

# COSTS: 2017

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## Introduction

1. In this paper I intend to look at the following topics: the Reforming the Soft Tissue Injury ('whiplash') Claims Process consultation, introducing Fixed Recoverable Costs In Lower Value Clinical Negligence Claims, the Jackson Review into Fixed Costs, some thoughts on how to thrive and prosper as a solicitor in a world of fixed costs, the continuing issues over proportionality, costs budgeting and some issues arising from QUOCS and Part 36.

## Fixed costs: an introduction

2. In principle there is nothing wrong with a concept of fixed costs. Fixed costs should, for the losing litigant, preserve both the polluter pays principle and also ensure that the losing party can decide to settle or fight litigation on an informed basis, and not go bust if they wrongly decide to fight. It is also hoped that a predictable scheme of fixed costs might kick start the BTE market, which historically has functioned as a clearing house for the referral of claims, rather than a provider of useful insurance products.
3. They could also encourage efficiency on the part of those bringing the claims and, more prosaically, they could be said to represent what is already happening in practice in lower value claims. Many case management systems are set up to record standard units of time for routine or mundane activities: 1 unit for creating forms of authority, 6 units for reading a GP's medical report etc, the sum of which is to all intents and purposes "fixed".
4. The mischief is always the amount at which costs are fixed at. The insurance industry would dearly love to see £65 per hour as one of the assumptions used in fixing costs, noting that if it's good enough for Legally Aided cases then it's good enough for a wider application too. Further, one notes from recent history that amounts which are prescribed by way of fixed costs tend to rust into position for years, irrespective of what is happening in the wider economy, such as inflation.
5. A wider consideration will also indicate that there are other potential consequences whose importance should not be glossed over. One of these is to note that since the end of Legal Aid in personal injury and clinical negligence cases, the legal profession has been heavily dependent on the costs recovered from the insurance industry and other compensating bodies. The independence and health of the legal profession is of constitutional importance. A short funded or failing legal profession is not in society's interests. Unless the law can be applied and accessed in the Courts by the citizens who have rights under it, then Parliament can make whatever laws it likes but their implementation is likely to be disregarded or flouted.

**Reforming the Soft Tissue Injury ('whiplash') Claims Process**

6. The Government promised a response to the consultation by the 7<sup>th</sup> April 2017 but the more substantive part of the response has already arrived. February saw the publication of the document: Part 1 of the Government Response to: Reforming the Soft Tissue Injury ('whiplash') Claims Process.
7. Starting with paragraph 78 of the document the Government moves to set out the key thrusts of its reforms which include the “double whammy” that the level of damages is to be reduced at the same time as the Small Claims Track limit is increased, thus permitting some compensation to be awarded but taking the wind out of lawyers’ sails who would formerly have recovered costs for steering the claimant’s ship to a safe harbour:

**Government action:** *The Government has decided to introduce a single tariff that will cover both whiplash claims and minor psychological claims. This decision takes account of the views of respondents to the consultation and the guidance included in the most recent Judicial College Guidelines.*

*The figures in the tariff have been updated taking into account the uplift provided for in the most recent version of the Judicial College Guidelines. It was suggested in the consultation document that the lowest bracket should be 0–6 months, but this has now been broken down further into two bands, namely 0–3 months and 4–6 months. The Government has decided that the levels of compensation available under the new tariff will be as follows:*

Injury Duration	2015 average payment for PSLA – uplifted to take account of JCG uplift (industry data)	Judicial College Guideline (JCG) amounts (13 <sup>th</sup> edition) Published September 2015	New tariff amounts
0–3 months	£1,750	A few hundred pounds to £2,050	£225
4–6 months	£2,150	£2,050 to £3,630	£450
7–9 months	£2,600	£2,050 to £3,630	£765
10–12 months	£3,100	£2,050 to £3,630	£1,190
13–15 months	£3,500	£3,630 to £6,600	£1,820
16–18 months	£3,950	£3,630 to £6,600	£2,660
19–24 months	£4,500	£3,630 to £6,600	£3,725

8. The tariff is not set in stone. It appears there will be scope for a discretionary uplift in “exceptional circumstances”. However, this will be limited to 20% of not very much:

*81. The following examples of what could be considered exceptional circumstances were given:*

- where fraud, fundamental dishonesty or low velocity impact is alleged;
- where liability is disputed;
- where the individual's loss of amenity is higher than usual (avid sports players, for example); and
- where the victim is elderly, has a disability and their ability to live independently is hampered.

**Government Action:** Good arguments both for and against including a judicial uplift of 20% were given in response to the question asked in the consultation. The Government has decided on balance that is appropriate to include such an uplift and will be taking this forward as part of the reform programme. However, having noted suggestions of what could be considered exceptional circumstances, such as those listed above, the Government does not intend to define such exceptional circumstances in primary legislation. Instead we believe it is more appropriate to leave consideration of when a claim is exceptional to the discretion of the Courts.

9. The Small Claims Track limit is increasing per paragraph 93 of the document:

**Government Action:** In line with the reasons given in the consultation document, and having taken note of the responses received, the Government has decided to increase the small claims limit for RTA related claims to £5,000. In addition, having considered the submissions of stakeholders in relation to non RTA PI claims, the small claims limit for all other types of PI claims will be increased to £2,000 in line with inflation.

The Government will work closely with interested parties to ensure these increases are implemented effectively and bed in fully. We will keep the small claims limit for all PI claims under review and will consider whether a further increase to £5,000 for all PI claims is required in the future.

10. It is readily accepted that the reforms could lead to a surge in the number of litigants in person. The Government response comments on ways that development might be addressed as follows:

98. The majority of respondents to question 15 provided examples of improvements that could be made to the small claims track to help litigants in person. Suggestions were made from respondents across the personal injury sector. Suggestions included:

- providing free legal advice/representation to claimants and improving access to and the provision of advice from support agencies such as Citizens Advice;
- changing the current adversarial system and using an independent arbitration system instead to settle disputes;

- *making Alternative Dispute Resolution compulsory before issuing court proceedings;*
- *simplifying the claims forms and providing example templates;*
- *simplifying the court procedure, providing standardised defences and conducting more hearings on paper;*
- *providing an online system for claimants to issue claims and obtain medical reports or extending MedCo and the claims portal for use by litigants in person;*
- *providing a system similar to MedCo to appoint someone to provide fixed price legal advice/representation to litigants in person;*
- *providing flowcharts showing the process and guidance on the various stages such as how to obtain a medical report and how to prepare for hearings;*
- *defendants arranging medical reports;*
- *introducing a mandatory code of conduct for insurers and increase general awareness of Before The Event insurance;*
- *introducing clear tariffs across the board so claimants know the value of their claim; and*
- *excluding claims where liability is denied from the small claims track.*

99. Around half of the respondents provided examples of specific measures that could be put in place regarding CMCs and paid McKenzie friends who operate in this sector. A number of respondents suggested CMCs and McKenzie friends should be banned from the market altogether. The main suggestions were:

- *introducing a ban on cold calling for personal injury claims;*
- *a complete ban on referral fees between CMCs, solicitors and insurers with better enforcement;*
- *providing clear codes of practice for all involved in the industry that must be adhered to;*
- *ensuring McKenzie friends are registered and regulated;*
- *providing information to claimants on CMCs and McKenzie friends, including what to expect from them and the fees involved;*
- *training for McKenzie friends;*

- *requiring McKenzie friends to have indemnity insurance;*
- *capping fees that can be charged by McKenzie friends and CMCs or stopping them from being able to charge fees;*
- *regulating CMCs and McKenzie Friends to the same level as solicitors;*
- *requiring CMCs to 'vet' potential clients sufficiently in the same way as claimant solicitors to ensure there is no contradictory evidence to filter out unwarranted claims; and*
- *changing the name of McKenzie friends to 'court supporter'.*

**Government action:** *The Government will consider further the suggestions made in response to questions 15 and 16, and will work with stakeholders from across the industry to develop appropriate support mechanisms to underpin the increase in the small claims limit. The Government will also discuss the potential impacts on the courts and judicial resource with the judiciary and other interested parties. The Government is also committed to working closely with both MedCo and Claims Portal Limited on this issue, taking into account the need for Litigants in Person with genuine injuries to be able to quickly and simply access these services in support of their claims.*

11. There is also to be a ban on pre-medical offers:

**Government Action:** *The Government has considered the responses to the consultation and has decided to bring forward legislation to ban offers to settle without medical evidence in RTA related whiplash claims only. The ban will, though, include the making, soliciting, accepting and receiving of such an offer. There will be no exemptions to the ban and it will be a regulatory ban enforced through the relevant regulators as identified in the legislation.*

12. Other issues remain outstanding:

*105. The Government also took the opportunity, through the consultation, to gather views from stakeholders on a number of other related issues affecting the personal injury sector. These were:*

- I. Implementation of certain recommendations made by the Insurance Fraud Taskforce;*
- II. Credit hire;*
- III. Early notification of claims;*

- IV. *Rehabilitation;*
- V. *Recoverability of disbursements; and*
- VI. *Introduction of a Barème type system.*

*106. Respondents to the consultation provided submissions on the issues shown above. It is not the Government's intention to address these issues in this response document. Rather, there will be a second response document to be issued in due course which will look at these proposals in more detail and which will outline the way forward.*

It follows that the agenda on credit hire, remains open.

13. The conclusions note:

*116. The Government will bring forward clauses in the Prisons and Courts Bill to set a tariff of predictable damages for RTA related whiplash claims and minor psychological injuries, whether they are of primary or secondary significance to the whiplash claim. The tariff will cover injuries with a duration of between 0 and 24 months.*

*117. The Government will also bring forward clauses in the Prisons and Courts Bill to ban offers to settle RTA related whiplash claims without medical evidence.*

*118. The Government will bring forward proposed changes to the Civil Procedure Rules, to be considered by the Civil Procedure Rule Committee, to raise the small claims limit to £5,000 for RTA related personal injury claims and £2,000 for other personal injury claims.*

*119. The Government intends to work with stakeholders from across the sector to implement these changes effectively.*

*120. The Government proposes these measures will be implemented on 1 October 2018.*

**Introducing Fixed Recoverable Costs in Lower Value Clinical Negligence Claims**

14. The 30<sup>th</sup> January 2017 also saw the publication of a number of documents relating to the long promised consultation on fixed costs in clinical negligence disputes. The three most important documents are Introducing Fixed Recoverable Costs in Lower Value Clinical Negligence Claims - A Consultation, an impact assessment and some draft rules and a new draft Protocol.

15. The proposed scope of the consultation is limited to claims worth less than £25,000:

*The Government seeks views on the preferred option of introducing a mandatory FRC scheme for clinical negligence claims above £1,000 and up to £25,000 in the fast track or multi track, which will be implemented through revised Civil Procedure Rules. The Rules will support timely resolution, which underpins fast and effective learning of lessons. Funding will be re-directed from litigation to front-line NHS services with the ultimate aim of improving patient safety. FRC will directly target the disproportionality between damages and claimant recoverable costs.*

16. The impetus comes from the following figures: of the total amounts paid out in respect of claims worth up to £25,000 of those figures the split is some 62% claimants costs, 10% defendants costs and 28% represents the damages paid to claimants.

17. The methodology for fixed costs, is it seems open to genuine debate:

*4.1. This chapter sets out potential methodologies for calculating the FRC rates and illustrative figures. We are consulting on the methodologies only - not the absolute figures. However, we felt it would be helpful to demonstrate what the differences in methodologies mean to the potential rates. The rates will be revised following the consultation depending on responses to Question 4 and Professor Fenn's additional work. These rates will apply to claims allocated to the fast track and multi-track.*

*4.2. The current process, together with arrangements for existing personal injury FRC and offers to settle, is set out in Parts 45 and 36 of the Civil Procedure Rules respectively. We expect that the revised Protocol will streamline current processes, which will support the application of FRC and this will work to incentivise good behaviour on the part of all parties in the process. The rates will be set out in the Civil Procedure Rules.*

*4.3. We are clear that patients should continue to have the option of taking legal action where something has gone wrong with their care. Therefore we recognise that the level at which FRC rates are set will be key in ensuring that claimant lawyers can recover reasonable costs and are not deterred from taking on these low value cases. Our other policy objectives are to encourage earlier resolution (for the benefit of all parties) and to create a less adversarial climate, which would reduce claimant lawyers' overall costs.*

*4.4. Options 1, 2 and 3 are based on a time analysis. An advisory group (commissioned by NHSLA on behalf of DH) provided three possible options for setting FRC rates in 2014/15. The group estimated the amount of legal time required at each stage of the current claims procedures for a case of average complexity; adjusted for a new streamlined approach (summarised in Table 5); used data from cost lawyers who deal with many claims against the NHS (Tables 4A and 4B of Annex E); and then multiplied by Guideline Hourly Rates. The Post-litigation/Pre-listing stage figure in the analysis has been split into two separate stages for the*

*purposes of the consultation, recognising that reasonable costs at each of these will be different. In summary, these reflect how long we think the streamlined processes will take.*

*4.5. The rates for options 1, 2 and 3 are illustrated in Table 6. The detail of the time estimates that underpin these are contained within Chapter 4 of Annex E and critiqued by Professor Fenn in section 3.2 of his report. The rates shown in Table 6 have been rounded from the original calculations.*

*4.6. Under this option, the recoverable amount would be fixed irrespective of settlement value, and would depend on the stage at which the claim was settled.*

**Table 5: Summary of Time Analysis: Minutes Required**

Grade of Lawyer

STAGE		SYSTEM	ADMIN CLERK	GA	GB	GC	GD	TOTAL
Hourly Rate (note 1)		n/a	£7.20	£217	£192	£161	£118	n/a
Pre issue	Table 4D: preliminary investigations	0	15	0	0	103	0	118
	Table 4E: formal complaint to trusts	0	0	0	0	45	0	45
	Table 4F: liability investigations	0	0	10	0	245	60	315
	Table 4G liability negotiations	0	0	0	0	145	0	145
	Table 4H: quantum investigations	0	10	0	0	229	0	239
	Sub-total minutes	0	25	10	0	767	60	862
	Sub-total £	£0	£3	£36	0	£2,058	£118	£2,215
Post Issue/ pre-allocat	Table 4I: issue of proceedings	0	5	10	0	269	0	284
	Sub-total £	£0	£1	£36	0	£721	0	£758
Post Allocat ion/pr	Table 4J: litigation tasks	0	10	20	0	512	0	542
	Subtotal £	£0	£1	£72	0	£1,373	£0	£1,745
Post listing	Table 4L: claim finalisation tasks	0	0	0	0	19	0	19
	Sub-total £	£0	£0	£0	£0	£51	£0	£51
Total	Table 4M: total	0	30	40	0	1,567	60	1,707
	£	£0	£4	£144	£0	£4,203	£118	£4,470
Table 4N: additional expert		0	0	0	0	201	0	201
		£0	£0	£0	£0	£539	£0	£539
Notes: (1): GHRs are used for lawyers and the hourly rate for the admin clerk is assumed to be national minimum wage. (2) Table numbers refer to tables with Annex E. (3) Figures are rounded. Source: NHS								

4.7. This option offers a lower fixed sum (the base cost) than option 1 but an additional amount would be calculated as a percentage of the final damages awarded, and would then be added to the base cost. The FRC paid would therefore be dependent on the settlement value and the stage at which the claim was settled. For example, if a claim was settled pre-issue for damages of £20,000, the claimant FRC would be £3,500 comprising the £1,500 base cost plus 10% of £20,000.

4.8. The flat fee rates used for Option 1 are reduced in cases where a defendant accepts liability within a defined period (e.g. the Protocol response period) and proposes settlement. This means the defendant would pay less in costs than if liability was accepted, or the case settled, at a later stage. For example, in a case settled prior to issue of a claims letter, FRC under option 1 would be £3,000; but if the defendant made an early admission of liability, claimant FRC would be reduced to £2,700.

**Table 6: Illustrative FRC Rates for Options 1, 2 and 3.**

Stage	Option 1: Staged Flat Fee Arrangement	Option 2: Staged Flat Fee Arrangement Plus % of damages	Option 3: Early Admission of Liability Arrangement
Pre-issue	£3,000	£1,500 + 10% of damages: minimum of £1,600 maximum of £4,000	£3,000 less 10% = £2,700
Post-issue/pre- allocation	£3,900	£3,000 + 10% of damages: minimum of £3,100 maximum of £5,500	£3,900 less 15% = £3,315
Post-allocation/pre- listing	£5,650	£6,000 + 10% of damages: minimum of £6,100 maximum of £8,500	£5,650 less 10% = £5,085
Post-listing	£7,150	£6,500 + 10% of damages: minimum of £6,600 or £7,000 maximum of £9,000	£7,150 less 10% = £6,435

Notes: (1) Factual Witness Costs, Trial Fees are in addition to the figures. Counsel costs are included with the figures but exclude trial advocacy. London weighting would be in addition. Recoverable trial costs to be in accordance with Civil Procedure Rule (CPR) 45.38 (Table 9). Excludes VAT and interest. (2) In option 2, the maximum rate is damages of £25,000 respectively. Two options are given for the minimum rate relating to damages awarded of £1,001 and £5,001. The rate recovered will depend on the amount of damages awarded.

4.9. *The Department subsequently asked Professor Fenn to review the methodology for these options in 2015-16. Some the options he refers to in his report concern claims above £25,000, and other approaches that have subsequently been discounted: these have been removed from this consultation. He accepted the work of the NHSLA was thorough and informative and agreed that GHRs were the most appropriate hourly rate of those originally proposed by the Department.*

4.10. *Professor Fenn proposed using the same methodology for calculating rates that is used in other FRC schemes for the proposed FRC scheme of lower value clinical negligence claims. They are set out in part 45 of the CPR and based on the current market costs as opposed to estimates of the time required for a streamlined process (options 1, 2 and 3).*

4.11. *Professor Fenn’s proposal is based on the mean relationship between current costs and damages using data from costs lawyers who deal with many claims against the NHS (tables 4A and 4B of Annex E). Professor Fenn produced his own illustrative fixed cost as an appendix to his report (see Annex C). These costs are subject to a reduction corresponding to the assumed efficiency savings from FRC and a further reduction of 10% if there was an early admission of liability. They are nevertheless higher than those produced by the NHS LA. The illustrative rates are shown in Table 7.*

**Table 7: Illustrative FRC Rates for Option 4.**

Stage	Illustrative Figures		
	Rate	Minimum: damages are £1,001	Maximum: damages are £25,000
Pre-issue	£3,080 + 19% of damages	£3,270	£7,830
Post-issue/pre-allocation	£5,920 + 34% of damages	£6,260	£14,420
Post-allocation/pre-listing	£11,560 + 38% of damages	£11,880	£21,000
Post-listing	£10,320 + 47% of damages	£11,970	£22,070

18. One of the more controversial areas is likely to be that pertaining to the fees of expert witnesses. Veterans in this area will recall the abandoned attempts to get experts to work at prescribed Legal Aid rates.

*5.2. Currently, an additional recoverable sum is available for expert witness costs. There is no standard fee for experts - these are negotiated between the expert and the lawyer. This allows claimants to obtain more than one expert witness report from different experts in relevant disciplines.*

*5.3. In future, we propose that these costs will only be recoverable at a standard sum. This standard will cover total costs for all expert reports on breach of duty; causation; and condition and prognosis. The level of cap proposed is considered sufficient to allow a claimant to obtain reports from an appropriate number of experts; and will have regard to case type and value. The proposed maximum is up to £1,200 for defendants and claimants alike for claims that settle.*

*5.4. We are also considering an exemption to FRC for claims where the number of experts reasonably required by both sides on issues of breach and causation exceeds a total of two per party - see paragraph 6.11.*

*5.5. During the preparation for this consultation, some parties have suggested that the resolution of claims could be speeded up by both the claimant lawyer and defendant lawyer agreeing to use a single set of experts. The Government is sympathetic to this approach and therefore proposes that an independent Single Joint Expert (SJE) should be appointed to provide an opinion on breach of duty and causation (in broad terms) at an early stage.*

*5.6. During this process, consideration of all issues about damages and future care will be postponed until the issue of liability is resolved. It is envisaged that in many cases the use of a SJE will accelerate resolution, reduce costs for all parties, potentially promote learning of lessons from the incident and lead to a better resolution to an incident for all parties but, in particular, for the patient. Any new system for clinical negligence claims would need to consider:*

- whether a list of experts is held centrally and if so, by whom;*
- process and criteria for admission to, and removal from the list;*
- cost attribution - how might this best be funded; and*
- the rules and processes for selection of an expert in a specific claim.*

19. The use of a single joint expert is interesting. If implemented, have we abandoned a system of adversarial litigation for one of expert adjudication? There may be a certain logic to that given the technical nature of clinical disputes.
20. Trial fees are to be slashed. Given that apparently there are only 96 small trials a year in this bracket, that may not be terribly significant.

*5.7. Trial court costs will need either to be summarily assessed, or referred for assessment if they cannot be agreed. The trial court costs will be paid in addition to the final stage fixed costs. Trial court costs will only apply if the trial actually starts, that is counsel or solicitor advocate addresses the court in a contested final hearing. All costs up to the start of the hearing are included in the final FRC stage. If counsel is used, the additional costs allowed for trial will include both the trial advocacy fee for counsel and the Solicitor's costs of attending at trial and the trial. Recoverable trial costs will be in accordance with Civil Procedure Rule (CPR) 45.38 (Table 9). Although these rates (table 8) are intended to apply to trials in the Fast Track, we intend that these rates should apply to clinical negligence above £1,000 and up to £25,000 in the multi-track and fast track. Your views are sought on this in Question 8. Please also refer to paragraph 5.3 on expert costs.*

*5.8. In 2015/16, there were 96 clinical negligence cases where the NHS in England was the defendant which went to trial, of which 12 were settled for damages above £1,000 and up to £25,000.*

### **The Jackson Review into Fixed Costs**

21. Grinding along in parallel to the efforts of the Ministry of Justice and the Ministry of Health are the renewed labours of Jackson LJ. The terms of reference for the Jackson review on fixed costs were set on 16<sup>th</sup> November 2016 in the following terms:

*Lord Justice Jackson has been commissioned to undertake a review of fixed recoverable costs, to be completed by 31 July 2017.*

*The review was commissioned by Lord Thomas, the Lord Chief Justice, and Sir Terence Etherton, the Master of the Rolls. The review's recommendations will help to inform a Government public consultation on reforms to extend fixed recoverable costs to further areas of civil litigation.*

*The terms of reference for the review are:*

1. *To develop proposals for extending the present civil fixed recoverable costs regime in England and Wales so as to make the costs of going to court more certain, transparent and proportionate for litigants.*
2. *To consider the types and areas of litigation in which such costs should be extended, and the value of claims to which such a regime should apply.*
3. *To report to the Lord Chief Justice and the Master of the Rolls by the 31st July 2017.*

22. Jackson LJ's take on his role is:

*This project requires me, with the assistance of assessors, to do the following:*

- (i) *Propose a scheme for fixed recoverable costs in respect of fast track cases which are not currently subject to fixed recoverable costs.*
- (ii) *Identify categories of cases (a) above the fast track or (b) not falling within any track, which should be subject to fixed recoverable costs and propose a scheme of fixed recoverable costs for such cases.*

23. At the current time, a number of seminars are ongoing. There will be five seminars (although the topics have changed somewhat since this list was originally published):

*Monday afternoon 6th February, Leeds (capacity 50): property and chancery litigation*

*Tuesday morning 7th February, Manchester (capacity 50): clinical negligence and personal injury*

*Monday afternoon, 13th March, London (capacity 200): structural issues, counsel's fees, expert fees, upper limit for cases subject to fixed recoverable costs*

*Thursday morning 16th March, Birmingham (capacity 50): mercantile and business litigation*

*Wednesday afternoon 5th April, Cardiff (capacity 80): judicial review and public law.*

*The plan is to have 4 speakers at each seminar. Begin with two 20 minute presentations, followed by discussion, then a tea/coffee break, then two more 20 minute presentations, followed by discussion. I will chair each of the seminars (as I did during the 2009 Costs Review).*

24. His position:

*I have expressed views about fixed recoverable costs in recent lectures (January and May 2016: available on the Judiciary website) and more recently in a book ("The reform of civil litigation"). Although I hold the view that fixed recoverable costs would be beneficial for lower value cases, I will keep an open mind for the time being about what types and levels of cases should fall within such a regime and what the costs figures should be. The purpose of the seminars is to explore the issues and the conflicting considerations which are in play.*

## Thoughts

25. Although it might be cynical to suggest that the introduction of wide ranging provisions for fixed costs are a "done deal" when consultations are still ongoing, as the case law suggests, although the Government must have an open mind, that is not the same thing as an empty mind and all the pointers are that fixed costs will be introduced to a greater or lesser extent, initially, and then in the years to come, the scope of fixed costs expanded to include more and more cases.

26. So what can be done to mitigate their impact or even to profit from their introduction? The following suggestions or ideas come readily to mind. There are others too, which may well come to pass further down the line. It is important to distinguish between steps which can be taken now or in the near future, to steps which may be taken in the far future.

1. Improvement to claims handling triage.

Claimants' solicitors (and barristers) make a living from the mistakes made by insurance companies and other compensators. These mistakes flow from the insurers having too much work and too few staff, taking bad points and ignoring good points and the consistent, persistent failure to make decent offers at an early stage of a claims notification. As has been observed elsewhere, insurers like to pay 70 pence in the pound of a claim's true value, as would be assessed by the Court. Under standard basis costs, the longer the claim runs the more costs the claimants' lawyers recover. Under fixed costs, the longer the claim runs the more overheads a claimant's solicitor will bleed. It follows that ruthless early evaluation of a claim is necessary and at the very earliest point a Part 36 offer should be made to make use of the principle in Broadhurst -v- Tan, that an award of indemnity costs, displaces fixed costs.

2. Lobby for a rule change.

The insurers learnt long ago that test cases are usually (not always, but usually) an expensive waste of time, particularly in the field of costs. What works is to change the parameters within which costs are awarded. Hence the drive for fixed costs is intended to drive down levels of

recoverable costs. What claimants' solicitors should be doing is lobbying for a rule change that when a claimant's Part 36 offer is accepted out of time, the Court has a discretion and/or there is a rebuttable presumption that the accepting party will pay indemnity costs.

### 3. Recognise a Black Swan when you see it.

The characteristics of the part of the profession that undertakes personal injury work has changed dramatically in the last 20 years. Fixed costs could mean that there will be a drive to increase the size of firms in order to obtain economies of scale. The problem with that is lawyers by and large are terrible businessmen. Hubristic empire building for the sake of it, or taking money out of the firm to buy a succession of expensive cars, always ends unhappily.

More fruitful areas could be a move to smaller, more boutique practices, with a drive to reduce overheads, assuming that lines of credit for disbursement funding are available or increasing automation. Devotees of the recent book "The Rise of the Robots" (2015) will note that anything that is routine and predictable can be automated, as the Bar has found to its cost, as routine pleading work has melted away. This, in turn, could provoke a move to more enhanced and streamlined case management systems; getting rid of expensive premises, the end of the post, the end of paper itself, driven by a desire to save money and increase the profit element in fixed costs.

### 4. Diversify

Fixed costs and provisional assessments have knocked a hole in the work of costs lawyers and costs draftsmen, and it is doubtful that costs budgeting is going to make it up. They are going to have to diversify. Equally, personal injury lawyers who have over-specialised in, for example, one particular type of injury or disease may need to raise their eyes to the horizon and look at other areas of work. There will always be injuries and claims in tort.

The key is to spot new fashions or new waves of litigation and be ready to ride them in preference to well-known and comforting areas of work. These are not necessarily the areas that appear the easiest. Holiday sickness, housing disrepair and cavity wall claims are being widely touted on LinkedIn. Those who take on holiday sickness claims I suspect will end up feeling rather ill themselves.

But there are many thousands each year of potential claims for disability discrimination under the Equality Act 2010, which are simply not being brought at the current time. Financial mis-selling (funded by contingency fee agreements) is another lucrative area.

5. The far future

Richard Susskind has been the prophet of digitisation and information technology for over 20 years, though more of a Jeremiah than a John the Baptist. But although in 2017 we have 140 characters, rather than levitating cars and jet packs, real change may be on the horizon. Driverless cars are being tested. The Government is consulting on how to deal with the insurance aspects of this phenomenon. The online Court could be a success and could be expanded into more traditional fields of work. The need to reduce overheads could mean improved claims handling through tools such as algorithms based on big data from hundreds of thousands of cases, which aid the evaluation of quantum and the pitching of perfect offers. I do not underestimate, however, the innate conservatism of lawyers and also the capital investment that would be required to really change the way litigation works.

**Proportionality**

27. As a society, we engage from time to time in collective delusions. A collective delusion is an idea which works as long as enough people understand it and subscribe to it. When people stop believing in it, it disappears, sometimes overnight. The collapse of democracy and the rule of law in Weimar Germany, the disappearance of the gods of the religion of Ancient Greece or republican Rome, are all examples of collective delusions coming to an abrupt end.
28. Although not in the same bracket, the current belief that proportionality is a meaningful concept that can be consistently deployed by the Courts to enhance access to justice is another such delusion. It is one that I detect is already starting to creak, hence the enthusiasm for fixed costs and the unstated desire to reduce the role of costs budgeting as faith in an individually applied approach to proportionality in budgeting or on detailed assessment starts to fade.
29. More positively, fixed costs could be viewed as the new incarnation of proportionality. Instead of "fixing" proportionate costs on a case by case basis through assessment, a fixed costs regime constitutes the expression in the rules of an award of proportionate costs applied across the board to a range of cases. Granted that there will be swings and roundabouts but across an entire class of litigation the theory is that proportionate costs will not only be awarded but will be predictable in advance and the transactional or frictional costs of assessment and budgeting can be avoided altogether, representing a more efficient deployment of resources.
30. I regard proportionality as an essentially meaningless concept which adds nothing to the concept of reasonableness in theory or as formulated in the rules. The importance of proportionality is its existence as a concept, meant to encourage the judiciary that legal costs claimed between the parties to litigation are too high and that they should use the concept as a reason to reduce them to make justice more affordable.

31. But a robust application of the principle of reasonableness would achieve the same result. In a case I did in Hastings last summer where an RTA case settled for 50k, a bill claiming 271k of costs was assessed down on the basis of reasonableness to 73k, and comfortably below the paying party's offer of 80k with the District Judge declining to reduce the 73k further by reason of proportionality, noting that a significant part of the costs allowed related to experts fees and the solicitors costs/counsel's fees of dealing with the expert evidence.
32. There have been a number of decisions in the last 9 months or so where the principle of proportionality has been expressly applied and which have had the consequence of "setting the cat amongst the pigeons."
33. The first of these, and due to be heard by the Court of Appeal in the autumn is that of *BNM -v-MGN Limited* [2016] EWHC B13 (Costs) a decision of Master Gordon-Saker:

*8. The Claimant commenced proceedings against the Defendant on 31st July 2013, having obtained an anonymity order the day before. She claimed an injunction to restrain the Defendant from using or publishing confidential information taken from her phone, damages and an order for delivery up of any confidential information.*

*9. The Defendant made substantial admissions in the Defence and the claim was concluded by a consent order dated 14th July 2014, under the terms of which the Defendant undertook not to use or disclose the confidential information, agreed to pay damages of £20,000 and agreed to pay the Claimant's costs of the action.*

*10. The costs claimed were in the sum of £241,817. That included a success fee in respect of the solicitors' costs of 60 per cent, success fees in respect of the costs of both counsel of 75 per cent and an after the event insurance premium of £58,000 plus insurance premium tax of £3,480.*

34. Such were the facts which underpinned the assessment of the winning claimant's costs:

*11. The detailed assessment was listed on 23<sup>rd</sup> November 2015 with a time estimate of 2 days. The first morning was taken up with leading counsel's submissions on the Defendant's argument that requiring it to pay additional liabilities would be incompatible with its right to freedom of expression as a publisher under Article 10 of the European Convention on Human Rights. I reserved judgment on that issue and proceeded with the detailed assessment on the footing that additional liabilities would be recoverable. By the end of the second day the only outstanding issue was proportionality, which I had indicated should be dealt with after the line by line assessment, and the detailed assessment was adjourned part heard to 29<sup>th</sup> April 2016. In the*

meantime, on 11<sup>th</sup> January 2016, I handed down judgment on the Article 10 issue, concluding that the recovery by the Claimant of additional liabilities would not be a violation of Article 10.

12. Subject to the outstanding issue of proportionality, the success fees of both solicitors and counsel were allowed at 33 per cent and the after the event insurance premium was allowed as claimed.

13. Following the hearing in November 2015 the parties agreed the figures resulting from the line by line assessment as:

Base profit costs	£46,321
Base Counsel's fees	£14,687.50
Court fees	£1,310
Base costs of drawing the bill	£4,530
Atkins Thomson's success fee	£16,780.83
Counsel's success fee	£4,846.88
ATE premium	£61,480
VAT	£17,433.24
<b>Total base costs</b>	<b>£62,318.50</b>
<b>Total costs</b>	<b>£167,389.45</b>

14. At the hearing in April 2016 the Defendant argued that these sums were disproportionate and should be reduced further. I concluded that the sums which had been allowed as reasonable on the line by line assessment were disproportionate and were about twice the sum which would be proportionate. As I had been given the breakdown set out above I gave separate figures for the sums allowed:

Base profit costs	£24,000
Base Counsel's fees	£7,300
Court fees	£1,310
Base costs of drawing the bill	£2,250
Atkins Thomson's success fee	£7,920

Counsel's success fee	£2,409
ATE premium	£30,000
VAT	£8,775.80
<b>Total costs</b>	<b>£83,964.80</b>

15. At the hearing the parties calculated the total as £84,855.80, a difference of £891.

16. Apart from the court fee, each of the items was reduced by about one half. The success fees are 33 per cent of the respective base costs allowed.

17. The relevant paragraphs of CPR 44.3, in force after 1st April 2013, are:

(2) Where the amount of costs is to be assessed on the standard basis, the court will –

(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and

(b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

(5) Costs incurred are proportionate if they 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.

(7) Paragraphs (2)(a) and (5) do not apply in relation to –

*(a) cases commenced before 1st April 2013; or*

*(b) costs incurred in respect of work done before 1st April 2013, and in relation to such cases or costs, rule 44.4(2)(a) as it was in force immediately before 1st April 2013 will apply instead.*

*18. The new test of proportionality was introduced because the old test did not promote access to justice at proportionate cost. In Willis v Nicolson [2007] EWCA Civ 199 Buxton LJ, delivering the judgment of the court, said:*

*When the Civil Procedure Rules replaced the Rules of the Supreme Court, and encouraged active intervention by the court and the application of public values and not merely those values with which the parties were comfortable, it was hoped that that practice might change; and that hope was reinforced when this court said, in [2] of its judgment in Lownds v Home Office [2002] 1 WLR 2450:*

*'Proportionality played no part in the taxation of costs under the Rules of the Supreme Court. The only test was that of reasonableness. The problem with that test, standing on its own, was that it institutionalised, as reasonable, the level of costs which were generally charged by the profession at the time when professional services were rendered. If a rate of charges was commonly adopted it was taken to be reasonable and so allowed on taxation even though the result was far from reasonable.'*

*However, in the event nothing seems to have changed. That is because, as explained in [29] of the same judgment, 'proportionality' is achieved by determining whether it was necessary to incur any particular item of costs. And then 'When an item of costs is necessarily incurred then a reasonable amount for the item should normally be allowed': and the reasonable amount per hour of the professional's time continues to be determined by the market.*

*19. At a public seminar held in Cardiff on 19th June 2009 as part of Sir Rupert Jackson's Review of Civil Litigation Costs, Sir Anthony May, then President of the Queen's Bench Division, said: In my experience, there is no doubt at all but that costs are assessed with nodding respect only to proportionality. An application of rule 44.5 of the Civil Procedure Rules and section 11 of the Costs Practice Direction can scarcely expect to do better than that.*

*20. It is clear that the new test of proportionality was intended to bring about a real change in the assessment of costs.*

*21. The procedure that the court should follow in applying the new test was described in Sir Rupert Jackson's final report at Part 1, chapter 3, paragraph 5.13:*

*In other words, I propose that in an assessment of costs on the standard basis, proportionality should prevail over reasonableness and the proportionality test should be applied on a global basis. The court should first make an assessment of reasonable costs, having regard to the individual items in the bill, the time reasonably spent on those items and the other factors listed in CPR rule 44.5(3). The court should then stand back and consider whether the total figure is proportionate. If the total figure is not proportionate, the court should make an appropriate reduction. There is already a precedent for this approach in relation to the assessment of legal aid costs in criminal proceedings: see R v Supreme Court Taxing Office ex p John Singh and Co [1997] 1 Costs LR 49.*

*22. In the 15th implementation lecture, entitled "Proportionate Costs" and given on 29th May 2012, Lord Neuberger, then Master of the Rolls, quoted that passage and said that it seems likely that the courts will develop the approach to proportionality "as Sir Rupert described it" in that paragraph.*

*23. There is no issue that the new test of proportionality applies to the costs claimed by the Claimant. The issues are:*

*i) Does the new test of proportionality apply to additional liabilities?*

*ii) If it does, should it be applied to additional liabilities separately, rather than by the global basis described above?*

*iii) Are the costs allowed on the line by line assessment disproportionate?*

*24. It is not in issue that the conditional fee agreement entered into between the Claimant and her solicitors, the conditional fee agreements entered into between the Claimant's solicitors and counsel and the after the event insurance policy purchased by the Claimant are all "pre-commencement funding arrangements" for the purposes of CPR 48.2(1)(b).*

*25. CPR 48.1(1), in force after 1st April 2013, provides:*

*The provisions of CPR Parts 43 to 48 relating to funding arrangements, and the attendant provisions of the Costs Practice Direction, will apply in relation to a pre-commencement funding arrangement as they were in force immediately before 1 April 2013, with such modifications (if any) as may be made by a practice direction on or after that date.*

*26. CPR 43.2(1)(a), as it was in force before 1st April 2013, defined "costs" as including "any additional liability incurred under a funding arrangement". CPR 44.1, in force after 1st April 2013, defines "costs" with no reference to additional liabilities.*

27. A number of rules relating to funding arrangements in the CPR in force prior to 1st April 2013 are identified in paragraph 1.4 of Practice Direction 48, in force after 1st April 2013. They include CPR 43.2(1)(a) but do not include CPR 44.4(2) – the old test of proportionality.

28. It seems to me that the intention was that the rules as to the recoverability of additional liabilities would be preserved in relation to those additional liabilities which remain recoverable after 1st April 2013. However the old test of proportionality was not preserved in relation to those additional liabilities. Had that been intended it could have been achieved quite easily by a further exception in CPR 44.3(7).

29. CPR 44.4(2), the test of proportionality in force before 1st April 2013, was not a provision "in relation to funding arrangements". CPR 43.2(1)(k), in force before 1st April 2013, defined funding arrangements as conditional fee agreements, after the event insurance premiums and arrangements with membership organisations for the purposes of s.30 Access to Justice Act 1999. CPR 44.4(2) does not therefore survive beyond 1st April 2013 by virtue of CPR 48.1(1), as in force after that date. It survives only in the circumstances set out in CPR 44.3(7).

30. The old test of proportionality applied to additional liabilities but rarely had an impact on assessment. If the base costs were reasonable and necessary the reasonable success fee would also be necessary. An after the event insurance premium, if reasonable, would rarely not be necessary; although greater enthusiasm developed for disallowing disproportionate or unreasonable premiums: *Redwing Construction Ltd v Wishart* [2011] EWHC 19 (TCC) (Akenhead J); *Kelly v Black Horse Limited* [2013] EWHC B17 (Costs) (Master Hurst); and my decision in *Banks v London Borough of Hillingdon* (unrep., 3rd November 2014).

31. A consequence of the reduction of the base costs to a proportionate figure will be that the success fee, a percentage of those base costs, also reduces. It would be absurd and unworkable to apply the new test of proportionality to the base costs, but the old test of proportionality to the success fee.

32. Ringfencing and excluding additional liabilities from the new test of proportionality would be a significant hindrance on the court's ability to comply with its obligation under CPR 44.3(2)(a) to allow only those costs which are proportionate.

33. Section 11 of the Costs Practice Direction in force before 1st April 2013 was headed: *Factors to be taken into account in deciding the amount of costs: Rule 44.5* and provided:

11.5 In deciding whether the costs claimed are reasonable and (on a standard basis assessment) proportionate, the court will consider the amount of any additional liability separately from the base costs.

11.9 A percentage increase will not be reduced simply on the ground that, when added to base costs, which are reasonable and (where relevant) proportionate, the total appears disproportionate.

34. In my judgment these provisions do not survive 1st April 2013 save in the circumstances described in CPR 44.3(7), in force after that date. Section 11 of the Costs Practice Direction was attendant on CPR 44.5, as in force before 1st April 2013 – "Factors to be taken into account in deciding the amount of costs". CPR 44.5 was not a provision "relating to funding arrangements" for the purposes of CPR 48.1, in force after 1st April 2013.

35. When applying the new test of proportionality, the court need not consider the amount of any additional liability separately from the base costs. In the event I have considered the after the event insurance premium separately.

36. Presently there is little guidance on how the new test of proportionality should be applied.

37. In the 15th implementation lecture Lord Neuberger said:

*While the change in culture should reduce the scope of costs assessments at the conclusion of proceedings, it will not obviate the need for a robust approach to such assessments. Again the decision as to whether an item was proportionately incurred is case-sensitive, and there may be a period of slight uncertainty as the case law is developed.*

*That is why I have not dealt with what precisely constitutes proportionality and how it is to be assessed. It would be positively dangerous for me to seek to give any sort of specific or detailed guidance in a lecture before the new rule has come into force and been applied. Any question relating to proportionality and any question relating to costs is each very case-sensitive, and when the two questions come together, that is all the more true. The law on proportionate costs will have to be developed on a case by case basis. This may mean a degree of satellite litigation while the courts work out the law, but we should be ready for that, and I hope it will involve relatively few cases.*

38. I was referred to a number of decisions made in relation to costs budgeting, but they are of little assistance to the present case. In *GDK Project Management Ltd v QPR Holdings Ltd* [2015] EWHC 2274 (TCC) Stuart-Smith J indicated that his

*... starting point is that a case would have to be wholly exceptional to render a costs budget of £824,000 proportional for the recovery of £805,000 plus interest.*

39. *Stocker v Stocker* [2015] EWHC 1634 (QB), to which I was not referred, was a libel action. The defendant was alleged to have made statements in electronic posts that the claimant, her former husband, had tried to kill her. Warby J said:

*I accept that it is not possible to approach the costs budgeting exercise in a case of this kind by assessing a case as relatively modest in scale, and the costs as high, and then simply reducing the costs to match the perceived importance of the case. As I observed in Yeo, many would suggest that the costs of litigation in this category become disproportionate at an early stage. There is no avoiding that, in many cases. So I agree that an approach based purely on financial proportionality would run the risk of disabling litigants from fairly presenting their cases.*

40. *Had it been intended that costs should never exceed the sums in issue the rule could easily have stated that. There will be cases in which the costs bear a reasonable relationship to the sums in issue even though they exceed those sums.*

41. *This is such a case; and the Defendant did not seek to argue otherwise. Mr Carpenter, on behalf of the Defendant, contended that a proportionate figure for base costs to the stage that the claim reached would be £20,000.*

42. *The sum in issue in these proceedings was always going to be modest. The claim settled for £20,000. The Claimant's first offer was £40,000.*

43. *The value of the non-monetary relief claimed is not easy to quantify, but in my judgment it was not substantial. The Claimant knew in March 2011 that the Defendant had access to the information on her phone. The phone was returned to her in May 2011. Yet it was not until March 2013 that the Claimant's father approached Atkins Thomson "to sound out whether any civil action could be brought". That enquiry was prompted by press reports of a similar case in which Atkins Thomson had acted.*

44. *No information taken from the phone had been published in the intervening 2 years. When proceedings were issued no application was made for an interim injunction. The anonymity order was required only because of the issue of proceedings. While the undertakings and the apology given by the Defendant as part of the settlement will have been of comfort to the Claimant, this was not a claim for substantial non-monetary relief. But for the claim for damages, it is unlikely that a claim would have been pursued.*

45. *Nor was it a particularly complex case. I accept that a privacy case is more complex than the run of the mill. In the course of the detailed assessment I accepted that this case was of importance to the Claimant, that it was specialist "Londoncentric" work, that the allegations against the Defendant were serious, that it was reasonable for the Claimant to issue*

*proceedings without prior warning given that she did not know what use the Defendant had made or would make of the confidential information, and that it was reasonable for her to apply for an anonymity order. It is these factors which make this a case where the costs can bear a reasonable relationship to the value of the claim even though they exceed that value and even though the claim was concluded at an early stage.*

*46. Little additional work was generated by the conduct of the Defendant. There was some correspondence between the parties following the service of the anonymity application with an unfortunate allegation that the court had been misled, but the amount of that correspondence was limited to a few letters. The same can be said of the Defendant's requests for extensions of time to serve the Defence and the Defendant's failure to respond to a Part 18 request. I do not think that the conduct of the Defendant added significantly to the costs.*

*47. Nor do I think that there were any wider factors involved in these proceedings. There was no real threat of publication and the Claimant was not seeking in any real way to protect her reputation. While the Defendant's conduct can fairly be categorised as reprehensible, so much of civil litigation is based on the bad behaviour of others. I cannot see that there was any wider public importance.*

*48. This claim settled at a relatively early stage, a year after the issue of proceedings and 16 months after solicitors were first instructed, before the first case management hearing, before disclosure of documents or exchange of witness statements, before any hearing other than the application for an anonymity order. The scope of the evidence would be very limited and the case was neither factually nor legally complex.*

*49. In these circumstances base profit costs of £46,000 and base counsel's fees of £14,000 must be disproportionate under the new test, being over 3 times the amount of agreed damages, and covering work which fell far short of trial. In my judgment costs of about one half of those figures would be proportionate.*

*50. The ATE premium of £58,000 excluding tax is also disproportionate. For the reasons that I gave in the course of the detailed assessment, I could not conclude that the premium was unreasonable. I also accept that it was necessary for the Claimant to purchase after the event insurance. But costs may be disproportionate even though they were necessary: CPR 44.3(2)(a).*

*51. This was not the premium which would cover the whole claim. £58,000 was the premium payable at the fourth of seven stages. Had the claim proceeded to judgment, the premium would have risen to £112,500 plus tax.*

*52. As is common, the policy insures the Claimant against her liability to pay the premium in the event that she does not succeed; and, if she does succeed, the premium is limited to the amount allowed by the court on assessment. However the court approaches the new test of proportionality, if the premium is reduced on the basis that it is disproportionate, it is important that the court should identify the figure allowed.*

*53. The premium has added significantly to the costs that were reasonably incurred, broadly matching the aggregate of base profit costs and counsel's fees. I concluded in the course of the detailed assessment that, at the outset, the Claimant's prospects of success were "significantly in excess of 50/50". Those prospects did not reduce. The Defendant made substantial admissions in its Defence. A premium of £58,000 at the stage that the claim settled, potentially doubling to £112,500, cannot be said to bear a reasonable relationship to a claim which settles for £20,000, where there was no substantial claim for non-monetary relief, which was not particularly complex, where no significant additional work was generated by the conduct of the paying party and where there were no wider factors involved.*

*54. In my judgment no more than one half of that amount could be considered proportionate.*

35. Since that decision there have been a number of other decisions which repay careful examination, and many of which turn on the application of particular aspects of the transitional provisions for pre- and post-1<sup>st</sup> April 2013, and also the provisions relating to those categories of cases, which involve recoverable success fees. Cases worth reading are *Dr Brian May -v- Wavell Group Plc* [2016] EWHC B16 (Costs) Master Rowley and *Murrells -v- Cambridge University NHS Foundation Trust* (SCCO 17th January 2017) Master Brown. The *Brian May* case is also on its way to the Court of Appeal, to be heard in the autumn along with *BNM*. Watch this space.

### Costs Budgeting and Assessment

36. Costs budgeting and its relationship with assessment has been the subject of recent developments. If we consider first of all the rule changes, then from 6<sup>th</sup> April 2017, there are a number of changes to Practice Direction 3E, which are meant to draw a clearer distinction between incurred and budgeted costs.
37. However, last week saw an interesting decision in the High Court in the case of *Merrix -v- Heart of England NHS Foundation Trust* [2017] EWHC 346 a decision given by Carr J on appeal from District Judge Lumb, wearing his hat as Regional Costs Judge.
38. The issues were set out in the opening paragraphs of the judgment as follows:

1. This is an appeal from the decision of District Judge Lumb sitting as a Regional Costs Judge ("the Costs Judge") in Birmingham District Registry on 13th October 2016 ([2016] EWHC B28 (QB)). It raises a point of considerable importance arising out of the interplay between the costs budgeting regime under Part 3 of the Civil Procedure Rules (as amended from time to time) ("the CPR") and the detailed costs assessment regime under Part 47 of the CPR. The Costs Judge when granting permission said this:

"The issue is the subject of significant debate in the legal profession with wide-ranging views and interpretations. There is no direct case authority on the point. An authority on the point would be highly desirable and as a matter of urgency. Already a number of detailed assessments have been adjourned pending this first instance decision."

2. The Appellant is the successful party in a claim against the Respondent for damages for clinical negligence. A costs management order under CPR 3.15(2) was made on 19th March 2015 when the Appellant's cost budget was approved in the total sum of £128,256. £74,780 of that figure related to future costs. The claim was compromised in September 2015 when the Appellant accepted the Respondent's offer made under CPR Part 36. By then, lay and expert evidence had been exchanged but the case had not been prepared for trial. The bill ultimately served by the Appellant was less than the total approved budget, unsurprisingly since the matter had not gone to trial.

3. This appeal is not about the budget in this particular case, nor whether there are good reasons for departing from it. The Costs Judge has not yet considered the budget or the bill. Rather, the appeal relates to the determination of a preliminary issue, formulated by the Costs Judge as follows:

"To what extent, if at all, does the costs budgeting regime under CPR Part 3 fetter the powers and discretion of the costs judge at a detailed assessment of costs under CPR Part 47?"

4. In summary, the Appellant contended that where a receiving party claims costs at or less than the budgeted figure, his or her costs should be assessed as claimed, unless the paying party establishes a good reason to depart from the budgeted figure. The Respondent, by contrast, contended that the paying party is entitled to benefit from a full detailed assessment de novo, with the costs budget being but one factor in determining reasonable and proportionate costs on detailed assessment. The costs judge is not fettered in that assessment by the costs budget. Thus the Respondent's position was (and remains) that a paying party does not need good reason to persuade a court to depart from an approved or agreed budget downwards, but a receiving party needs a good reason to persuade a court to depart from an approved or agreed budget upwards.

5. The Costs Judge's "strict" answer was that the powers and discretion of a costs judge on detailed assessment are not fettered by the costs budgeting regime, save that the budgeted figures should not be exceeded unless good reason can be shown (see [61] of the judgment). His "full" answer was, however, more "nuanced" than the Respondent's position of "open season" (see [62] of the judgment). In essence, his conclusion was that the budget, although not binding, will be a strong guide to what will be allowed on a detailed assessment.

6. The issue is one that arises in every detailed assessment of costs on a standard basis where a costs management order has been made. The practical significance of the dispute is obvious and reflected in the surrounding debate that has emerged both before and after the judgment below. The Civil Procedure Rule Committee (SARPD Sub-Committee) reported in November 2016 that it had not been able to reach a unanimous decision on the issue (albeit noting that the issue did not fall strictly within its remit). The decision of the Costs Judge has been followed elsewhere in *Tahera Bhojani v University Hospitals of Leicester NHS Trust* (14th December 2016) (unreported decision of District Judge Hale sitting as a Regional Costs Judge in Nottingham) ("Bhojani"), albeit "with some hesitation". But it has also been criticised recently by District Judge Middleton (another Regional Costs Judge and co-author of *Cook on Costs*) in an article published in *Civil Procedure News* (Issue 2/2017). It has been seen by some as an unfortunate decision which robs costs budgeting of much of its merit. The predictability and reduction in the scope of disagreement on assessment that costs budgets should have brought will be rendered illusory. Furthermore, Senior Costs Judge Master Gordon-Saker reached a different conclusion to that of the Costs Judge in *Collins v Devonport Royal Dockyard Limited* [AGS/16029/54] ("Collins") on 8th February 2017.

39. The High Court Judge looked at the history of costs budgeting:

7. The recommendations in the *Access to Justice: Final Report* (July 1996) implemented by the introduction of the *Civil Procedure Rules* in 1998 made no express reference to costs management. The emphasis was on active case management as part of the court's duty to meet the overriding objective. However, Jackson LJ's *Review of Civil Litigation Costs: Preliminary Report* (May 2009) stated that the time had come to elevate the court's costs management powers to rules, and to use the term "costs management" for the purpose of recognising those powers as a feature of case management (see chapter 48 on "costs management").

8. Costs budgeting was then piloted under schemes in defamation cases (*Practice Direction 51D*) and in the *Technology & Construction and Mercantile Courts* (*Practice Direction 51G*). (Appropriately enough in the present context, the pilot in the *Mercantile and Technology & Construction Courts* was run in the *Birmingham specialist civil courts*.) The scheme under *Practice Direction 51D* was mandatory, whilst that under *Practice Direction 51G* was voluntary.

9. In his *Review of Civil Litigation Costs: Final Report (December 2010)* (the "Final Report"), Jackson LJ again devoted a whole chapter (40) to costs management. He had earlier (in chapter 3) proposed a definition of "proportionality", which would come into play when an assessment of "reasonable" costs would result in an excessive figure. This would of itself introduce a new dimension to costs management. At paragraph 1.4 under the heading "The essence of costs management" he stated this:

"The essential elements of case management are the following:

- (i) The parties prepare and exchange litigation budgets or (as the case proceeds) amended budgets.
- (ii) The court states the extent to which those budgets are approved.
- (iii) So far as possible, the court manages the case so that it proceeds within the approved budgets.
- (iv) At the end of the litigation, the recoverable costs of the winning party are assessed in accordance with the approved budget."

10. He went on to say at paragraph 1.5 under the heading "Issues for consideration":

"If costs management becomes a feature of civil litigation in the future, many issues will have to be considered before any set of costs management rules is drawn up. In particular:

...

- (iii) To what extent should the last approved budget be binding, alternatively influential, upon the final assessment of costs?
- (iv) In so far as the last approved budget is binding, should it operate as an upper limit upon recoverable costs or should it operate as a form of assessment in advance?
- ...
- (vi) What steps should be taken to ensure that the process is cost-effective, i.e. that the litigation costs saved exceed the costs of the process?"

11. Whilst Jackson LJ recognised that costs management is an exercise which generates additional costs and which makes additional demands on the limited resources of the court – both powerful negative factors – he also identified powerful factors in support of costs

*management: first, case management and costs management go hand in hand; secondly, costs management, if done properly, would save substantially more costs than it would generate (see paragraph 7.1). At paragraph 7.16 he concluded, amongst other things, that effective costs management was well within the abilities of all civil judges if properly trained, and that "effective costs management has the potential to control the recoverable costs, and sometimes the actual costs, of litigation to more acceptable levels."*

*12. The costs management regime in section II of CPR Part 3 was later introduced on 1st April 2013, based on the Final Report and drawing on the experience of the pilot schemes. Various amendments and variations to the rules have been made from time to time. Unless otherwise stated, references to rules and any practice direction below are references to those currently in force.*

40. The Judge went onto consider part 3 and its practice direction 3E, as they stood at the time:

*13. By CPR 3.12(1), the costs management regime in section II of Part 3 of the CPR applies to all Part 7 multi-track claims issued after 1st April 2013 except:*

*"(a) Where the claim is commenced on or after 22nd April 2014 and the amount of money claimed as stated on the claim form is £10million or more; or*

*(b) Where the claim is commenced on or after 22nd April 2014 and is for a monetary claim which is not quantified or not fully quantified or is for a non-monetary claim and in any such case the claim form contains a statement that the claim is valued at £10million or more; or*

*(c) Where in proceedings commenced after 6th April 2016 a claim is made by or on behalf of a person under the age of 18; or*

*(d) Where the proceedings are the subject of fixed costs or scale costs; or*

*(e) The court otherwise orders."*

*14. It will also apply to any other proceedings (including applications) where the court so orders (see CPR 3.12 (1A)). A good example of such an order is the decision of Coulson J in CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd [2015] EWHC 481 to exercise the court's discretion to make a costs management order even though the stated claim value exceeded £10million.*

*15. By CPR 3.12(2), the purpose of costs management is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further*

*the overriding objective, namely to deal with cases justly and at proportionate cost (see CPR 1.1). Dealing with a case justly and at proportionate cost includes, so far as practicable, ensuring that the parties are on an equal footing and saving expense.*

*16. Thus costs management is to be prospective (see CPR 3.12(2), 3.15(1), 3.15(3), and Practice Direction 3E at paragraphs 7.4 and 7.6). However, the court may record its comments on costs already incurred and take them into account when considering the reasonableness and proportionality of all future costs (see Practice Direction 3E at paragraph 7.4). This was the approach taken in CIP Properties (supra), where the claimant had filed a budget totalling almost £9.5million of which about £4.3million had already been incurred. The Court of Appeal in SARPD Oil International Ltd v Addax Energy SA [2016] EWCA Civ 120 ("SARPD Oil") (at [44]) held that parties coming to the first case management conference to debate their respective costs budgets should know that that was the appropriate occasion to contest the budgets, not only in respect of estimated but also incurred costs elements. Following those comments, amendments to paragraphs 7.3, 7.4 and 7.7 of Practice Direction 3E are to be introduced on 6th April 2017. They confirm that when setting a costs budget, a court is dealing only with prospective costs. There is an ability, but no requirement, to comment on costs already incurred. Additionally, costs of the case management conference are to be treated as costs already incurred.*

*17. CPR 3.13 provides for all parties (except litigants in person) to file and exchange budgets within certain prescribed time limits. For claims where the stated value on the claim form is less than £50,000 and a budget is filed, an agreed budget discussion report must be filed by all parties (other than litigants in person) no later than 7 days before the first case management conference. A failure to file a budget despite being required to do so is, by virtue of CPR 3.14, to be treated as having filed a budget comprising only the applicable court fees "unless the court otherwise orders". The consequences of a failure to file a budget within time are thus draconian – see Mitchell v News Group Newspapers Ltd [2014] 1 WLR 795 at [30]. The merit of the rule is that it sets out a stark and simple default sanction: see Mitchell at [58].*

*18. CPR 3.15 provides that the court may manage costs to be incurred by any party. It goes on to state as follows:*

*"(2) The court may at any time make a "costs management order". Where costs budgets have been filed and exchanged the court will make a costs management order unless it is satisfied that the litigation can be conducted justly and at proportionate cost in accordance with the overriding objective without such an order being made."*

*19. A costs management order is a recording of the extent to which budgets are agreed between the parties or in respect of budgets or parts of budgets which are not agreed, a record of the court's approval after making appropriate revisions. Once a costs management order has been*

*made the court will thereafter control the parties' budgets in respect of recoverable costs (see CPR 13.15 (3)).*

*20.CPR 3.16 states that a hearing convened solely for the purpose of costs management is to be referred to as a "costs management conference" and is to be conducted by telephone or in writing where practicable.*

*21.CPR 3.17 provides that when making any case management decisions the court will have regard to any available budgets of the parties and will take into account the costs involved in each procedural step, irrespective of whether any costs management order has been made.*

*22.CPR 3.18 is central to the present dispute and provides as follows:*

*"Assessing costs on the standard basis where a costs management order has been made*

*3.18 In any case where a costs management order has been made, when assessing costs on the standard basis, the court will –*

*(a) have regard to the receiving party's last approved or agreed budget for each phase of the proceedings; and*

*(b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so.*

*(Attention is drawn to rules 44.3(2)(a) and 44.3(5), which concern proportionality of costs.)"*

*23.The rule makes it clear that the assessment is to be by reference to the budget phases rather than the total budget. The notes to CPR 3.18 in the White Book suggest that the reference to CPR 44.3(2)(a) and 44.3(5) indicates that once pre-incurred costs outside the budget are assessed on the basis of having been reasonably incurred and reasonable in amount, and then added to the budgeted costs, the total figure is still subject to an overall assessment of proportionality.*

*24.Practice Direction 3E supplements the rules, as already referred to above. It provides, amongst other things, as follows:*

*"D. Costs management orders*

*...*

*7.3 If the budgets or parts of the budgets are agreed between all parties, the court will record the extent of such agreement. In so far as the budgets are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgets. The court's approval will relate only to the total figures for each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure. When reviewing budgets, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.*

...

*7.6 Each party shall revise its budget in respect of future costs upwards or downwards, if significant developments in the litigation warrant such revisions. Such amended budgets shall be submitted to the other parties for agreement. In default of agreement, the amended budgets shall be submitted to the court, together with a note of (a) the changes made and the reasons for those changes and (b) the objections of any other party. The court may approve, vary or disapprove the revisions, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed....*

*7.7 If interim applications are made which, reasonably, were not included in a budget, then the costs of such interim applications shall be treated as additional to the approved budgets.*

...

*7.10 The making of a costs management order under rule 3.15 concerns the total allowed for each phase of the budget. It is not the role of the court in the costs management hearing to fix or approve the hourly rates claimed in the budget. The underlying detail in the budget for each phase used by the party to calculate the totals claimed is provided for reference purposes only to assist the court in fixing a budget."*

41. After looking at a number of recent cases, authorities decided in various contexts and also looking at the respective arguments for the appellant and respondent she expressed her views as follows:

*66. The starting point for any analysis must be section 11 of CPR Part 3 which contains the regime under which costs budgeting was introduced. The effect of a costs management order is addressed in CPR 3.18 :*

*"3.18 In any case where a costs management order has been made, when assessing costs on the standard basis, the court will –*

*(a) have regard to the receiving party's last approved or agreed budget for each phase of the proceedings; and*

*(b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so."*

*67. The words are clear. The court will not – the words are mandatory - depart from the budget, absent good reason. On a detailed assessment on a standard basis, the costs judge is bound by the agreed or approved costs budget, unless there is good reason to depart from it. No distinction is made between the situation where it is claimed that budgeted figures are or are not to be exceeded. It is not possible to square the words of CPR 3.18 with the suggestion that the assessing costs judge may nevertheless depart from the budget without good reason and carry out a line by line assessment, merely using the budget as a guide or factor to be taken into account in the subsequent detailed assessment exercise. The obvious intention of CPR 3.18 was to reduce the scope of and need for detailed assessment. The Respondent's approach would defeat that object.*

*68. This straightforward conclusion reflects the fact that costs budgeting involves the determination of reasonableness and proportionality (see paragraph 7.3 of Practice Direction 3E and paragraph 3 of the Guidance Notes to Precedent H). It is important to remember at the outset (and also in the context of the debate as to the meaning of the word "budget" addressed below) precisely what a judge is doing at the cost-budgeting stage. He/she is not identifying what is the maximum amount by way of future costs considered to be reasonable and proportionate. He/she is identifying what future costs are reasonable and proportionate.*

*69. I reject the Respondent's suggestion that, on this construction, CPR 3.18(a) is otiose. The conjunctive clauses when read together direct the court that it must take the budget into account by having regard to it by not departing from it, absent good reason.*

*70. Albeit that I accept that the issue has to be decided effectively on first principles, the approach set out above is consistent with the (albeit obiter but very recent) comments of the Court of Appeal in SARPD Oil. Read as a whole (and in particular [41], [43], [47], [49] and [52]) it is clear that the Court of Appeal's position was that, once a budget was agreed or approved, then Part 3.18(b) applied. The fact that the court only described the budget as "a strong guide as to the likely costs order to be made after trial" reflects that the fact that a court, on an application for security for costs, could not go further than it did. At that stage, it could not be said precisely how the case might evolve, for example as to its ultimate quantum. The wording does not in my judgment provide support for the Costs Judge's overall conclusion.*

71. *The approach is also consistent with the thinking of Coulson J in MacInnes (at [25]). Again, he could not go further than he did in the context of an application for an interim payment on account of costs. But, as he commented, the significance of the rule in CPR 3.18 cannot be overstated. The setting of a costs budget is an exercise of fundamental importance: underpinned by the consequences of failure to file a cost budget as required (as set out in CPR 3.14). Its importance is underlined by the detailed provisions within CPR 3 section II, Practice Direction 3E and Precedent H in setting out the exercise that is to be carried out. There is thus, for example, express provision for the updating and revising of the costs budget as the proceedings progress, if necessary and appropriate. It is fair to ask the question that, if it be right that an agreed or approved costs budget is no more than a guide at detailed assessment, even if a strong one, what point there can be in the parties and the court spending so much time on the cost budgeting exercise. The Respondent counters that it will still have value in that it can be a strong guide and so be likely to deter some detailed assessments altogether. But it is still difficult to see why so much time and money would be invested at the costs management stage if the budget were to be no more than a guide in any case where there is an underspend.*

72. *It is also a view which coincides with that of Senior Costs Judge Master Gordon-Saker in Collins, who felt able to resolve the matter in only a few short paragraphs, and the view of Master Whalan in Harrison.*

73. *Nothing in paragraph 7.3 of Practice Direction 3E, where it is stated that when reviewing budgets the court will not carry out a detailed assessment "in advance", impinges on this approach. The Practice Direction is there setting out the nature of the assessment exercise at the costs budgeting stage. The court will not carry out a detailed assessment at that stage; rather it will consider whether the budgeted costs fall within the range of reasonable and proportionate costs. It is not stating that, whatever costs budget is approved or agreed, there will be an unfettered detailed assessment in due course. The fact that hourly rates are not fixed at the costs budgeting stage is no obstacle to such a conclusion. As the notes to CPR 3.18 in the White Book reflect, the fact that hourly rates at the detailed assessment stage may be different to those used for the budget may be a good reason for allowing less, or more, than some of the phase totals in the budget.*

74. *There is no need for present purposes to examine in any detail what might and might not be a "good reason" for the purpose of CPR 3.18. But clearly, if the receiving party has spent less than was agreed or approved in the budget, the need to comply with the indemnity principle would require departure from the budget. There is no question of a party receiving more by way of costs than was actually spent. As District Judge Baldwin sitting as a Regional Costs Judge in Jones commented in this context (at [34(iv)]), the incurring of costs lower than were budgeted for would clearly be a good reason for departure from the budget:*

"...but, in my judgment, the presumption must then be that the lower figure is even more reasonable and proportionate than the approved amount, and therefore a high burden would remain upon the paying party to show a good reason to award less than the lower figure. The raising of such an argument would only exceptionally, in my view, be a proportionate or appropriate use of scarce court resources."

75. The question of what was and was not a good reason was of course the only point at issue in *Henry* (see [8]) and then in circumstances where a party had exceeded the costs budget and not complied with the costs budgeting provisions. I do not consider that the decision in *Henry* points to a conclusion different to that expressed above. It comes of course from a highly authoritative source, albeit at a very early stage in the development of the costs budgeting regime. The taking of a cautious approach would be understandable. But in any event its focus was on a different issue, namely what was a good reason for departure from a budget, and then on a different factual premise, where the costs being claimed exceeded the budget. There is no reason to suppose that the court heard detailed submissions on the position where the costs being claimed were less than budgeted. It was also a decision in the context of the pilot scheme under CPR 51D which had, for example, no equivalent of CPR 44.3(5) or 44.3(2)(a). Moreover, the comments in [16] (that where a party is claiming less than budgeted costs, to award no more than has been incurred does not involve a departure from the budget) lead to the same result in practice as if one treats the indemnity principle as a good reason for departure from the budget. It is also right to record that the notes in the *White Book* at CPR 3.18 (at page 122) following *Henry* suggest that the authors did not take the view that *Henry* in any way meant that, where the costs being claimed were less than budgeted, the budget was anything other than binding, absent good reason to depart.

76. Both parties understandably placed far less emphasis on the comments of Moore-Bick LJ in *Troy*. Those comments were made in the context of the granting of permission only without full argument but, more importantly, the appeal again arose in the context of a pilot scheme, this time in the *Mercantile and Technology and Construction Courts*. Significantly, CPR PD 51G only referred expressly to questions of reasonableness and proportionality in the context of already incurred costs. That is in stark contrast to the clarity of *Practice Direction 3E* (at paragraph 7.3) where it is clear that questions of reasonableness and proportionality are to be considered when setting each phase of a budget. Moore-Bick LJ also expressed concern that the judge below had not approved figures by reference to reasonableness or proportionality but by reference to whether any figure was not "grossly disproportionate".

77. Nor do the remarks of Warby J in *Simpson* cut across this approach. Warby J emphasised the importance of adherence to costs budgeting. His comments in [19] (and [20]) are again consistent with the notion that breach of the indemnity principle would be a good reason for

*departure from the budget but that good reason would be needed to depart either upwards or downwards from an agreed or approved budget.*

*78. It is of course right to say that costs budgeting under section II of CPR 3 does not "replace" detailed assessment. It is common ground that, as the Costs Judge remarked (at [53]), Precedent Q is not an advanced assessment of the recoverable costs. It informs the court, in a readily accessible format, what has been spent compared with the budget. But the Appellant is not contending that there should be no detailed assessment. On the contrary, the question is how that assessment should be conducted. Further and on any analysis, there remains room for detailed assessment outside the budget – for example in relation to pre-incurred costs not the subject of the costs budget; costs of interim applications which were reasonably not included in a budget; where costs are being assessed on an indemnity basis; where the costs judge finds there to be a good reason for departing from the costs budget.*

*79. Equally the addition of the receiving party's last approved or agreed budget as being a factor to which the court will also have regard (in CPR 44.4 (3)(h)) does not demote the budget to the status of a guide alone. At the risk of repetition, this approach ignores the express words of CPR 3.18 (and, for that matter, perhaps also CPR 44.4(2)). The introduction of CPR 44.4(3)(h) ensured that there was no tension between CPR 3.18(b) and CPR 44.4. The court will be having regard to the receiving party's last approved or agreed budget by respecting it or finding that there is some good reason to depart from it. Additionally, there will be occasions when the budget is relevant in relation to the assessment of costs falling outside it. Put shortly, there is nothing in CPR 44 that overrides CPR 3.18.*

*80. The fact that CPR 3.18 only draws attention to CPR 44.3(2)(a) and not (b) is also to be noted. It avoids any potential conflict between CPR 3.18 and 44.3(2)(b). In relation to matters the subject of agreement or approval in the costs budget, Part 3.18(b) applies.*

*81. I do not consider the debate as to whether a costs budget is to be seen as an available fund as opposed to a fixed sum to be particularly instructive. The plain meaning of the word "budget" may be said to equate with an available fund. But if costs within an agreed or approved budget can then be reduced on detailed assessment, it is difficult to see how it can be said that the budget is available. Effectively the budget then becomes a cap. Jackson LJ stated in clear terms (adopting what he described as a helpful summary from the Law Society) that budgeting is not costs capping (see paragraph 6.6 of chapter 40 of the Final Report). That then produces the obvious oddity of there being two parallel costs-capping regimes: one in section II of CPR Part 3 and one in section III of CPR Part 3. As Master Gordon-Saker commented in Collins (at [25]), there would be "no logic" in having two systems of costs capping running in parallel in this way.*

82. *This approach does not make it impossible to apply the proportionality test identified in May or more generally. The proportionality test can be applied at the time of fixing the budget. If there is good reason to depart from that decision, the judge on detailed assessment can do so. Additionally, as the notes to CPR 3.18 in the White Book suggest, once pre-incurred costs have been assessed on the basis of reasonableness and added to the budgeted costs, the total figure is then subject to an overall assessment of proportionality. So, unless there is good reason to depart from the budget, the overall figure can never be less than the budget, but it can be less than the total of the budget sum plus the reasonably incurred and reasonable in amount non-budgeted sum.*

83. *Fundamentally, this conclusion reflects what is in my judgment the clear intention of costs management as set out in CPR 3.18(b), namely to reduce the cost of the detailed assessment process by the treatment of agreed or approved cost budgets as binding, absent good reason to proceed otherwise. If this approach be right, the scope and cost of detailed assessment of costs on a standard basis will indeed be reduced materially. Jackson LJ's view was that the burden of costs management, if done properly, would save substantially more costs than it generates, even if he reached no final conclusions and made no final recommendations in the Final Report as to how that would be achieved. It is achieved if there is a saving in the time and costs needed for detailed assessment, rather than duplication of time and expense in an unfettered landscape (even if the budget is seen as a strong guide). Such a solution might appear to be an obvious one, even if not one upon which Jackson LJ fixed conclusively in the Final Report.*

84. *The Costs Judge expressed concern that such an approach would, on the other hand, lead to longer and more expensive cost management hearings. With proper and realistic co-operation and engagement between the parties that should not be the case. The costs budgeting exercise already takes up significant amounts of court time and the parties' time in preparation. There is already a very substantial investment. Further, the costs budgeting exercise is not intended to be a detailed assessment, and the parties and the court should not approach it as such. It is a broad, phase-based assessment which will, albeit performed on a principled and carefully timetabled basis, inevitably be rough and ready in places. The clear intention behind and effect of the cost budgeting regime is that it is nevertheless to result in a budget from which the court will not depart on detailed assessment on a standard basis, unless there is good reason to do so. There is a balance to be struck: on any view, the Respondent's approach would involve very significant duplication and the added burden of having to cross-refer at each stage to the costs budget as a guide, albeit not a binding one.*

85. *This is of course a topical area, with a growing trend towards the fixing of costs in advance. There is a current consultation by the Department of Health with regard to fixing fees in clinical negligence claims for sums up to £25,000. There is the ongoing review by Jackson LJ with*

*regard to fixed costs in all areas of civil litigation, including clinical negligence and personal injury, for claims up to £250,000. (It goes without saying that the costs budgeting regime, even on the Appellant's case, is far more refined than a fixed cost regime.)*

*86. Further, as the Appellant points out, complaints by the Respondent as to shortcomings and inevitable inaccuracies in the cost budgeting process cannot avail the Respondent. Where costs claimed are less than the budgeted figure, then the inaccuracies will be irrelevant, since the receiving party will only recover the lower figure (because there would be good reason to depart by reason of the indemnity principle). Equally, where costs claimed were higher, the receiving party would have to show good reason for departure from the budget. Nor is it fair, as the Respondent does, to refer to the judges carrying out the costs budgeting exercise as "neophytes". As Jackson LJ made clear in the Final Report, with training and experience all civil judges are equal to the task of costs budgeting.*

*87. As already indicated, there is no suggestion by the Respondent that the budgeted figure is not fit for purpose as something not to be departed from without good reason if the sums claimed exceed the budget. No compelling argument has been advanced as to why an approved costs budget is sufficiently good to be adhered to if it is exceeded, but not if the sums budgeted for are not reached. It might even be said that such an approach would act perversely as a disincentive to minimise costs incurred under the budget: the receiving party stands to gain (by avoiding a full detailed assessment) if the budget is exceeded. Nor do I consider that that the result is at odds with a stricter approach to standard basis assessment. The court still has to focus on reasonableness and proportionality.*

*88. Finally, real emphasis needs to be placed on the importance of certainty on costs in the context of access to justice. The desirability of predictability was touched on by the Court of Appeal in SARPD Oil (at [43] already set out above but repeated for ease of reference) and albeit commenting by reference to pre-incurred costs:*

*"...In such a case, the party who had put forward the costs budget would have been encouraged by the court to litigate on the understanding and with the legitimate expectation that such costs would be likely to be recovered if he were successful, and good reason would need to exist to justify defeating that expectation."*

*89. Similarly, Jackson LJ in The Reform of Civil Litigation (2016) said this (at paragraph 14-019):*

*"Both sides know where they stand financially. They have clarity as to a) what they will recover if they win...and b) what they will pay if they lose (own actual costs + other parties' recoverable costs) . . . This information is of obvious benefit for those making decisions about the future conduct of litigation."*

90. *Fidelity to the clear words of CPR 3.18, as set out above, will achieve the dual purpose both of reducing the costs of the detailed assessment process and of securing greater predictability on costs exposure/recovery for the parties. Both the receiving and paying party have the benefit of the legitimate expectation. This is a central pillar of access to justice in a world where costs will always be a primary consideration for those contemplating or participating in litigation, and consistent with the overriding objective. The expensive costs of the detailed assessment procedure are reduced and the case is dealt with justly, with both parties knowing from an early stage what their potential costs liability is, absent good reason to depart from the budget.*

42. It is important to note what this case is about: it is about budgeted costs, not incurred costs. Therefore its utility might be limited in cases where the claim has been “front loaded”. The Learned Judge’s conclusions were as follows:

91. *The judgment below was the product of the careful and reasoned thinking of an experienced specialist costs (and clinical negligence) judge, which naturally deserves respect. However, there is on any view legitimate scope for disagreement, as other recent judgments from specialist costs judges have readily demonstrated. For the reasons set out above, I have come to the conclusion that the answer given to the preliminary issue by the Costs Judge was wrong.*

92. *In my judgment, the answer to the preliminary issue is as follows: where a costs management order has been made, when assessing costs on the standard basis, the costs judge will not depart from the receiving party’s last approved or agreed budget unless satisfied that there is good reason to do so. This applies as much where the receiving party claims a sum equal to or less than the sums budgeted as where the receiving party seeks to recover more than the sums budgeted.*

93. *The appeal will therefore be allowed.*

94. *To use a preliminary issue in a factual vacuum for resolution of issues such as this is inevitably to apply a blunt tool. There are so many potential variables and nuances that the answer on any particular given set of facts might require refinement. But the central message is that set out in CPR 3.18, namely that the approved or agreed budget will bind the parties at the detailed assessment stage (on a standard basis) whether the costs claimed are for less than, equal to or more than the sums approved or agreed by that budget, unless there is good reason otherwise.*

95. *One can be confident that this decision on first appeal will not end the debate. I respectfully make the perhaps obvious point that the issue would appear to be ripe for early consideration by the Court of Appeal raising, as it does, an important point of principle or practice. Indeed, I learned only days before the appeal came before me that there is in fact an appeal already listed*

*to be heard in the Court of Appeal this May against Master Whalan's decision in Harrison (by way of "leapfrog" direction and albeit on a "floating" basis only). It may be that any appeal from this decision could be listed alongside that matter, if that were thought appropriate.*

*96. Whatever the future holds, however, it is important that a growing body of judgments on the same issue does not emerge in piecemeal manner. It is essential that there is procedural co-ordination. The same solicitors and/or counsel are involved in many of these matters in what is a relatively small world. I am told that many stays of detailed assessments are already in place, pending the outcome of this appeal. The parties may accept my judgment as binding for their purposes. Alternatively, it may be that further stays need to be imposed, to prevent unnecessary court and judicial time and expense being devoted to a debate which the Court of Appeal is very shortly going to consider.*

43. It follows that within 3 months this decision is likely to be reviewed. Again, watch this space.

## QUOCS

44. QUOCS was introduced as part of the LASPO 2012 reforms on 1st April 2013 to provide that, subject to a limited number of exceptions, a costs Order made against a losing claimant bringing a personal injury claim could not be enforced against the claimant.
45. The principal exceptions provided for QUOCS protection not to apply in circumstances where a claim was struck out, where it was found to be fundamentally dishonest and when it was brought for the financial benefit, in whole or in part of another party. This was the quid pro quo, for the abolition of recoverable liabilities namely success fees and ATE insurance premiums.
46. The result has been that the insurance industry and other serial litigants if they successfully defend a claim at trial on its merits will be left with an irrecoverable bill for their own costs.
47. One of the more predictable results of the LASPO 2012 reforms is that the last 3 1/2 years have seen an upsurge in wasted costs applications against solicitors representing the losing claimants in personal injury claims, numerous allegations of fundamental dishonesty being levied at claimants sometimes with and sometimes without, a proper foundation and the development of some arguments that could be regarded as risible, including the argument that a claim struck out is synonymous with it being dismissed at trial.
48. A far more fruitful argument has long seemed to me to be the potential for a non-party costs application to be made under section 51 of the Senior Courts Costs Act 1981 against an ATE insurer who has written a policy providing an indemnity for adverse costs for the benefit of a claimant in a personal injury claim.

49. That few such applications have been made is surprising. I suspect the reason is that it has simply been assumed that the QUOCS scheme precludes any such applications being made.
50. The starting point to note is that QUOCS protection applies to claimants, not to insurance companies that have agreed to provide them with an insurance indemnity for their own unrecovered costs and any adverse costs, they may be liable to pay.

51. Rule 44.14 provides as follows:

*(1) Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant.*

*(2) Orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.*

*(3) An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record.*

52. It will be noted that the express scope of the prohibition on enforcement of costs Orders is limited to those costs Orders made against the claimant. There is nothing in the prohibition which would preclude an application being made directly against an ATE insurer.

53. Moreover, the rules plainly contemplate that a claimant who has had a costs Order made against them, is liable to pay the costs of that Order: it remains due and owing but is simply unenforceable, meaning that court proceedings to recover the costs will fail. This seems clear from rule 44.14(3), which provides that an unsatisfied costs Order will not taint the claimant's credit record by reason of its status on the court record. There is no wider development of a "hold harmless" provision, nor do the Rules provide, as they might, that no costs Order at all should be made against a claimant, merely that such an Order is unenforceable.

54. The criteria upon which a non-party costs Order might be made would be drawn from the leading case on non-party costs Orders against legal expense insurers, that of *Murphy and Another -v- Young & Co.'s Brewery and Another* [1997] 1 W.L.R. 1591 which provided the following reasoning for making such an Order as follows drawing together a number of principles:

*(1) In Giles v. Thompson [1994] 1 A.C. 142 , 164 Lord Mustill suggested that the current test of maintenance should ask the question whether: "there is wanton and officious intermeddling with the disputes of others in where the meddler has no interest whatever, and where the assistance*

*he renders to one or the other party is without justification or excuse.” Where such a test is satisfied, I would expect the court to be receptive to an application under section 51 that the meddler pay any costs attributable to his intermeddling.*

*(2) Where a non-party has supported an unsuccessful party on terms that place the non-party under a clear contractual obligation to indemnify the unsuccessful party against his liability to pay the costs of the successful party, it may well be appropriate to make an order under section 51 that the non-party pay those costs directly to the successful party. Such an order may, for instance, save time and costs in short-circuiting the Third Parties (Rights against Insurers) Act 1930 . Bourne v. Colodense Ltd. [1985] I.C.R. 291 is a case where the court might well have thought fit to make such an order had it appreciated that it had jurisdiction to do so.*

*(3) Where a trade union funds unsuccessful litigation on behalf of a member the following factors, in addition to the funding itself, are likely to be present and, where they are, to make it appropriate to order the union to pay the successful party’s costs should such an order be necessary: (a) an implied obligation owed by the union to its member to do so see (2) above; (b) an interest on the part of the union in supporting and being seen to support the member’s claim; (c) the conduct of the litigation; (d) expectation based on convention that the union will bear the costs of the successful party should the member lose.*

*(4) Where an unsuccessful defendant’s costs are funded by insurers who have provided cover against liability, which is not subject to any relevant limit, the same considerations that I have set out under (3) are likely to apply.*

55. The analysis above is untested as far as I can glean in any decided case post April 2013. There are of course excellent arguments which ATE insurers could deploy to argue that they should not be made subject to non-party costs Orders, but given the length of this paper already, I shall have to save those for another day.

#### **Late Acceptance of Part 36 Offers**

56. The issue of late acceptance of a claimant’s Part 36 offer in personal injury proceedings, by a defendant, and whether this in turn permits escape from the regime of fixed costs is continuing to attract interest, with the respective claimant and defendant interests arguing the toss vigorously.

57. I shall first of all look at the arguments from the defendant’s perspective and leave the very respectable arguments that exist for those who represent claimants in abeyance for now given that I am already at 20,000 words.

58. The starting point in the context of a modestly valued claim for damages for personal injuries sustained in a road traffic accident is rule 45.29:

*45.29B*

*Subject to rules 45.29F, 45.29G, 45.29H and 45.29J, if, in a claim started under the RTA Protocol, the Claim Notification Form is submitted on or after 31st July 2013, the only costs allowed are—*

*(a) the fixed costs in rule 45.29C;*

*(b) disbursements in accordance with rule 45.29I.*

59. There is an escape clause: rule 45.29J affords the Court discretion to allow more than fixed costs, but the exercise of the discretion is tightly prescribed by the rules. There must be something “exceptional” to justify a departure from the fixed costs regime:

*(1) If it considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred to in rules 45.29B to 45.29H.*

*(2) If the court considers such a claim to be appropriate, it may—*

*(a) summarily assess the costs; or*

*(b) make an order for the costs to be subject to detailed assessment.*

*(3) If the court does not consider the claim to be appropriate, it will make an order—*

*(a) if the claim is made by the claimant, for the fixed recoverable costs; or*

*(b) if the claim is made by the defendant, for a sum which has regard to, but which does not exceed the fixed recoverable costs, and any permitted disbursements only.*

60. This is a provision which repays careful consideration: there is very little law, on what constitutes “exceptional” at the current time.

61. Turning to consider Part 36, rule 36.11 provides so far as is material:

*(1) A Part 36 offer is accepted by serving written notice of acceptance on the offeror.*

*(2) Subject to paragraphs (3) and (4) and to rule 36.12, a Part 36 offer may be accepted at any time (whether or not the offeree has subsequently made a different offer), unless it has already been withdrawn.*

62. Turning to rule 36.13 that states as far as is material:

*(1) Subject to paragraphs (2) and (4) and to rule 36.20, where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings (including their recoverable pre-action costs) up to the date on which notice of acceptance was served on the offeror.*

*(Rule 36.20 makes provision for the costs consequences of accepting a Part 36 offer in certain personal injury claims where the claim no longer proceeds under the RTA or EL/PL Protocol.)*

*(2) Where—*

*(a) a defendant's Part 36 offer relates to part only of the claim; and*

*(b) at the time of serving notice of acceptance within the relevant period the claimant abandons the balance of the claim,*

*the claimant will only be entitled to the costs of such part of the claim unless the court orders otherwise.*

*(3) Except where the recoverable costs are fixed by these Rules, costs under paragraphs (1) and (2) are to be assessed on the standard basis if the amount of costs is not agreed.*

*(Rule 44.3(2) explains the standard basis for the assessment of costs.)*

*(Rule 44.9 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.)*

*(Part 45 provides for fixed costs in certain classes of case.)*

*(4) Where—*

*(a) a Part 36 offer which was made less than 21 days before the start of a trial is accepted;  
or*

*(b) a Part 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period; or*

*(c) subject to paragraph (2), a Part 36 offer which does not relate to the whole of the claim is accepted at any time,*

*the liability for costs must be determined by the court unless the parties have agreed the costs.*

*(5) Where paragraph (4)(b) applies but the parties cannot agree the liability for costs, the court must, unless it considers it unjust to do so, order that—*

*(a) the claimant be awarded costs up to the date on which the relevant period expired; and*

*(b) the offeree do pay the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance.*

*(6) In considering whether it would be unjust to make the orders specified in paragraph (5), the court must take into account all the circumstances of the case including the matters listed in rule 36.17(5).*

*(7) The claimant's costs include any costs incurred in dealing with the defendant's counterclaim if the Part 36 offer states that it takes it into account.*

63. It will be noted that rule 36.13(5) does not specify that the costs are to be awarded on the indemnity basis in contrast with rule 36.17 which expressly does prescribe when indemnity costs can be awarded under Part 36: when a claimant's Part 36 offer is beaten at trial.

64. Rule 36.17 provides:

*(1) Subject to rule 36.21, this rule applies where upon judgment being entered—*

*(a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or*

*(b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.*

*(Rule 36.21 makes provision for the costs consequences following judgment in certain personal injury claims where the claim no longer proceeds under the RTA or EL/PL Protocol.)*

*(2) For the purposes of paragraph (1), 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.*

*(3) Subject to paragraphs (7) and (8), where paragraph (1)(a) applies, the court must, unless it considers it unjust to do so, order that the defendant is entitled to—*

*(a) costs (including any recoverable pre-action costs) from the date on which the relevant period expired; and*

*(b) interest on those costs.*

*(4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—*

*(a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;*

*(b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;*

*(c) interest on those costs at a rate not exceeding 10% above base rate; and*

*(d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—*

*(i) the sum awarded to the claimant by the court; or*

*(ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs—*

*Amount awarded by the court*

*Prescribed percentage*

*Up to £500,000*

*10% of the amount awarded*

*Above £500,000*

*10% of the first £500,000 and (subject to the limit of £75,000) 5% of any amount above that figure.*

*(5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including—*

*(a) the terms of any Part 36 offer;*

*(b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;*

*(c) the information available to the parties at the time when the Part 36 offer was made;*

*(d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and*

*(e) whether the offer was a genuine attempt to settle the proceedings.*

65. The rules noted above cross-refer to two further rules which apply in the context of a case which started but did not continue under the RTA Protocol in order to ensure that Part 36 and the fixed costs rules in part 45 read seamlessly. Rule 36.20 specially deals with the costs consequences of acceptance of a Part 36 offer:

*(1) This rule applies where a claim no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A(1).*

*(2) Where a Part 36 offer is accepted within the relevant period, the claimant is entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which notice of acceptance was served on the offeror.*

*(3) Where—*

*(a) a defendant's Part 36 offer relates to part only of the claim; and*

*(b) at the time of serving notice of acceptance within the relevant period the claimant abandons the balance of the claim,*

*the claimant will be entitled to the fixed costs in paragraph (2).*

*(4) Subject to paragraphs (5), (6) and (7), where a defendant's Part 36 offer is accepted after the relevant period—*

*(a) the claimant will be entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which the relevant period expired; and*

*(b) the claimant will be liable for the defendant's costs for the period from the date of expiry of the relevant period to the date of acceptance.*

*(5) Subject to paragraphs (6) and (7), where the claimant accepts the defendant's Protocol offer after the date on which the claim leaves the Protocol—*

*(a) the claimant will be entitled to the applicable Stage 1 and Stage 2 fixed costs in Table 6 or Table 6A in Section III of Part 45; and*

*(b) the claimant will be liable for the defendant's costs from the date on which the Protocol offer is deemed to have been made to the date of acceptance.*

*(6) In a soft tissue injury claim, if the defendant makes a Part 36 offer before the defendant receives a fixed cost medical report, paragraphs (4) and (5) will only have effect if the claimant accepts the offer more than 21 days after the defendant received the report.*

*(7) In this rule, "fixed cost medical report" and "soft tissue injury claim" have the same meaning as in paragraph 1.1(10A) and (16A) respectively of the RTA Protocol.*

*(8) For the purposes of this rule a defendant's Protocol offer is either—*

*(a) defined in accordance with rules 36.25 and 36.26; or*

*(b) if the claim leaves the Protocol before the Court Proceedings Pack Form is sent to the defendant—*

*(i) the last offer made by the defendant before the claim leaves the Protocol; and*

*(ii) deemed to be made on the first business day after the claim leaves the Protocol.*

(9) A reference to—

(a) the “Court Proceedings Pack Form” is a reference to the form used in the Protocol; and

(b) “business day” is a reference to a business day as defined in rule 6.2.

(10) Fixed costs shall be calculated by reference to the amount of the offer which is accepted.

(11) Where the parties do not agree the liability for costs, the court must make an order as to costs.

(12) Where the court makes an order for costs in favour of the defendant—

(a) the court must have regard to; and

(b) the amount of costs ordered must not exceed,

the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 applicable at the date of acceptance, less the fixed costs to which the claimant is entitled under paragraph (4) or (5).

(13) The parties are entitled to disbursements allowed in accordance with rule 45.29I incurred in any period for which costs are payable to them.

66. This rule contains no provisions for the costs consequences of acceptance of a Part 36 offer to the defendant made by the claimant outside the “relevant period” i.e. the 21 days. The effect, therefore, is that the Court is thrown back onto the general provision under rule 36.13(4)(b) and 36.13(5): it has a discretion as to whether to order costs or not.

67. However, there is an important pointer in the rules to what was contemplated to be the just result. Where a claimant accepts a defendant’s Part 36 offer out of time, so that the claimant is entitled to costs until 21 days after the date of the offer, and the defendant to its costs thereafter, pursuant to rule 36.20(12) the costs the claimant must pay are not costs on the standard basis but costs which cannot exceed an amount calculated by reference to the fixed costs in table 6B, 6C or 6D.

68. In effect, although the costs liability is split between the parties, both sets of costs are calculated by reference to the tables for fixed costs.

69. Rule 36.21 deals with the costs consequences after judgment is obtained in a case which started in the RTA Protocol. It has no application to a case that settles before trial and is stayed, pursuant to rule 36.14, without judgment being entered.
70. The origin of the rule in rule 36.13(5) is that it represents the codification of the approach and principles set out in Lumb -v- Hampsey [2011] EWHC2808. The origins of the rule are therefore grounded in the need in some cases, to adjust the normal “before and after” rule for the allocation of costs: eg where a claimant accepts a defendant’s Part 36 offer late, because of belated disclosure by the defendant or other conduct justifying disapplication of the normal rule.
71. The rule gives the Court jurisdiction to potentially make an award of indemnity costs or standard basis costs. The issue is what criteria would justify an award of other than fixed costs.
72. The leading case on when it is appropriate to award indemnity costs remains that of Excelsior Industrial and Commercial Holdings -v- Salisbury Hammer Aspden and Johnson [2002] EWCA Civ 879 where Lord Woolf LCJ made a number of observations. As a statement of principle binding upon the lower Courts, mere late acceptance of a settlement offer, without more is not conduct justifying an award of indemnity costs.
73. Similar considerations drove the decision in the case of Fitzpatrick Contractors Ltd -v- Tyco Fire and Integrated Solutions [2009] EWHC 274; there has to be something more than late acceptance. The case is important for the very detailed and careful exposition of Coulson J, forming part of the ratio of the case, as to why mere late acceptance of a claimant’s Part 36 offer did not generate a presumption in favour of indemnity costs.

*19 First, I am bound to note that there is no reference at all within CPR 36.10(4) and (5) to a presumption that, unless it is unjust to do so, the court will order a late-accepting defendant to pay the claimant’s costs on an indemnity basis. The absence of such a provision is important. The usual basis for the assessment of costs is the standard basis; if there is an entitlement to seek indemnity costs, then it is expressly spelled out in the CPR , either as a rebuttable presumption (such as the presumption in r36.14 ) or by way of conduct ( r44.3 ). There is no rebuttable presumption expressed here.*

*20 Although it is always dangerous to speculate how and why the rules say what they do, it seems to me that there is a relatively straight forward explanation for why this part of the CPR is in its present form. A claimant’s entitlement to indemnity costs when it beats its own offer after a trial was first enshrined in the old r36.21 and was plainly designed to deal with the situation where a trial had taken place and costs had been wasted because the defendant should have accepted the Part 36 offer. For the reasons explained by Lord Woolf in Excelsior, this was more advantageous than the defendant’s position under r36.20. On the words of the old r36.21 the*

situation argued for here could not have arisen, because r36.21 applied only where the defendant was held liable “for more” than the amount of the offer. Following the decision in *Read v Edmed* the rule was changed so that it expressly covered the situation where, after a trial, the claimant recovered the same as the amount of its unaccepted offer. But there is nothing on the face of any of the existing rules to suggest that this change was also designed to reward a claimant (whose offer under CPR 36.10 was accepted out of time and before there was any trial) with a rebuttable presumption in its favour in respect of indemnity costs.

21 Secondly, I consider that the court has to be very careful before inserting into a rule, which is silent on costs, a presumption of this kind, extracted from a different rule altogether. It seems to me that, on this point, Lord Woolf’s remarks in *Excelsior* are of some relevance (although I acknowledge that he was dealing there with a contrast between the old r36.21 and the old r36.20.) He concluded that, in the absence of any reference to the indemnity basis, an order for costs which the court was required to make under the old r36.20 was an order for costs on the standard basis. It seems to me that precisely the same general reasoning would apply here to CPR 36.10(4) and (5).

22 I accept Mr Thomas’s submission that the other cases relied on by Fitzpatrick, namely *Petrotrade*, *Huck* and *Read* do not offer very much assistance to the central question here, which is whether a rebuttable presumption in favour of indemnity costs, taken from a rule dealing with the situation following a trial where the offer has not been accepted, should be inferred into a rule dealing with the position prior to trial, where the offer has been accepted. I do not accept that the present situation is analogous to those cases. In all three of them, the courts were endeavouring to apply the words of the old r36.21 in a commonsense way, to achieve a just and sensible result, and to prevent injustice; they all arose after a trial on the merits (either on a summary or a full basis). In contrast, I conclude that the replacement of old r36.21 – the new CPR 36.14 – does not apply to the present case, because there has been a settlement, and it has occurred before the trial. The claimant has therefore been spared the costs, disruption and stress of the trial.

23 Thirdly, I note that r36.10(3), which deals with the situation where the claimant’s offer is accepted within the relevant period, expressly provides that costs will be assessed on the standard basis. If, therefore, there was a presumption that indemnity costs would apply under r36.10(5), when an offer was accepted outside the period, it seems to me that the rule would say so. It does not, and, in my judgment, that is not an oversight or an omission; it is because either standard or indemnity costs may be applicable where an offer is accepted after the relevant period, depending on the analysis under CPR 44.3

24 Finally, I am not persuaded that, as a matter of policy, it would be appropriate to import an indemnity costs presumption into r36.10(4) and (5). A defendant is entitled to accept an offer

*beyond the period of acceptance. In a complex case such as this, a defendant should be encouraged continuously to evaluate and re-evaluate the claim and its own response to that claim, so that even if the defendant had originally concluded that it was not going to accept the offer, it should always be prepared to change its mind. The CPR should be interpreted in a way that encourages such constant re-evaluation.*

*25 All those of us involved in civil litigation are conscious of the irony that a well-judged Part 36 offer by one party (whether claimant or defendant) at the outset of proceedings can often make a trial and a fight to the finish more, rather than less, likely, because there will often be instances where, by the time the offeree has belatedly realised that the offer was well-judged, he will have incurred considerable cost, and may feel that he has no option but to go on and fight the case through to the finish in the hope of bettering the offer. Such an outcome is not to be encouraged. There is a risk that, if a defendant belatedly changed its mind as to the acceptability of a claimant's Part 36 offer, the defendant would be discouraged from formally accepting that offer if it thought that it would have to pay indemnity costs in consequence. It would not be appropriate to construe the CPR in such a way, because that would, in my view, actively discourage late settlements and instead give rise to another reason for the offeree to push on to a trial.*

74. See further the summation by the Court in paragraphs 31 and 32:

*31 I am unable to accept that proposition. It seems to me that there is no basis for it. As I have said, a party can seek indemnity costs in one of two ways: either because there is a presumption that such costs will apply (such as under CPR 36.14) or because it can demonstrate the necessary evidence of conduct etc. pursuant to CPR 44.3. There is no basis under the CPR, or any authority of which I am aware, which would allow the court to order indemnity costs for any other reason or on any other basis.*

*32 Accordingly, Fitzpatrick's claim for indemnity costs on the basis of either a rebuttable presumption, or a watered-down conduct test, must fail as a matter of principle: in these circumstances, only a case by reference to conduct etc. pursuant to CPR 44.3 could justify such an order. Both parties made detailed submissions on questions of conduct and its relevance to the application for indemnity costs. Accordingly, if I am wrong in my rejection of either Mr Livesey's primary case, or his secondary case, or if, despite its realistic understanding of the likely outcome, Fitzpatrick maintain an entitlement to indemnity costs by reference to CPR Part 44, I now set out my views as to the parties' conduct and the overall justice of the situation.*

75. Heavy reliance is usually placed by claimants on the County Court judgment in the case of Sutherland -v- Khan 21st April 2016. District Judge Besford felt able to distinguish the case of Fitzpatrick. He did not, however, identify any decision which had overruled this case and was bound to apply it. If District Judge Besford doubted the correctness of Fitzpatrick, his proper course was to apply it and grant

permission to appeal: see the decision of the Court of Appeal in the case of Sayce -v- TNT (UK) Limited [2011] EWCA Civ 1583 at paragraphs 22 and 23, on the application of the doctrine of stare decisis and precedent at common law.

76. An alternative argument is usually based upon the case of Broadhurst -v- Tan [2016] EWCA Civ 94 but that case is not in point that concerns a judgment after trial and the application of rule 36.17, which does expressly provide for an award of indemnity costs.
77. It is anticipated that when the authorities of Excelsior and Fitzpatrick have been considered, as a fallback position, an award of standard basis costs will often be sought by those representing claimants.
78. Such an award could be said to be wrong in principle. Although the court retains a discretion, it must be exercised pursuant to the rules, in accordance with the statutory purpose and in a way that accords with the overriding objective.
79. First, and returning to the starting point, Rule 45.29B makes it clear that pursuant to rule 45.29J only in “exceptional” circumstances will an award in excess of fixed costs be made.
80. Secondly, the true ratios of both Excelsior and Fitzpatrick noted above are that there is nothing culpable in a party re-evaluating its case and accepting a Part 36 offer late, or out of time. Indeed to do so runs with the grain of the CPR which requires parties to consider settlement as an alternative to a contested trial (see in particular paragraphs 24 and 25 of the judgment) noted above.
81. Thirdly, the internal construction of Part 36, in particular the way a defendant’s costs are dealt with when a claimant accepts a defendant’s Part 36 offer late and pursuant to rule 36.20(12) the claimant is only exposed to costs capped at the level of fixed costs. This is a powerful pointer, for a defendant only to be exposed to a greater quantum of fixed costs, for late settlement.
82. Fourthly, the claimant’s position in an appropriate case is in any event protected by the rules under rule 36.13(5) or rule 45.29J, misconduct on the part of the defendant or exceptional circumstances can ground an application for standard or indemnity basis costs.

**Andrew Hogan**  
**March 2017**