

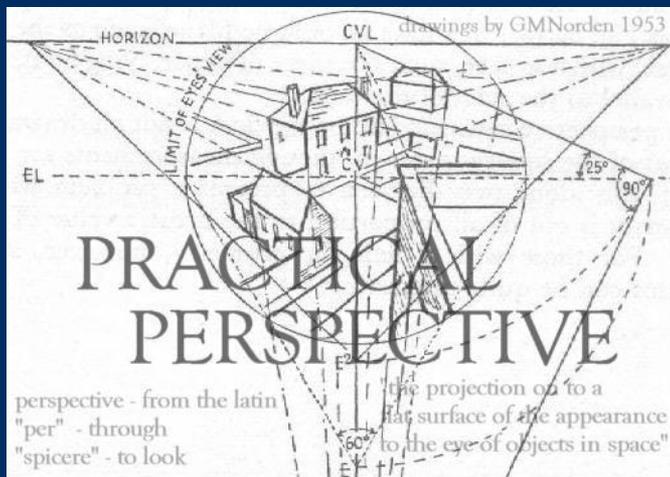
Jackson : A Whistle Stop Tour

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Qualified One Way Costs Shifting

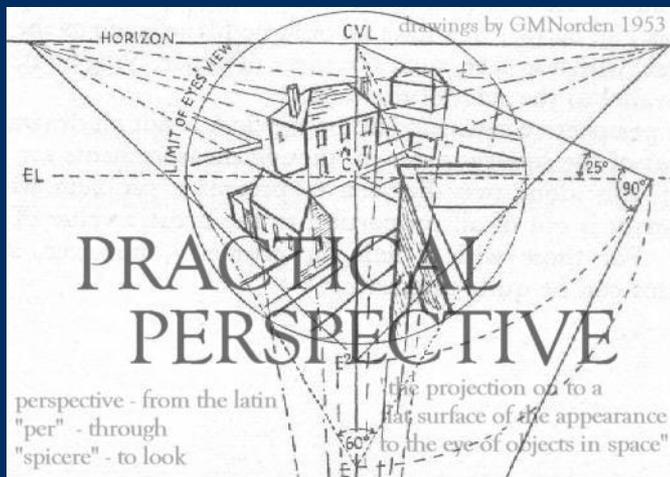
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Practicalities



- A Court may make any order for costs
- Subject to the exceptions in 44.15 and 44.16
- That order can be enforced without permission up to the level of damages and interest recovered
- Note “any order”
- Frighteningly wide

Practicalities



- They can be enforced only when:
 - costs agreed or assessed; and
 - proceedings concluded
- 44.14(2) refers to “orders for costs” not final orders
- a strong argument on the wording that interlocutory orders are caught as well

Exceptions



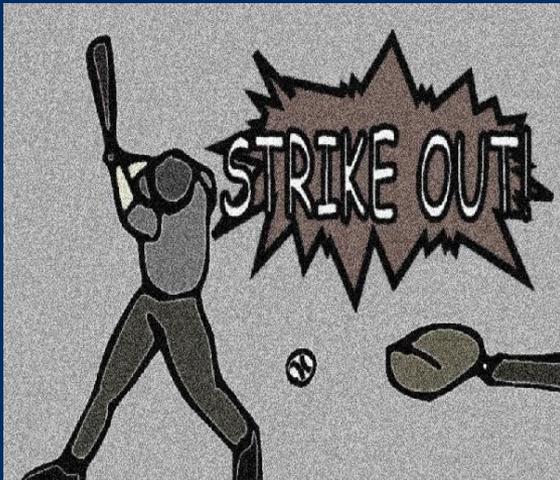
- Part 36 offers
- Strike Out
- Fundamentally Dishonest
- A claim for the benefit of others

Part 36



- The trigger is Part 36 – the same as it was before
- You fail to beat the Defendant's offer
- At risk then is the whole of the Claimant's damages and the interest thereon (44.14)

Strike Out



- No permission required to enforce an order for costs made where:
 - No reasonable grounds for bringing proceedings; or
 - An abuse of Court process; or
 - Conduct of Claimant or representative likely to obstruct just disposal
- Not limited to damages
- The Court would be involved in the striking out

Fundamentally Dishonest



JUSTIN SULLIVAN/GETTY IMAGES

Democratic advisers admit Mitt Romney was commanding in Wednesday's debate -- but President Obama's top aide also called him "fundamentally dishonest."

Fundamentally Dishonest



- Permission need to enforce a costs order if:
 - On the balance of probabilities
 - The claim found to be “fundamentally dishonest”
- Not limited to damages
- What do they mean?
- It’s an oxymoron
- What was wrong with fraud?

Fundamentally Dishonest



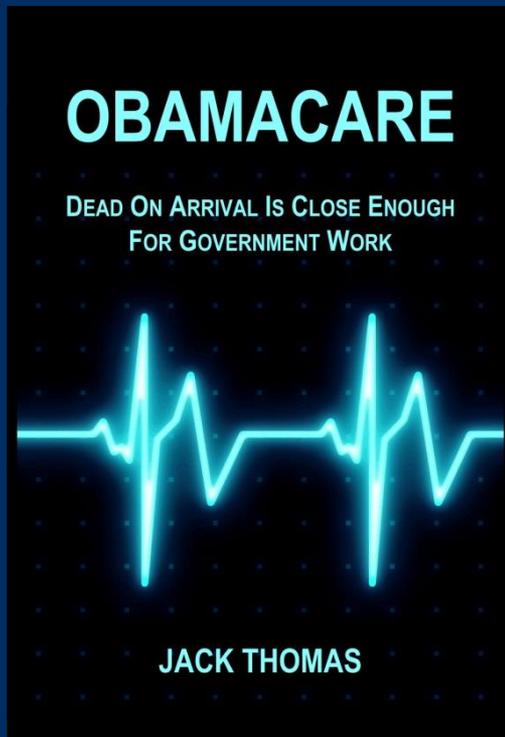
- Practice Direction:
 - Usually be determined at trial
 - In exceptional circumstances may interfere even in a settled case
 - May still interfere even if you have discontinued
 - The Court's discretion as to costs attributable
- A perfect recipe for satellite litigation

For the Benefit of Others

Credit Hire
It's simple

- Does not catch:
 - Gratuitous care
 - Earnings paid by an employer or medical expenses
 - A dependency claim
- Intended to catch:
 - Credit hire
 - Subrogated claims
- The non-party who benefits may have an order for costs made against them

Dead on Arrival?



- The intention was to replace ATE
- There are too many risks left not to consider whether ATE even if the cost is not recoverable is worthwhile
- How ATE is used depends upon the cost of it now
- The premium will need to be competitive (cheap) for clients to consider it
- How hard will you now look for BTE?

Proportionality

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Proportionality



- CPR 44.5(3) sets out a long list of relevant issues
- The sums in issue makes it to the top
- The old test based on *Lownds* saw an item being incurred as proportionate if it was necessary and you then looked to see if the cost of it was reasonable
- The new rule reverses this
- **It does not matter if an item was necessary under the new rule**
- Counter intuitive

Proportionality

- There will be no practice direction to assist
- A few robust Court of Appeal decisions will assist!
- Practically
 - If case issued pre 1 April 2013 then the old proportionality rules apply
 - If issued afterwards then:
 - Old rule to 1 April 2013
 - New rule post April 2013



Proportionality

- Visibly important in MT cases because of costs budgeting
- How important in the FT?
 - FRC set your base costs
 - What if you want to argue escape?
 - No indication of mechanism if FRC stage not agreed. What if the Defendant contends not proportionate to issue?
 - Clearly still applies to disbursements
 - The rules for FRC are awaited



Proportionality

- How you might avoid some of the effects?
- CPR 36.14(3)(b)
 - if you beat your own Part 36 offer “upon judgment being entered”
 - you get **costs on the indemnity basis** from the date on which the relevant period expired



Proportionality

- How you might avoid some of the effects?
 - CPR 44.3(3)



Where the amount of costs is to be **assessed on the indemnity basis**, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party

Costs Budgeting

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The Basics



- The Civil Procedure (Amendment) Rules 2013
- CPR 3 and Practice Direction 3E
- Precedent H
- Sixteenth Implementation Lecture – Ramsey J 29 May 2012
- The Civil Procedure (Amendment No.2) Rules 2013

Carve Outs

THERE IS NO
EXCEPTION TO THE
RULE THAT EVERY RULE
HAS AN EXCEPTION.

JAMES THURBER

- Amazingly there have been huge exceptions to costs budgeting recently
- See the Amendment no. 2 SI
- Why is a commercial case not subject to costs budgeting where a large PI case is?
- As a PI lawyer I could feel unwanted and untrusted

Application



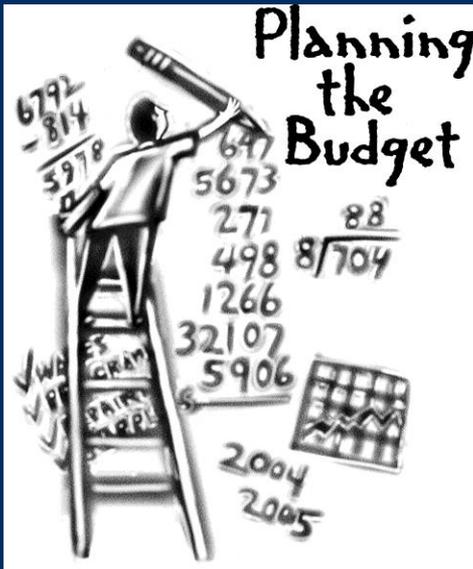
- All multi track cases commenced post 1 April 2013
- Will cases issued before then avoid it?
- No:
 - The Court may manage the costs to be incurred by any party in any proceedings
 - The Court may at any time make a costs management order
 - The section and Practice Direction may apply to any other proceedings where the Court so orders

When? Seriously?

- Applies to all parties except litigants in person unless the Court orders otherwise
- Must be filed and exchanged when the notice of provisional allocation states
- No later than 7 days before the first CMC
- Make sure you do as:
 - If you do not then you will be treated as having filed a budget limited to court fees



Payment for Budgeting



- To complete Precedent H:
 - No higher than 1% of the approved budget or £1,000
- Budgeting and costs management overall:
 - No higher than 2% of the approved budget

Precedent H



- Mandatory
- A 9 page excel spreadsheet
- Jackson thought two hours to complete
- I suspect he will be wrong about that also
- First page only if budgeted costs are less than £25,000
- The formulas do not work!
- Note the statement of truth

Precedent H

- It is split in to :
 - Pre-action costs
 - Issue of proceedings and pleadings
 - CMC
 - Disclosure
 - Witness Statements
 - Experts Reports
 - Pre-Trial Review
 - Trial preparation
 - Trial
 - Settlement Discussions
 - Provision for contingencies



Costs Management Order

- The outcome of the budgeting process is an order recording:

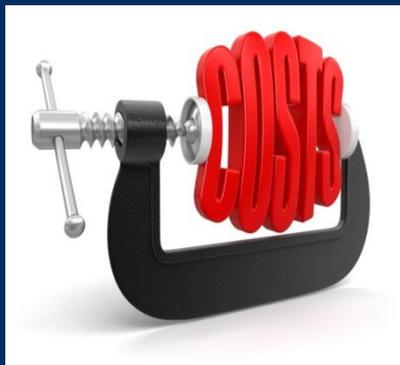


- The extent to which the parties agree the budgets; and
- Where not agreed to record the Court's approval after making appropriate revisions

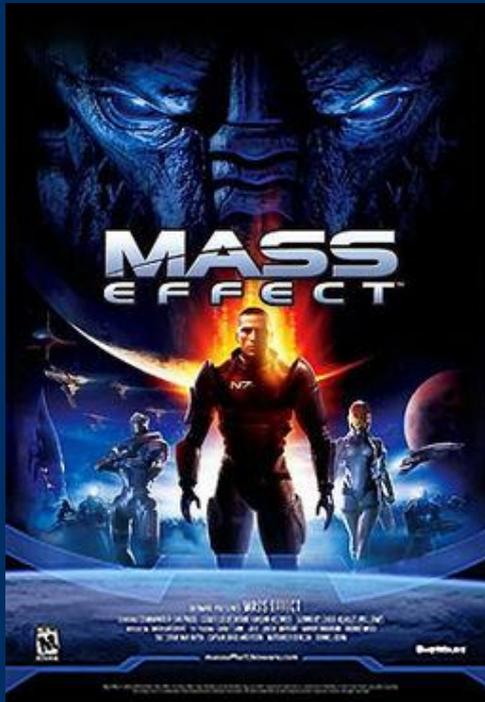
- Once you have one then the Court controls the budgets in respect of recoverable costs

Costs Management Conference

- Practically the first case management conference will be the first time the budgets are before the Court
- It may be that the Court lists the budgeting separately in larger cases or where there is substantial dispute
- Such hearings will have a grand new title and will be by telephone where practicable

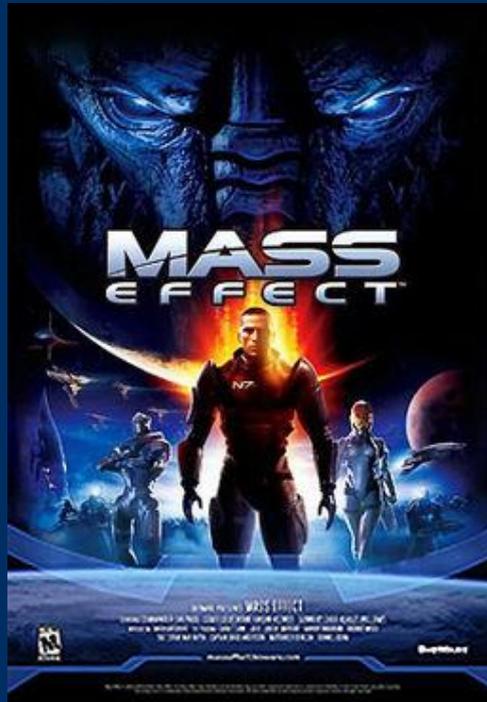


Practical Effects



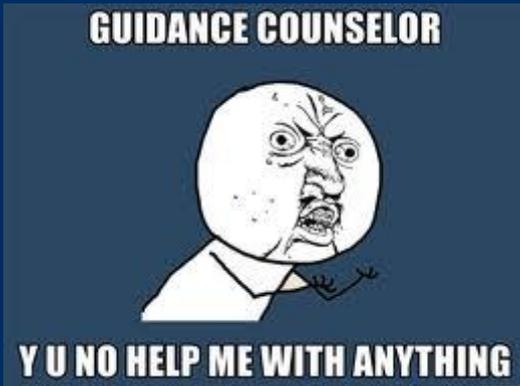
- On assessment of costs the Court:
 - will have regard to last approved or agreed budget for each phase of proceedings
 - will not depart from the budget unless good reason to do so
- Within proceedings:
 - Any case management decision will take in to account budgets and the costs involved in each procedural step

Practical Effects



- Experts:
 - Clear interaction with amendments to CPR 35 requiring estimate of costs for the expert evidence required and a summary of issues it will address
 - Should you ask experts to tender for work?
- Evidence:
 - Again a clear link with amendments to CPR 31 and 32 giving the Court explicit power to limit evidence on issues

Any Guidance?



- Case law is unclear:
 - Henry v. News Group saw costs allowed substantially outside budget but clear indication the new rules would not be so flexible
 - Ryder v. Beever saw a case struck out for failure to file a costs estimate

Best Practice

- Budget properly:
 - Do centrally
 - Do not leave to individual fee earners
 - Work out from existing files what certain steps cost
 - Consider contingencies on all and specific cases
 - Negative assumptions
 - Take up the invitation to include contingencies
 - Keep under review and go back if you may bust the budget



Provisional Assessment

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What is it?



- Leeds Pilot
- Bill, points of dispute and replies given to a judge as a paper exercise
- He makes a provisional assessment
- If you want more you risk further costs
- The intention was that it would dove tail in with costs budgeting at £25,000 – that gives you an idea of their view of proportionality also
- Suddenly changed to £75,000

Reasoning

- For the extension to £75,000:
 - The pilot was £25,00 base costs
 - In practice with additional liabilities often much more
- Illogical where the additional liabilities are not recoverable inter partes any more
- For the provisional assessment process:
 - Said to work in the pilot – most practitioners have concerns
 - Theory of judges being docketed



In Practice



- Most bills will be provisionally assessed – form N258 and supporting documents
- POD's and replies will follow Precedent G
- £1500 limit on costs for doing this
- If you want to argue for more then you have to beat the provisional assessment by 20%
- There is an interaction with QOCS on the drafting – the cover is still in place
- Generally believed to be virtually impossible to appeal

Small Claims / Whiplash

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Small Claims / Whiplash



- Up already to £10,000 as of 1 April 2013 for non-PI
- Consultation gave three options
 - Raise to £5,000 for Whiplash claims
 - Raise to £5,000 for all RTA claims
 - No change

Small Claims / Whiplash

- Early Day Motion 1140
 - Submitted calling for slow down in reforms specifically small claims track
 - 42 signatories – two conservative
 - Important to ask your MP to sign it if you live outside of Pendle or Burnley
 - Different tactics being tried



Small Claims / Whiplash

- Timing
 - Helen Grant MP committed to awaiting outcome of transport select committee review
 - Written evidence published 30 April 2013
 - Oral evidence, report, and response are usual next stages



Fixed Recoverable Costs

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Reasoning?

- Government Response to Consultation
27th February

- Intended to catch cases that fall out of the portals

- Apparently reasonable and proportionate to consider referral fee cost but ignore marketing spend

- It will not limit access to justice

- EL/PL are considered more complex than RTA and hence attract a higher fee



Reasoning?

- Disease cases not caught – political?
- No commitment to a review in 12 months as they are not convinced there will be any evidence to challenge their decision
- No delay to allow for bedding in of other reforms
- Civil Justice Council ignored



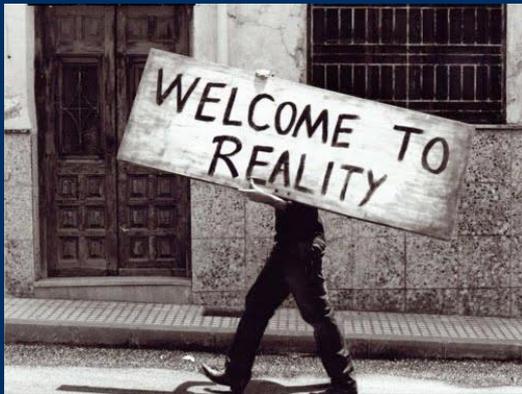
Figures



- RTA to trial
 - Max - £7,655 (£25,000 dmg's)
 - Min - £2,855 (£1,000 dmg's)
- EL to trial
 - Max - £11,780 (£25,000 dmg's)
 - Min - £4,580 (£1,000 dmg's)
- PL to trial
 - Max - £10,665 (£25,000 dmg's)
 - Min - £4,065 (£25,000 dmg's)

Harsh Realities

- The Government (of the time) sets policy
- To do a proper job you must be paid
- There will be winning and losing cases as before
- Claimants will have to forgo damages and lawyers will have to take success fees
- Remember the early days of CFA's?



A Few Thoughts

- Some cases have always been riskier eg Highway Trippers
- Will there be any appetite for that risk?
- The success fee is capped at 25% of generals and past pecuniary loss
- Para 27 of the Govt. response bases the fixed level of fees on civil legal aid rates
- Some might say that is an invitation to charge a shortfall to the client based on the hourly rate differential



A Few Thoughts

- Be cautious about deciding that disease work is the answer
- There is a perverse incentive for a Defendant to admit liability in the portal on such cases as once out of the portal the costs are not fixed
- We will all pay more attention to maximising damages to get above £25,000 – is that an unintended but good consequence?
- Some Defendants producing guidance on break even point!



Portals and Costs

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Timing

- RTA
 - End of July 2013 extension to £25,000
 - Fee cut in existing portal already occurred at the end of April 2013
- EL/PL
 - End of July 2013
 - Some suggestion still that there may be further delay to September 2013



Fees

Fixed recoverable costs for claims within the rta and el/pl protocols

	Claims of £1k-£10k			Claims of £10k-£25k		
	Stage 1	Stage 2	Total	Stage 1	Stage 2	Total
RTA claims	£200	£300	£500	£200	£600	£800
EL/PL claims	£300	£600	£900	£300	£1,300	£1,600

- Massive drop
- Based on irrational assumptions
 - Referral fee of £700 taken out
 - Based on civil legal aid rates (Para 27 Govt. Response)

Escape?

- Behavioural issues
 - Case law on existing portal makes it clear Claimant takes risk on costs where drop out on technicality – *Patel v. Fortis*
- EL/PL and RTA drop out if there is a dispute where there is for example a liability or contributory negligence argument
- Very worthwhile even if you fall in to fixed recoverable costs particularly for EL



Escape?



- Reminiscent of advice on introduction of RTA predictable costs
 - Get yourself to a point where you can issue
 - Not clear how little information you could get away with on the CNF?
 - Worth limiting the information given to the Defendant as far as you are comfortable with
 - In effect make them work to keep it in the portal

Guidance

- Draft Protocols are out
- So are the forms
- Go on Nigel's course – I am!



Funding The Claim

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Funding the Claim



- The background
 - Fixed Recoverable Costs up to £25,000 in value
 - Predicted drop in fee income of 21%
 - Budgeting in the multi track
 - Unpredictable
 - Provisional Assessment
 - Up to £75,000 value – my view is lower fees

Funding the Claim

- The starting point is CFA or DBA?
- Little practical value to the DBA as drafted
- Real tension with clients interests
- That may change if
 - the small claims limit changes
 - the rules are re-drafted
- So we start with the CFA?
- Not enough to advise that alone



Funding the Claim



- Your starting point is your duty to advise the client
- Essentially you start with the shopping list of possibilities and narrow down to the best choice for them
- In the absence of legal aid, and the ability to pay privately the choices are realistically:
 - CFA
 - DBA
 - BTE

Funding the Claim



- BTE may be something we now look harder for
- Primarily because it
 - covers disbursements
 - covers the opponent's costs
 - may cover all our costs in an FRC case
- However, some providers seem to be taking steps to cut their cover

Funding the Claim

- The CFA route
- Practical problems
 - Can I take money from the client?
 - What if others are not?
 - Is 25% of generals and past pecuniary losses enough?



Funding the Claim



- You can and should take money from the client
- Client feedback has been positive!
- Some never believed you got something for nothing
- Other firms are taking money as there is no practical alternative – the base fees are too low

Funding the Claim



- Some risk of other firms taking less but will they survive?
- A possibility some insurer backed ABS' will do so – but are they your direct competitors for like for like work? Is your service more local and more personal?
- Some clients have tried to haggle
- You must be prepared for this and to sell yourself as the better option eg more experience

Funding the Claim



- Shortfalls on base costs
- Done in the past and in other areas of law
- The Claimant gets what they pay for
- Para 27 of the Govt. response on fixed recoverable costs bases the fixed level of fees on civil legal aid rates
- Clearly there is a limit on work that can be done for the money recoverable

Funding the Claim



- Not limited to certain heads of damage
- Is it too close to a DBA if you say we will charge you a % of your damages made up of success fee and this shortfall?
- Clients like certainty in deductions
- It is not a magic cure

Funding the Claim

- So what model will work?
- In my view based on feedback from clients and other practitioners:



- Clients accept deductions
- Deductions are needed to keep you in business
- A combination of CFA and base costs shortfall
- Start with the clients interests in funding choices and work forward
- What is your selling point? Experience? Local service?

Funding Disbursements



- QOCS does not cover disbursements
- What are the clients options?
 - Pay as you go – unattractive
 - Solicitor funds – possible but problems
 - Solicitor carries but client insures risk of not recovering - possible

Funding Disbursements



- Pay as you go – client funds
 - Others in the market will not be seeking money from the client during the case
 - Clients in a difficult economic position
 - Will the case be delayed if they don't pay? Can you afford delay in FRC?
- Not attractive

Funding Disbursements



- Solicitor funds
- Possible – Flatman v. Germany
- Approval given by Court of Appeal to
 - Solicitor paying disbursements as case proceeds and the client repaying at the end; and
 - Solicitor paying them and only recovering them if the case is won
 - Not to allow this was seen as leaving open a route to Defendants undermining QOCS

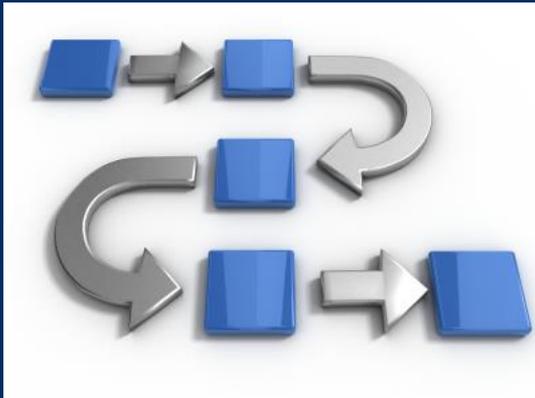
Funding Disbursements



- Solicitor carries – client insures
- Again possible
- Premiums seem to be modest at the outset - £50 to £100
- Important that the client pays for a premium – don't be an insurer
- There are policies that, as with old style ATE, defer payment to the conclusion and pay themselves off if you claim on them

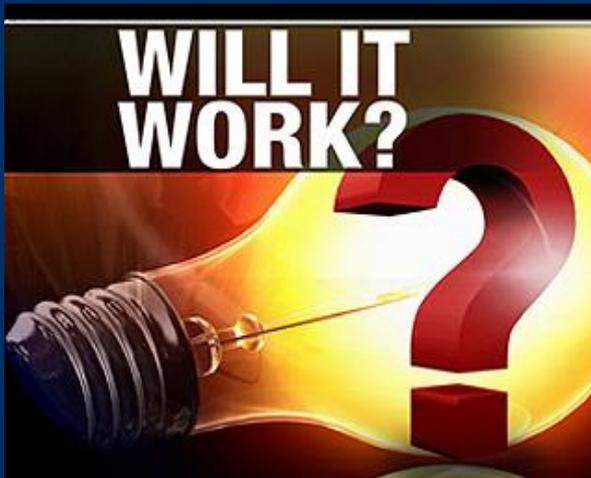
The Final Package

- A business model selling your perceived strengths to the client
- A consideration of options for the client
- Leading to:
 - A CFA
 - The client contributing to the cost
 - Disbursements funded by you and possibly insured by client
 - QOCS cover but ATE discussed with the client



The Final Package

- It can work
- FRC, proportionality, and budgeting are real challenges BUT you must get your funding arrangement settled first
- We will all be on a leaner diet but we can still
 - Run a business
 - Help injured people



Precedent CFA's

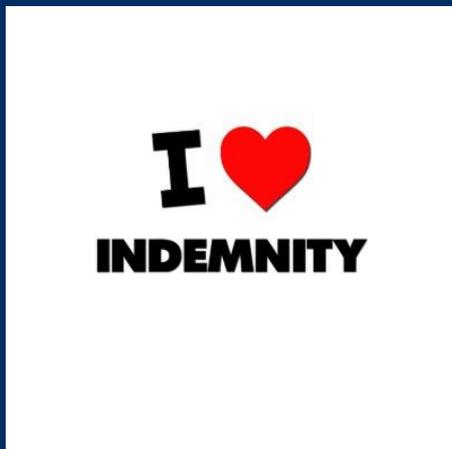


- The Law Society have produced a model CFA
- It is a starting point and you should use it as part of the review of your own arrangements
- Many practitioners sticking close to it in their drafting
- Kings Chambers produced a draft
- Very cumbersome but again a good source
- Draft your own with a costs specialists help

Possible Challenges?

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The Indemnity Principle



- The indemnity principle still lives on and is relevant to your CFA drafting
- CFA's need to account for it so remain complex
- Some believe it does not apply to CFA's based on
 - Costs a creature of the CPR
 - Nizami v. Butt

The Indemnity Principle



- Too early to say that
 - Nizami stood on its own facts
 - We have not even seen the regulations or CPR amendments for FRC
 - What about the multi-track?
- So
 - Important to jump through the hoops the indemnity principle requires
 - CFA needs to state onus on client to pay

CFA's and VAT



- The drafting of s58AA(3)(ii) of the Courts and Legal Services Act (as amended) is unclear, along with the CFA Order 2013, as to how it treats VAT in the success fee
 - is it included or not?
- Pay close attention to how you deal with VAT in any description of the success fee

CFA's and VAT



- Essentially the worry is that the body of the order sets the amount of success fee at 25%
- The explanatory note which says it is not part of the order suggests VAT inclusive
- If you do not adopt that then if VAT is subsequently found to be included in the 25% cap your CFA would be above the cap and not valid