium enterprise (an "SME") is litigating against a multi-national, recoverable ATE insurance will strengthen the hands of the SME. However, the flaw in this argument is that the present "recoverability" rules give the multi-national just as much right as the SME to take out ATE insurance. ATE insurance with recoverable premiums is a trump card which may be taken into the hand of either player.

5.7 It would, in theory, be possible to devise procedural rules to shield smaller companies from costs liabilities to larger companies, but such a quest would be fraught with difficulties and unintended consequences. I most certainly do not recommend that approach. In my view, in ordinary commercial, construction and similar litigation there should be no special rules to protect weaker parties against adverse costs orders. If any party wishes to obtain insurance against adverse costs liability, it should do so at its own expense, as was the position before April 2000.

(iii) Personal injuries litigation

5.8 In personal injuries litigation it must be accepted that claimants require protection against adverse costs orders. Otherwise injured persons may be deterred from bringing claims for compensation. I recommend a form of qualified one way costs shifting in personal injury cases, as set out in chapter 19 below.

5.9 In chapter 19 I also address the question how and by whom disbursements in personal injury cases should be paid.

(iv) Other categories of litigation

5.10 Further consultation required if my recommendations are accepted in principle. The essential thrust of the present chapter is that recoverability of ATE insurance premiums should be abolished and that this should be replaced by qualified one way costs shifting, targeted upon those who merit such protection on grounds of public policy. The question then arises as to which categories of litigant should benefit from qualified one way costs shifting. This is a question upon which further consultation will be required, in the event that the recommendations made in this chapter are accepted as a matter of principle.

5.11 Areas where qualified one way costs shifting may be appropriate. In my view qualified one way costs shifting may be appropriate on grounds of social policy, where the parties are in an asymmetric relationship. Examples of parties who are generally in an asymmetric relationship with their opponents are claimants in housing disrepair cases, claimants in actions against the police, claimants seeking judicial review and individuals making claims for defamation or breach of privacy against the media. If protection modelled upon section 11(1) of the 1999 Act is extended to claimants in such cases, it will not avail those who bring frivolous claims (because unreasonable conduct is taken into account). Nor will it avail those whose resources are such that they can afford to pay adverse costs if they lose.

5.12 I discuss more fully in chapter 19 below how the section 11 model might be adapted and applied to non-legally aided parties, in the event that it is decided to confer upon such parties the benefit of qualified one way costs shifting. See in particular paragraphs 4.5 to 4.11 of that chapter.

5.13 Professional negligence litigation. Whether qualified one way costs shifting should be introduced for any (and if so which) categories of professional negligence litigation should be the subject of consultation. My own view is that this may be difficult to justify outside clinical negligence. Most persons who employ solicitors, accountants, architects etc could afford to take out before-the-event (“BTE”) insurance, if they chose to do so.

Appendix 2 - extract of 2011 CJC report, chapter 3

(the numbering of the original has been retained but footnotes have been omitted)

Fraudulent claims

77. We unanimously agreed that:
    - the bringing of a fraudulent claim should cause the loss of QOCS protection
    - an appropriate definition of "fraudulent" for these purposes would be advisable in order to prevent satellite litigation on the point
    - 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 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, 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 –*
>
> *(d) that the statement of case discloses no reasonable grounds for bringing or defending the claim;*
>
> *(e) 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*
>
> *(f) 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.

Appendix 3 - extract from *Fairclough Homes v Summers* [2012] UKSC 26

50. It was submitted on behalf of the defendant that it is necessary to use the power to strike out the claim in circumstances of this kind in order to deter fraudulent claims of the type made by the claimant in the instant case because they are all too prevalent. We accept that all reasonable steps should be taken to deter them. However, there is a balance to be struck. To date the balance has been struck by assessing both liability and quantum and, provided that those assessments can be carried out fairly, to give judgment in the ordinary way. The reasons for that approach are explained by the Court of Appeal in both *Masood v Zahoor* and *Ul-Haq v Shah*.

51. We accept that such an approach will be correct in the vast majority of cases. Moreover, we do not accept the submission that, unless such claims are struck out, dishonest claimants will not be deterred. There are many ways in which deterrence can be achieved. They include ensuring that the dishonesty does not increase the award of damages, making orders for costs, reducing interest, proceedings for contempt and criminal proceedings.

52. A party who fraudulently or dishonestly invents or exaggerates a claim will have considerable difficulties in persuading the trial judge that any of his evidence should be accepted. This may affect either liability or quantum. In the instant case, as explained above, the claimant's fraud and dishonesty led the judge to reject his evidence except where it was supported by other evidence. The judge naturally refused to draw any inferences of fact in his favour. It is likely that, if the claimant had told the truth throughout, his damages would have been assessed at a somewhat larger figure than they were in fact. This is often likely to be the case.

53. As to costs, in the ordinary way one would expect the judge to penalise the dishonest and fraudulent claimant in costs. It is entirely appropriate in a case of this kind to order the claimant to pay the costs of any part of the process which have been caused by his fraud or dishonesty and moreover to do so by making orders for costs on an indemnity basis. Such cost orders may often be in substantial sums perhaps leaving the claimant out of pocket. It seems to the Court that the prospect of such orders is likely to be a real deterrent.

54. There was much discussion in the course of the argument as to whether the defendant can protect its position in costs by making a Part 36 offer or some other offer which will provide appropriate protection. It was submitted that a Part 36 offer is of no real assistance because, if it is accepted, the defendant must pay the claimant's costs under CPR 36.10. We accept the force of that argument. However, we see no reason why a defendant should not make a form of *Calderbank* offer *(*see *Calderbank v Calderbank* [1976] Fam 93) in which it offers to settle the genuine claim but at the same time offers to settle the issues of costs on the basis that the claimant will pay the defendant's costs incurred in respect of the fraudulent or dishonest aspects of the case on an indemnity basis. In *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790 the Court of Appeal correctly accepted at para 45 that the parties were entitled to make a *Calderbank* offer outside the framework of Part 36. The precise formulation of such an offer would of course depend upon the facts of a particular case, but the offer would be made without prejudice save as to costs and, unless accepted, would thus be available to the defendant when the issue of costs came to be considered by the trial judge at the end of a trial.

55. The court can also reduce interest that might otherwise have been awarded to a claimant if time has been wasted on fraudulent claims.