PRESIDENT OF THE
QUEEN'S BENCH DIVISION

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COSTS CONFERENCE

CARDIFF

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I hope that it will not be thought in any sense offensive if I say that I do not like making what are called keynote addresses. The expression has overtones. There is more than a hint that you're supposed to hit the right note or strike the right chord – to anticipate in a well filled nutshell the high and persuasive points to be discussed later in the day and to distil the essence of what you are all thinking before you have had an opportunity to say what you may be thinking, or to digest the material in the talks that you will hear.

There is however one keynote with which I am sure you will all chime – that is that Rupert Jackson has done and is doing a fantastic job. Those who know him well are not surprised that his preliminary report is as thorough, comprehensive and perceptive as it is, nor more than mildly surprised that it only covers 663 pages. It's not easy to envisage the length of his final report. What is abundantly plain is that his task embraces a subject matter of huge importance. No one with any degree of familiarity with civil litigation can doubt but that the way we have come to handle costs is a serious impediment to access to justice. Civil litigation costs far too much.

What I intend to do, quite briefly, is to develop a very few main points and to present them to you as my personal opinion. These views are not necessarily shared by other senior members of the judiciary. Nor should you understand them as representing any corporate view within the judiciary. They in fact correspond with and to a significant extent are taken

with some modification from, a paper which I gave to a Specialist Judges' Conference on 10th July 2003, when I again expressed them in a purely personal capacity. Nicholas Chambers, who was there on that occasion and indeed organsied it, will I hope forgive me for the element of self-plagiarism. At the time I was Deputy Head of Civil Justice, the office now held by Moore-Bick LJ, and the day to day Chairman of the Civil Procedure Rule Committee. I had been a member of that committee since its inception in late 1996 and had participated in the drafting of the original batches of the civil procedure rules. In July 2003, *Callery v Gray* had recently been decided in the House of Lords, and the rules for fixed costs in uncontested smaller road traffic cases were on the verge of implementation. I supported those provisions as, with one qualification, I still do.

Essentially I have three things to say – and three things only. The first is a short and discreet point which, as you will see, dictates why there are only two more. The first point is a purely practical one. It is a plea for eventual simplicity – I say "eventual simplicity" because Rupert is plainly right to investigate all angles and consider all possibilities. As with most things, however, the more complicated the solution to a problem, the less likely it is to be implemented. Rupert will never achieve unanimity on the subject of costs. There are too many diverse vested interests and too many genuinely held points of view. Successful reform will require political will and courage, and judicial will and courage, and each will need to be preceded by a sufficient conviction that the main lines of the reform are right and achievable in the public interest. There need to be main lines and they need to be practical and achievable. A point of view, for example, that skeleton arguments are too long and that their preparation and time consuming use needlessly increase costs; or even the pre-action protocols generate front loaded expense are not in the present context main line points. This is because adjustments in these and other matters will not strike at the heart of the problem as I see it. What is needed, in my personal view, is a small number of fairly radical structural reforms. Without structural reform the problems will not be alleviated. Too many and complicated proposed reforms will never be implemented because there will be endless debate as to their merit and insufficient political and judicial will to carry them through.

In this context, there are some possible changes which I would not myself regard as achievable, however sensible they might be portrayed in theory. For instance, some might espouse a system where one party to civil litigation was not normally at risk of paying the other party's costs if they lose, unless perhaps they have conducted the proceedings fraudulently. Such a reform would be simple to set forth, and some might espouse it. But it would represent, I think, an unachievable cultural change which Parliament would never legislate to put in place. As in most things, you have to move on from where you are.

So that is my first plea. The other two are also simple to state, but need some introduction.

When I addressed the specialist judges in July 2003, I tried to find a catchy title to my talk. One possibility was "Costs – a rudderless boat" or perhaps "Dropping the pilot". Something along those lines was the general theme of what I was trying to say. And I began with what I referred to as some anchors. One such anchor, which I did not mention, but which now seems to me to be important is to realise that no amount of rhetoric or attempted persuasion will succeed in bucking or altering market forces. The market here is that which provides legal services, and lawyers are not, and never will be, philanthropists. Lawyers, like greengrocers, will charge as much as the market will bear, and will do as much chargeable work as they believe they will be paid for. What is more, skilful lawyers are a fairly scarce commodity and those with large corporate clients are able to, and will always, charge high fees. That is a fact of life, and no judge or political party is going to change it. The fees which large city firms or pinnacle Queen's Counsel are able to charge set a pattern for those lower down the scale – and accordingly civil litigation will generate high costs if it is conducted by competent professionals unconstrained by outside forces. Judges and the courts cannot reasonably expect to limit what lawyers will charge their clients. There are, however, indirect forces which can be brought to play which may moderate what lawyers charge their clients. In this context, I am distinctly sceptical about attempts to reduce costs by purely procedural modifications. For example, the attempt in the Civil Procedure Rules to limit standard disclosure has on the whole been unsuccessful. The court cannot control the time which lawyers spend preparing a case nor easily limit the amount of paper which litigation may generate. The court can limit the time spent in court and this has been to a large extent achieved. But that does not seem to make a vast difference to the total amount of time spent on the case by the lawyers for which they charge. Skeleton arguments are not skeleton, arguments and have become very expensive to prepare. However, the court can be to place a more exacting limit on the amount of these costs which may be recovered from a losing party under a costs order. I believe that the court should do so, and that this would have a welcome tendency to reduce the cost of civil litigation.

The legal world in which many of us grew up did not countenance arrangements such as now exist as conditional fee agreements, let alone contingency fees. As recently as in May 1980 Lord Denning was saying this *Trendtex Trading v Credit Suisse* [1980] 1 QB 629 at 654:

> "So far as champerty is concerned, there is need for some updating. Champerty is a species of maintenance; but it is a particularly obnoxious form of it. It exists when

the maintainer seeks to make a profit out of another man's action – by taking the proceeds of it or part of them, for himself. Modern public policy condemns champerty in a lawyer whenever he seeks to recover – not only his proper costs – but also a portion of the damages for himself; or when he conducts a case on the basis that he is to be paid if he wins but not if he loses. As I said in *Re Trepca Mines Limited (No 2)* [1963] Ch 199, 219-220;

> "The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses."

This reason is still valid after the Act of 1967. In *Wallersteiner v Moir (No 2)* [1975] QB 373, 394, I said:

> "It was suggested to us that the only reason why contingency fees were not allowed in England was because they offended against the criminal law as to champerty; and that, now that criminal liability is abolished, the courts were free to hold that contingency fees were lawful. I cannot accept this contention. The reason why contingency fees are in general unlawful is that they are contrary to public policy as we understand it in England."

They *are* contrary to modern public policy."

So Lord Denning. In my view, contingency fees reamina as contrary to public policy as Lord Denning regarded them in 1980.

It was only in the previous year, 1979, that the Royal Commission on Legal Services had rejected contingency fees as a way of financing litigation. Their reasons for doing so were essentially those which Lord Denning gave in the passage I have just quoted.

The second anchor, if it is right to see it as such, is the indemnity principle. This is a common law principle which finds its place in section 60(3) of the Solicitor's Act 1974 in these terms:

> "A client shall not be entitled to recover from any other person under an order for the payment of any costs to which a contentious business agreement relates more than

> the amount payable by him to his solicitor in respect of those costs under the agreement."

I fear that the tide of modern circumstances has caused this anchor to slip. There has been sustained and vociferous lobbying by and on behalf of the Law Society for the abolition of the indemnity principle.

The Civil Justice Council and the former Master of the Rolls, as Head of Civil Justice, accepted that the indemnity principle should, by the appropriate legislative process, be abolished. But I do think that there is need for real caution here. Why should a litigant who is ordered to pay another party's costs be obliged to pay more than the amount which those costs truly are? But I suggest that in principle there is no convincing reason why litigants or their lawyers should be able to recover anything more than that which an indemnity will produce. And an indemnity cannot, I think, operate on anything other than the costs which the receiving party is obliged to pay their lawyers. An answer which is proffered to that sometimes is that abolition of the indemnity principle is not intended to facilitate the recovery of costs greater than the client is obliged to pay to his lawyers. All that is wanted is the recovery of reasonable costs unencumbered with a dialectical opposition based on the indemnity principle. This would then enable lawyers to make transparent agreements with their clients that they will be paid whatever is recovered from the other party, or nothing if the case is lost. But I rather think that a plea for reasonable costs, unrelated to a commercial rate or amount which is agreed to be payable by the client to the lawyer, risks steering the boat towards at least one whirlpool. In a world of "no win no fee" agreements, where is the measure of what are reasonable costs? Up to now, the main reference for what is reasonable is that which lawyers charge their clients in the market place. The Senior Costs Judge circulates benchmark hourly rates for litigating solicitors of various seniority in various areas as an aid to assessment of costs. The basis for these numbers is what solicitors in the areas in question actually charge their clients. If there were no such market, what is the measure of reasonableness? I shall come to proportionality later in this paper, but the whirlpool to which the boat may be travelling could be one where what is reasonable is simply what is truly proportionate. Some might regard that as, not a whirlpool, but calm water.

If, as I think, there is a general perception among judges who conduct civil litigation that the cost of such litigation is often too high, it is perhaps worth considering what are the underlying influences. I well remember when I was in practice in the mid 1980's being, as it were, on the other side of this debate. The Lord Chief Justice, Geoffrey Lane, had made some public pronouncement to the effect that barristers' fees and solicitors' charges had become too great. My own mental state was naturally defensive against this proposition. I

remember thinking that the Lord Chief Justice had been out of practice for a long time and may have become a bit out of touch with what was going on in a world which he had long since left. Well the boot may now be on the other foot and I certainly think that we should try to guard against judgments based on out of date experience. That said, the cost of litigating in a civil court *is* too high and there are some fairly obvious causes of this. First, good lawyers are, as I have said, a scarce commodity and, unpopular though they may be with the general public, it is unsurprising if in the market place they are expensive. Ordinary lawyers do not, generally speaking, earn massive fees. Some lawyers put up their fees as a self defence mechanism against gross overwork. Second, the practical requirements of our Civil Procedure Rules and Practice Directions are intrinsically expensive. Disclosure, for instance, takes time and is expensive. Third, an adversarial system of civil litigation is necessarily an expensive process. We have all been brought up with the adversarial system. Most of us believe that it is a necessary ingredient of a process to reach a just result. Fourth, and this is a cynical point, questions of costs are to a very large extent debated and decided upon by and for the benefit of lawyers. And in many instances, the lawyers are debating, albeit in a representative capacity, questions affecting their own remuneration. Questions of costs thus tend to concentrate on what the lawyers should be paid rather than, in the case of costs orders made in contested litigation, what the paying party ought to be obliged to pay. These are, or should be, distinct questions, but they tend to be blurred. I appreciate that an access to justice argument will tend to equate what the winning party's lawyers should be paid with what the losing party should pay to the winning party. If the two are not the same, the winning party loses out and access to justice is discouraged. But they are not the same, and my personal view is that the first, and perhaps only question should be how much is it fair and reasonable that the losing party should be obliged to pay.

The Civil Procedure Rule Committee had to make rules about conditional fee agreements when they were introduced. This was not because the Committee considered that this was a good thing to do, but because government policy and legislation required it. I was a party to signing those rules and I was also concerned with, although not responsible for, the consequent costs practice direction. In so far as I am about to question some of the underlying principles, I can at least say that I made these points in the Committee when the relevant rules were under consideration, unpersuasively in the event.

As we know, the basic structure of the costs rules and the costs practice direction in so far as they relate to conditional fee agreement is as follows. The rules refer to a "funding arrangement". This includes where a person has entered into a conditional fee agreement which provides for a success fee within the meaning of section 58(2) of the Courts and Legal

Services Act 1990; and/or has taken out an insurance policy to which section 29 of the Access to Justice Act 1999 applies. Section 29 concerns recovery of an insurance premium by way of costs. The assessment first determines the "base costs", which are essentially the traditionally calculated ordinary costs without the additional amounts which may become payable if the claim is successful and the losing party is ordered to pay costs. Base costs are assessed upon orthodox considerations. There may then be a "percentage increase" which is the percentage by which the amount of a legal representative's fee can be increased in accordance with a conditional fee agreement which provides for a success fee; and an "insurance premium" which is a sum paid or payable for insurance against the risk of incurring a costs liability in the proceedings, taken out after the event that is the subject matter of the claim. Questions of reasonableness arise in relation to each of these (see section 11 of the costs practice direction). Hence, *Callery v Gray* [2001] 1 WLR 2112 in the Court of Appeal and [2002] 1 WLR 2000 in the House of Lords.

Remembering that conditional fee agreements of this kind were designed as a means of funding litigation upon the withdrawal of legal aid, the justification for the success fee was, not to give the lawyers an interest in the proceedings, but to encourage them to take on clients speculatively who would otherwise not be able to afford the litigation. The success fee was the lawyer's reward for the speculation and was overtly intended to compensate by means of recovery in successful cases losses incurred on those which did not succeed. Hence the argument that, if you win 50% of your cases, mathematically you need a success fee uplift of 100% in every case to break even. By contrast, the practice direction requires the reasonableness of the uplift to be judged by reference to the risk undertaken in the individual case. So a claim which is almost bound to be successful will only reasonably stand a small percentage uplift.

I question whether this basic structure constitutes a principled approach to the assessment of costs which a losing party to litigation should be ordered to pay. Is it right in principle that a losing party should have to pay an additional amount, in excess of the proper and reasonable costs of the litigation, to cover the winning party's lawyer's costs of losing other cases on behalf of other clients? Is it in principle right that an eventual losing party to litigation should be at risk of paying a greater uplift if he has a strongly arguably case which he nevertheless loses, whereas, if he has a rotten case, the justifiable uplift will be less? So too with the after the event insurance premium. This has insured the winning party against the costs he would have been ordered to pay if he had lost, including the costs he would have paid to the eventual losing party. Is it right in principle that a party to litigation should be ordered to pay costs referable to an insurance policy which would have covered his own costs

if he had been successful? I do not here question the appropriateness of agreements providing for success fees nor the sense of insuring against potential liabilities in costs. What I do question is whether the other party should in principle be ordered to pay these elements. After all, we do start from the position that the base costs are the proper reasonable costs of conducting the litigation. Why should the losing party additionally finance the costs of other litigation of which he is not a party or of an insurance premium to cover the risk that his own defence might succeed. And the stronger his own defence, the more he has to pay if nevertheless he loses. He may have been negligent or in breach of contract, but his negligence or breach of contract did not generate these expenses. Success fees relate to other litigation and there is no intrinsic reason why a defendant should have to pay to enable a claimant to litigate against him without risk. It may in crude terms be a system which could operate with some broad economic justification if all claimants were individuals and all defendants liability insurers. It is then simply a commercial means of paying the lawyers. But there are other kinds of litigants and litigation.

Those are problems with success fees and insurance premiums. There is also this problem with base costs. If all litigation is conducted on "no win no fee" conditional fee agreements, by what yardstick is the reasonableness of base costs to be judged? In that event, there is no market in orthodox levels of costs. We are in danger, I fear, of being adrift with no proper comparables.

Another mistake, as I now think, was the invention of costs only proceedings. These were a creature of the Civil Procedure Rules enshrined in rule 44.12A. This provides a procedure where the parties to a dispute have reached an agreement on all issues, including which party is to pay the costs. No proceedings have been started but they have failed to agree the amount of the costs. In these circumstances, either party may start costs only proceedings by means of a Part 8 claim form. The only issue is the amount of costs of negotiating a claim which has been compromised, apart from costs, before ever proceedings were started. I leave aside the intellectual difficulty of a court determining what costs are reasonable when the court has not determined the underlying dispute. The invention of costs only proceedings spawned *Callery v Gray* and the tens, if not hundreds of thousands of other similar cases. What in reality happened was that liability insurers dug their toes in to resist the wilder excesses which the wholesale introduction of conditional fee agreements produced. These included in my personal experience a whole string of tripping and whiplash injury cases in Liverpool in which the claims had been settled for £1500, but the district judges found themselves having to assess the claimants' costs at sums in excess of £3000, including an ATE insurance premium of £840, I think it was. Tripping and whiplash cases

in Liverpool always settle for £1500 and the risk for which the insurance premium was paid is virtually non-existent. The same happened with road traffic cases. No wonder the Norwich Union dug its toes in.

The Senior Costs Judge and the Court of Appeal proceeded to determine a large number of points of detailed principle arising out of this state of affairs. In *Callery v Gray* (No 1) itself, the Court of Appeal decided that, on a proper construction of section 29 of the Access to Justice Act 1999 and rule 44.12A, an after the event insurance premium could in principle be recovered as part of the claimant's costs, even where the claim had settled without the need for substantive proceedings. In modest and straightforward damages claims following road traffic accidents, it would normally be reasonable for a claimant to enter into a conditional fee agreement and take out after the event insurance cover when he first instructed his solicitor. If at that stage a reasonable success fee was agreed and insurance at a reasonable premium was taken out, the costs of each were recoverable from the defendant if the claim succeeded or was settled on terms that the defendant paid the claimant's costs. If a conditional fee agreement was concluded at the outset in such a case, 20% was the maximum success fee that could reasonably be agreed provided that there was no special feature. In *Callery v Gray* (No 2) [2001] 1 WLR 1242, the Court of Appeal gave further consideration to insurance premiums, and upheld a district judge's ruling that £350 was a reasonable after the event insurance premium, where the claimant had suffered minor injuries in a road traffic accident. The decisions went to the House of Lords who dismissed the appeals, saying that the Court of Appeal was the appropriate level at which procedural questions of this kind should be decided. Lord Scott dissented on parts of the decisions relating to After The Event insurance premiums.

Lord Hoffmann, whilst agreeing that the appeals should be dismissed, nevertheless made some characteristically trenchant remarks. He said this:

> "18. That said, I am bound to add that I feel considerable unease about the present state of the law. In this respect I do not think that I am alone. There seems to be widespread recognition among those involved in personal injury litigation that costs, particularly in relation to small claims, are getting out of hand. They are excessive in relation to the amounts at stake (contrary to the principle of proportionality), some elements (such as after the event insurance premiums) lack transparency and, perhaps in consequence, too much time money and court resources are spent in disputes over costs."

On the subject of solicitors setting an appropriate level of success fee, Lord Hoffmann said (at paragraph 26):

> "What in fact determines the success fee solicitors charge is what costs judges have been willing to allow in more or less comparable cases, the fee being set at the level being regarded as optimistic but hopefully not so optimistic as to provoke the liability insurers into contesting the amount. I shall in due course come back to the question of whether this is a sensible system."

Then at paragraph 32 he said:

> "The reasoning of the Court of Appeal ... assumes that the present cost of motor accident litigation is a fixed sum which must be paid by liability insurers one way or the other. But that is the very question in issue. And the reason why it is disputed is that, in the circumstances in which such litigation is funded, market forces are insufficient to keep costs within reasonable limits. As I have already said, solicitors offering motor accident personal injury CFAs have no incentive to compete on the success fee they charge. So the next question is whether a decision of a costs judge, or the Court of Appeal on appeal from a costs judge, or taxing master, as he used to be called, was to decide what fees were reasonable by reference to his experience of the general level of fees being charged for comparable work. But this approach only makes sense if the general level of fees is itself directly or indirectly determined by market forces. Otherwise the exercise becomes circular and costs judges will be deciding what is reasonable according to general levels which costs judges themselves have determined. In such circumstances there is no restraint upon a ratchet effect whereby the highest success fee obtainable from a costs judge are relied upon in subsequent assessments.

And finally on the subject of ATE insurance premiums at paragraph 44:

> "Again, the costs judge has absolutely no criteria to enable him to decide whether any given premium is reasonable. On the contrary, the likelihood is that whatever costs judges are prepared to allow will constitute the benchmark around which ATE insurers will tacitly collude in fixing their premiums."

To return to the broader horizon, the Court of Appeal decision in *Lownds v The Home Office* [2002] 1 WLR 2450 addressed the problem of proportionality. The judgment identifies the rules which stipulate the basis on which costs assessments are to be made. It points to rule

44.4(2) which provides that, where the amount of costs is to be assessed on the standard basis, the court will only allow costs which are proportionate to the matters in issue; and to rule 44.5 which requires the court to consider whether costs are proportionately and reasonably incurred and are proportionate and reasonable in amount. The court said this at paragraph 10:

> "Because of the central role that proportionality should have in the resolution of civil litigation, it is essential that courts attach the appropriate significance to the requirement of proportionality when making orders for costs and assessing the amount of costs. What has however caused practitioners and the members of the judiciary who have to assess costs difficulty is how to give effect to the requirement of proportionality. In particular there is uncertainty as to the relationship between the requirement of reasonableness and the requirement of proportionality. Where there is a conflict between reasonableness and proportionality does one requirement prevail over the other and, if so, which requirement is to take precedence? There is also the question whether the proportionality test is to be applied globally or on an item by item basis, or both globally and on an item by item basis."

Having outlined the facts and referred to certain authority, the judgment then has this at paragraph 31:

> "In other words what is required is a two stage approach. There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which CPR r44.5(3) states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the cost of that item should be reasonable. If on the other hand the costs on the whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable If because of lack of planning or due to other causes, the global costs are disproportionately high, then the requirement that the costs should be proportionate means that no more should be payable than would have been payable if the litigation had been conducted in a proportionate manner. This in turn means that reasonable costs will only be recovered for the items which were necessary if the litigation had been conducted in a proportionate manner."

Then in paragraph 37:

> "Although we emphasise the need, when costs are disproportionate, to determine what was necessary, we also emphasise that a sensible standard of necessity has to be adopted. This is a standard which takes fully into account the need to make allowances for the different judgments which those responsible for litigation can sensibly come to as to what is required. The danger of setting too high a standard with the benefit of hindsight has to be avoided. While the threshold required to meet necessity is higher than that of reasonableness, it is still a standard that a competent practitioner should be able to achieve without undue difficulty. When a practitioner incurs expenses which are reasonable but not necessary, he may be able to recover his fees and disbursements from his client, but extra expense which results from conducting litigation in a disproportionate manner cannot be recovered from the other party."

Thus, as I understand the judgment, the court has to ask whether the costs claimed are proportionate. If on the face of it they are not, the court has to examine on an item by item basis whether the work which they represent was necessary and whether the amounts claimed are reasonable. Reductions in cost resulting from this process may reduce or eliminate the apparent disproportion. But they may not. If it is determined that all items were both necessary and reasonable in amount, they are, as I understand it, recoverable even though the result may be disproportionate. I may have missed it, but I do not think you can find in this judgment a yardstick of reasonableness. Take counsel's fees. A brief fee of (say) £10,000 may be a reasonable amount for this job and it may be reasonable for the party engaging this barrister to pay this amount. It does not follow that it is necessarily reasonable, let alone proportionate, that an opposing party ordered to pay costs should be saddled with the full fee. Perhaps the most stark anomaly as I see it, maybe found in paragraph 11.9 of the Costs Practice Direction which provides that a percentage increase will not be reduced on the ground that, when added to base costs which are reasonable and (where relevant) proportionate, the total appears disproportionate. That is an explicit sanctioning of disproportionate recovery of an element of costs which in principle in my view should not be recoverable at all.

I do not for a moment question the correctness of the *Lownds* decision as an application of the law and Civil Procedure Rules as they now stand. But the tension remains. I do think we should ask whether, in the expensive world of adversarial litigation, a litigant should be able to recover from a losing opponent costs which it was reasonable and necessary for the winner

to spend, even though the resulting amount may be out of all proportion to the amount claimed or the amount recovered? Assessments which have to concentrate retrospectively on what the winning party has spent will always risk producing a disproportionate result.

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 Practise Direction can scarcely expect to do better than that.

These considerations lead me to offer the two reforming changes to the present arrangements which I think together would help to redress a balance which has gone wrong.

First, I would reverse the position by which a paying party has to pay the success fee uplift and the ATE premium of the receiving party. I do not regard the present arrangements as principled for the reasons which I have attempted to explain. Litigants could enter into CFAs if they wish and take out ATE insurance, but at their own expense.

Second, I would reverse the application, if not the literal effect, of *Lownds v The Home Office* to provide that costs which are disproportionate to the amount involved and the nature of the claim are disallowed so as to be irrecoverable against the paying party. The exercise should be carried out both on an item by item basis and globally. It should be possible for judges to stand back and make broad judgments, which at least one Court of Appeal authority suggests is not at present permissible.

I acknowledge that these two changes would represent a shift of philosophy which some might regard as a serious retreat from access to justice. I believe, however, first that it is more important that a defendant should not be at risk of a grotesquely disproportionate costs order than that claimants should be enabled to conduct risk free litigation. The proof of this pudding lies in the proliferation of ambulance chasers and the spawning of claims on the back of the introduction of CFAs. Second, I believe that the market would adjust to my reformed regime, so that lawyers would charge less for their work for the very reason that the level at which the client could recover from the other party would be reduced. It would also mean that lawyers were more economical with the time they spent on their client's cases.