Neutral Citation Number: [2025] EWHC 884 (KB)

Case No: KA-2023-000199

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM THE COUNTY COURT AT SOUTHEND
ORDER OF HHJ DUDDRIDGE OF 27 SEPTEMBER 2023
COUNTY COURT CASE NUMBER: H19YX810
APPEAL REF: KA-2023-000199

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/04/2025

Before :

MRS JUSTICE STACEY

- -

Between :

MISS LAURA ATTERSLEY	**Appellant/ Claimant**
- and -	
UK INSURANCE LIMITED	**Respondent/ Defendant**

- -
- -

Mr Alexander Hutton KC and Thomas Mason (instructed by **HCC Solicitors)** for the **Appellant**
Andrew Roy KC (instructed by **Clyde & Co)** for the **Respondent**

Hearing date: 14 October 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 11th April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MRS JUSTICE STACEY

Mrs Justice Stacey:

1. This is an appeal against the Judgment of HHJ Duddridge sitting in the County Court at Southend[1] on 26 September 2023. The appellant was the claimant at first instance in a claim for damages for personal injury in the tort of negligence following a road traffic accident. The respondent to the appeal, the defendant below, was the insurer of the driver of the other vehicle involved. I shall continue to refer to the parties as they were at first instance.

2. The narrow issue in the appeal is whether the claimant was entitled to either fixed costs, or costs assessed on the standard basis, up to the point of the expiry of the relevant period of a Part 36 offer that she had accepted late. Her claim had been commenced under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (£1,000- £25,000) ("the RTA Protocol"). At the defendant's request the claim exited the RTA Protocol since liability was initially disputed. The claimant subsequently issued Part 7 proceedings claiming up to £150,000 damages, whereupon the defendant made a Part 36 offer for £45,000, long before the Part 7 claim was allocated to a track. The claim was subsequently allocated to the multi-track and the following year the claimant belatedly accepted the Part 36 offer. The claimant contends that she is entitled to her reasonable costs on the standard basis up to the expiry of the Part 36 offer in accordance with CPR 45.29B, in force at the material time, whilst the defendant submits that the claimant is only entitled to her fixed costs up to that date, pursuant to CPR 36.20, as it was then in force[2]. The case raises the issue of how to resolve the tension between the wording of CPR 45.29B, as amended after the case of *Qader v Esure* [2017] 1 WLR 1924 and Part 36.20(4) which was not amended post *Qader*. At the time of acceptance of the offer the case had been allocated to the multi-track per rule 45.29B, but at the time when the offer was made and at the time for accepting the Part 36 offer (without incurring costs consequences) had expired, the case had not been allocated to the multi-track, although it had exited the Protocol at the defendant's behest.

Fixed costs regime

3. CPR 45.29B is part of Section IIIA of Part 45 entitled: "Claims Which No Longer Continue Under the RTA or EL/PL Pre-Action Protocols…– Fixed Recoverable Costs."

> "Scope and interpretation
>
> 45.29A (1) Subject to paragraph (3), this section applies-
>
> (a) to a claim started under

[1] The Order following the judgment is recorded as being from the County Court sitting at Southend although it appears that the hearing may have taken place in Chelmsford according to the transcript. The appellant's notice is silent as to the County Court and the respondent's notice states that it is Southend. I have taken Southend as being correct.

[2] The rules have since been amended with effect from October 2023 and are no longer in the same place. There was no suggestion from either advocate that there were any material differences or substantive changes to the Rules, it was merely the positioning and numbering within the Rules that has been altered.

> (i) the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the RTA Protocol"); or
>
> (ii) the Pre-Action protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ("EL/PL Protocol"),
>
> Where such a claim no longer continues under the relevant protocol or the Stage 3 Procedure in Practice Direction 49F; and
>
> (b) to a claim which the Pre-Action Protocol for Resolution of Package Travel Claims applies
>
> (2) This section does not apply to a disease claim which is started under the EL/PL Protocol
>
> (3) Nothing in this section shall prevent the court making an order under rule 45.24 [A rule which makes special provision where a claimant fails to comply with the relevant Protocol or unreasonably elects not to continue with that process. It has no application here.]
>
> 45.29B Subject to rules 45.29F, 45.29G, 45.29H and 45.29J, and for as long as the case is not allocated to the multi-track, if in a claim started under the RTA Protocol, the Claim Notification is submitted on or after 31st July 2013, the only costs allowed are-
>
> The fixed costs in rule 45.29C;
>
> Disbursements in accordance with rule 45.29I "

4. Rules 45.29F, G and H do not apply to this case. 45.29J allows the court to consider a claim for costs of more than the fixed recoverable amount if there are exceptional circumstances which make it appropriate to do so.

5. The footnote to paragraph 45.29B in the White Book states:

> "Cases allocated to the multi-track
>
> Section IIIA of Pt 45 does not apply to claims allocated to the multi-track, even if they were started under the Low Value Personal Injury Protocols: *Qader v Esure Services Ltd* [2016] EWCA Civ 1109. The court suggested that r.45.29B should be amended by adding, after the reference to 45.29J: "…and for so long as the claim is not allocated to the multi-track…" The rule was amended accordingly with effect from 6 April 2017."

Part 36 code

6. The costs consequences of acceptance of a Part 36 offer are set out in Rule 36.13:

"Costs consequences of acceptance of a Part 36 offer

36.13—(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)…..

(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 unless the court orders otherwise.

(Rules 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.)"

7. The commentary in the White Book describes the effect of CPR 36.13(3) as follows: "where, however, the claimant's costs are subject to the fixed costs regime in Pt 45, the provisions of that regime prevail: r.36.13(3)."

8. The provisions of Part 36.20 (as was in force at the material time) entitled "Costs consequences of acceptance of a Part 36 offer where Section IIIA of Part 45 applies" provided at 36.20(4) that where a defendant's Part 36 offer is accepted after the relevant period, the claimant will be entitled to the fixed costs in the relevant table in Section IIIA of Part 45 for the stage applicable at the date on which the relevant period expired in the following terms:

"36.20—(1) This rule applies where—

(a) a claim no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A(1); or

(b) the claim is one to which the Pre-Action Protocol for Resolution of Package Travel Claims applies.

(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."

9. None of the three exceptions referred to in paragraphs (5), (6) and (7) are relevant or applicable to the facts of this case.

10. How do CPR 45.29B and 36.20(4) mesh together in this case? On the one hand, the claim had been allocated to the multi-track at the time of the offer's acceptance which would, on the face of it, take the case out of the scope of Section IIIA of Pt 45 and consequentially Pt 36(20)(4) entitling the claimant to assessed costs. On the other hand, when the offer had been made and when the notice of acceptance should have been served, Section IIIA of Pt 45 and Pt 36(20)(4) were engaged as the case was not allocated to the multi-track at that particular moment in time, entitling the claimant only to fixed costs subject to any exceptional circumstance she might be able to establish under Pt 45.29J.

11. Perhaps surprisingly the point has not previously come before the courts, insofar as the parties were aware.

12. I have been immensely assisted by Costs Judge Brown who has sat with me as an assessor to whom I am indebted and very grateful.

Facts and procedural background

13. The claimant was involved in a road traffic accident on 9 March 2018 in Southend on Sea, Essex. She was driving her vehicle southbound along Victoria Avenue at the junction with East Street when an oncoming vehicle driven by the defendant's insured turned right across her path causing a collision. The driver of the oncoming vehicle had failed to stop at the lights to wait for the green filter light before commencing her manoeuvre.

14. Ten days later on 19 March 2018 solicitors instructed by the claimant submitted a Claim Notification form (RTA1) under the RTA Protocol. The value of the claim was given as being up to £10,000 and the injuries were identified as soft tissue, whiplash and

"other" namely "neck, shoulders, left arm, black eyes, busted lips, burns and bruises on face from airbag, right leg extensively bruised, general back pain. She is struggling with anxiety and flashbacks, chest bruising." She had taken time off work as a psychologist as a result of the injury and remained off work. She had sought medical attention as a result of the accident on the day of the accident, but did not attend hospital. She had not received a medical professional recommendation to undertake any rehabilitation but had needed physiotherapy arising out of the accident.

15. On 9 April 2018 the claim exited the RTA Protocol following the defendant's request under paragraph 6.15(3) of the RTA Protocol since it disputed liability pending further enquiries at that stage. Subsequently on 29 April 2019 the defendant admitted liability.

16. Nearly two years later on 12 February 2021, shortly before the expiry of the limitation period, the claimant started proceedings with the issue of a Part 7 claim. The injuries and consequences of the accident were now considered to be far more serious than had first been described in the RTA1. The particulars of claim dated 13 January 2021 signed by the claimant on 1 February 2021 stated that she now expected to recover up to £150,000 in damages with ongoing physical and psychological issues. Three medical reports were attached from psychologist, oral maxillofacial and Ear Nose and Throat experts.

17. On 4 March 2021 a defence was filed admitting liability and the defendant made a Part 36 offer of £45,000 in accordance with CPR 36.13. The offer was not accepted by the claimant within the prescribed time (25 March 2021).

18. At a Case Management Conference ("CMC") on 5 January 2022 before DDJ Balchin the case was allocated to the multi-track, the claimant was granted permission to rely on 6 medical experts from a range of specialisms and the defendant also obtained permission to rely on four experts in a range of specialisms. Various orders and directions were made and the trial listed for a 5 day hearing some time after 9 January 2023. A costs management order was made. The claimant's budgeted costs were approved in the sum of £102,531 with the total budget at £233,047.68. The Court noted that it considered the claimant's incurred costs to be disproportionate. The defendant's budgeted costs were approved at £71,404, with a total budget of £92,098.60. The parties were given liberty to challenge incurred costs on detailed assessment and a date set for the parties to file revised Precedent H front sheets.

19. It was agreed by both parties that the case was entirely suitable for the multi-track and wholly unsuitable for the fast track given the quantum claimed, the expert evidence required and the time estimate for trial.

20. On 18 May 2022 the defendant applied to amend its defence to allege fundamental dishonesty and on 14 July 2022 the court listed the application to be heard on 1 August 2022. The alleged dishonesty related to quantum, not liability. However, the application was never dealt with since on 8 July 2022 the claimant accepted the Part 36 offer. There was no application by the defendant to withdraw the Part 36 offer. It is accepted by both counsel today that notwithstanding the wording of a covering letter that purported to make the acceptance of the Part 36 offer conditional upon the claimant receiving its reasonable costs, the acceptance of the Part 36 offer was unequivocal and is a binding compromise as to the damages that the defendant had agreed to pay to the claimant.

The hearing on 1 August 2022 was vacated by the Court. It was relisted for a 30 minute hearing on 3 July 2023 when it came before DDJ Coombe who adjourned the case to be heard before a Circuit Judge on 26 September 2023 to determine the dispute between the parties about the costs effect of the claimant's late acceptance of the Part 36 offer.

21. It was common ground that if the claimant had accepted the offer by the date for acceptance she would have only been entitled to her fixed costs subject to CPR 45.29J (claims for an amount of costs exceeding fixed recoverable costs in exceptional circumstances). It was also common ground that ordinarily the claimant should pay the defendant's costs from the end of relevant offer period onwards, although since this was a claim for personal injury it would be unenforceable because of the QOCS regime (Qualified One Way Costs Shifting). No justification had been put forward explaining why the claimant had not accepted the offer in time so as to displace the normal order.

Judgment below

22. Before HHJ Duddridge, as before me, the dispute was principally about whether the dicta in *Qader,* and the subsequent rule change to 45.29B of section IIIA of Part 45 had the effect of dis-applying rule 36.20.

23. In a careful and impressive extempore judgment the judge considered *Qader* and decided:

> "15. However it is clear from reading the judgment as a whole that Briggs LJ was deciding [in *Qader*] that the fixed costs regime was not intended to apply at all to cases that ended up allocated to the multi-track and, therefore, that, so far as his decision was concerned, "allocated to multi-track" did have retrospective effect in that, upon allocation to that track, such cases would simply be excepted from or exit the fixed costs regime and then be subject to the normal rules which provide for detailed assessment of costs if they are not agreed, or summary assessment in cases where summary assessment is appropriate."

24. But after having decided that the general effect of allocation to the multi-track was to disapply fixed costs retrospectively, *Qader* was not a case about Part 36 and the costs consequences of Part 36 offers are set out in Part 36 itself which is a self-contained code. Since the claimant had accepted the defendant's Part 36 offer late, she was limited to the fixed costs applicable to the stage at which the relevant period expired. The judge found that the combined effect of CPR 36.20 and 45.29A and B limited the claimant's entitlement to costs as at the relevant date for acceptance of the Part 36 offer to fixed costs. The judge identified factors that weighed in his consideration:

> "33. A consideration which did weigh with me earlier in this hearing was this: that there is or might be the potential for the claimant to gain an entirely adventitious advantage, in other words one that was not foreseen by the terms of the offer itself but comes about as a result of chance, simply by waiting to see whether the case is allocated to the multi-track before deciding whether to accept an offer or not, that if Mr Mason is right the claimant might be materially be better off by waiting and seeing and then accepting the offer after allocation to the multi-track. That, it

> seems to me, would not be consistent with the scheme that is set out in Part 36. It is quite clear from the Rules that I have already referred to, dealing with what costs will be paid depending on the time of acceptance of the offer that the Rules envisage that the starting point is that the claimant gets his costs up to the date when the relevant period expired and the defendant gets their costs thereafter. That is the starting point and that is clearly designed to incentivise early settlement of offers by transferring risk to the claimant in respect of the costs that will be incurred after the date an offer expired.
>
> 34.With that in mind, it seemed to me that it would be a very odd result if a claimant, particularly in a QOCS case, could be materially better off because they could wait and see and then accept an offer after allocation to the multi-track on the basis that they were now entitled to an assessment on the standard basis which might put them in a materially better position than being confined to fixed costs. It seems to me that if that were the result it would not be a result that was intended by or particularly consistent with the scheme under Part 36. However, that consideration weighs rather less heavily on me now in the sense that there is likely to be much less advantage to claimants from that sort of approach now that the rule in relation to QOCS has been amended so that defendants can set off their costs against the damages and costs recoverable by the claimant. That means there will be much more risk for claimants in this sort of litigation of a sort of wait and see approach and accepting offers late, which should disincentivise any deliberate behaviour of that kind.
>
> 35. Furthermore, I also accept that it is not necessarily obvious that an assessment on the standard basis will produce a materially better outcome for a claimant than fixed costs, at least in cases where damages are above the ceiling above which a percentage of damages can be recoverable as part of the fixed costs. Although there is the potential for some advantage to the claimant from late acceptance, it is not necessarily the case that there will be such advantage and that consideration, therefore, only plays a small part in my thinking. Essentially, what I have to decide is whether the effect of the Court of Appeal's decision in Qader is that the case is treated as retrospectively and for all purposes no longer subject to the fixed costs regime."

25. HHJ Duddridge thus broadly agreed with the defendant's submissions. He considered that *Qader* was "not necessarily directly binding on [him]" since "it was not directly concerned with the problem he was faced with ". He considered that the answer to the problem he was faced with was determined by CPR 36.20 [40]. Insofar as the authors of Cook on Costs provided a contrary view, he respectfully disagreed with them. In other words he carved out Part 36 from the general application of the *Qader* rationale.

26. He concluded that his judgment that fixed costs applied accorded with the overall justice of the case:

> "43. Finally, I would say that, in my judgment, that decision accords with the overall justice of the case because it seems to me that that does reflect the broad intention behind CPR 36.13, which is that claimants who accept offers by the end of the relevant period are entitled to their costs on whatever regime applies as at that date. It seems to me that it is arbitrary to say that a claimant that accepts the offer later than that should be entitled to fixed costs or to standard costs dependent solely upon the date on which allocation to the multi-track happened, if it did happen, which is a matter which is often not within the direct control of the parties but depends upon, for example, whether the court allocates to the multi-track of its own motion, whether there is a case management conference at which allocation takes place and when that case management conference is able to be listed. It seems to me undesirable that Rules which are designed to bring certainty about the consequence of offer and acceptance of Part 36 offers should be subject to uncertainties which depend entirely upon circumstances that are outside the parties' control."

27. He ordered the defendant to pay the claimant's fixed costs up until 25 March 2021 pursuant to CPR 36.20 subject to any application the claimant may make under CPR45.29J. No other parts of the order are now in dispute. I am not aware of any application having been made under 45.29J which provides that if the court considers that there are exceptional circumstances making it appropriate to do so, it will consider a claim for more than fixed recoverable costs and may make a summary assessment or order a detailed assessment. Perhaps the claimant is awaiting the outcome of this appeal.

Grounds of appeal

28. Two grounds of appeal were advanced by the claimant. Firstly, that the judge erred in law in finding that CPR 36.20 applied. It was submitted that CPR 36.20 does not and cannot apply to this case since allocation to the multi-track automatically disapplies fixed costs (*Qader* per Briggs LJ). It is therefore impossible for Section IIIA of Part 45 to apply since fixed costs were automatically disapplied upon allocation to the multi-track. The result is that allocation to the multi-track removes the case from the scope of CPR 36.20 since the wording is explicit: it sets out the "Costs consequences of acceptance of a Part 36 offer where Section IIIA of Part 45 applies". CPR 36.20 is therefore contingent on S.IIIA of Part 45 and if that section does not apply, CPR 36.20 does not and cannot apply.

29. In an alternative argument in ground 1, if the judge was correct to hold that CPR 36.20 did apply, then he was wrong in law to find that the Claimant was entitled to fixed costs when costs should have been awarded to be assessed on the standard basis. In light of CPR 45.29B, the judge should have found that since the claim had been allocated to the multi-track the fixed costs regime had been automatically disapplied: since fixed costs in the rules only applied "for as long as the case is not allocated to the multi-track", it meant that the fixed costs regime is disapplied retrospectively back to the beginning, in a case that is allocated to the multi-track.

30. Ground 2 was that that the judge's decision that the claimant was entitled to her fixed costs was outside the range of decisions reasonably open to him. Since the judge had determined that *Qader* and CPR 45.29B meant that conventional costs apply

retrospectively and prospectively upon allocation to the multi-track, it was inconsistent and not open to him to then award fixed costs.

Respondent's notice

31. The defendant sought to uphold the judge's decision for the reasons given. In the alternative, if the claimant's costs properly fell to be assessed by the judge, the judge's decision should be upheld for a different reason to those given, namely that the court should exercise its discretion to award costs at the equivalent level to the fixed costs that the claimant would have been entitled to had she accepted the Part 36 offer before it expired. It was submitted that the court should exercise its discretion to assess the claimant's costs at a level equivalent to fixed costs so as to apply fixed costs indirectly in accordance with the principle in *Williams v Secretary of State for Business Energy and Industrial Strategy* [2018] EWCA Civ 852.

32. Mr Roy KC acknowledged a degree of ambiguity in the CPR, but submitted that a purposive approach to the legislative intention favoured the defendant's interpretation, principally because the claimant's argument produced a plainly absurd result. Courts should avoid an interpretation that produces an absurd result unless no other interpretation is possible (*Hassam v Rabot* [2024] UKSC 11 at [47]). The absurd result in this case would be the claimant gaining significant additional costs at the defendant's expense for her late acceptance of the Part 36 offer, which should have been accepted in time. It would generate a perverse reward for late acceptance which would be contrary to the overriding objective. The legislative intention behind both the fixed costs regime and Part 36 as set out in the Jackson final report and analysed in the subsequent case law was to increase incentives to reduce costs and encourage early and proportionate settlement of cases. It thus favoured the defendant's interpretation.

33. A robust purposive approach is expressly built into the overriding objective in the CPR. Furthermore, if there is tension between a general and a specific rule, the general rule must yield to the specific (*Solomon v Cromwell Group* [2011] EWCA Civ 1584) thus supporting the defendant's argument that the Part 36 provisions prevailed.

34. It was submitted that the claimant's interpretation was one that the court should not endorse unless it was unavoidably constrained to do, which it was not. Applying proper principles of construction, the non-absurd result that the judge achieved, was not only a preferable, but also correct result.

The law

35. The relevant rules are set out above. The principles of statutory interpretation were not in dispute. Per Lord Burrows in *Hassam*

> "…the modern approach to statutory interpretation requires the courts to ascertain the meaning of the words used in the light of their context and the purpose of their provisions." [11] "

36. Per Lord Bingham of Cornhill's comments in *R (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687:

> "7. Such is the skill of parliamentary draftsmen that most statutory enactments are expressed in language which is clear and unambiguous and gives rise to no serious controversy. But these are not the provisions which reach the courts, or at any rate the appellate courts. Where parties expend substantial resources arguing about the effect of a statutory provision it is usually because the provision is, or is said to be, capable of bearing two or more different meanings, or to be of doubtful application to the particular case which has now arisen, perhaps because the statutory language is said to be inapt to apply to it, sometimes because the situation which has arisen is one which the draftsman could not have foreseen and for which he has accordingly made no express provision.
>
> 8. The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

37. There is a heavy presumption against any interpretation which produces an absurd result. *Bennion, Bailey and Norbury on Statutory Interpretation (8thedition)* Bennion, Bailey (s.13.1) provides the following:

> "…the courts give a very wide meaning to the concept of "absurdity", using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief. "

38. Turning to the case law more specific to the point that arises, *Qader* considered two conjoined appeals where cases had commenced under the RTA Protocol but subsequently been allocated to the multi-track. Briggs LJ noted that rule Part IIIA CPR 45A-L clearly and unequivocally provided that the fixed costs regime applied to all cases started under the RTA Protocol that did not ultimately continue under the Protocol

(other than for certain exceptions that did not apply in *Qader* and nor are they relevant here (apart from possibly CPR 45.29J if exceptional circumstances apply). Briggs LJ described the background history of the RTA Protocol which was to provide an efficient modern framework for the resolution of modest personal injury claims arising out of road traffic accidents [2]: "The RTA Protocol was not designed for the resolution of large claims or complex disputes" [3]. The three aims of the RTA Protocol, (set out in paragraph 3 of the RTA Protocol itself) are: (1) to ensure that a defendant pays damages and costs using the process set out in the RTA Protocol without the need for the claimant to start proceedings; (2) for damages to be paid within a reasonable time and, (3) for the claimant's legal representative to receive the fixed costs at each appropriate stage.

39. He noted that claims arising from road traffic accidents that had properly started under the RTA Protocol can leave it for a number of perfectly valid reasons. For example, and most obviously where liability is not admitted and proceedings are then issued under Part 7. Briggs LJ noted that:

> "…the formulation of the detailed tabular provisions for the recovery of fixed costs in relation to claims started but no longer continuing under the relevant Protocols was developed upon an assumption that, if Pt 7 proceedings were issued, they would in due course be allocated to the fast track, if not determined at a disposal hearing following judgment for damages to be assessed." [14] .

40. He went on to analyse the rarer circumstances when claims that start, but no longer continue in the RTA Protocol, are subsequently issued as Pt 7 claims and then allocated to the multi-track. *Qader* and *Khan* were such examples because allegations of fundamental dishonesty by the defendants against the claimants in each of those cases made them unsuitable for the fast-track. Another example cited by Briggs LJ is when a claim initially thought to be worth no more than £25,000 is re-valued at a substantially higher level. He noted that "a large escalation in the amount claimed is inherently likely to lead to intensification of the litigation about its quantification, sufficient to take the case beyond the one day trial estimate which is a key feature of for allocation to the fast track." [16].

41. The fixed costs regime under Part IIIA CPR 45 "was plainly designed to be suitable only for fast track cases" and not cases likely to last well over one day [19]. On an analysis of the background and history, he noted that the government's intention was to exclude multi-track cases from the fixed costs regime. However, that was not reflected in the wording of the rules.

> "35.After more hesitation than my Lords I have come to the conclusion that s.IIIA of Pt 45 should be read as if the fixed costs regime which it prescribes for cases which start within the RTA Protocol but then no longer continue under it is automatically dis-applied in any case allocated to the multi-track, without the requirement for the claimant to have recourse to r.45.29J, by demonstrating exceptional circumstances"

42. He accepted that the "more rigorous route of making fixed costs applicable to all cases coming out of the relevant Protocols" no matter which track they ended up on was clear and neither irrational or unreasonable and would appear to have been what the Rule Committee intended. However:

> "54……The intended purpose of the fixed costs regime in this context [cases leaving the RTA and EL/PL Protocols] was that it should apply as widely as possible (and therefore to cases allocated to the fast track, and to cases sent for quantification of damages at disposal hearings), **but not to cases where there had been a judicial determination that they should continue in the multi-track.** The intended restriction on the ambit of the fixed costs regime is clear, and the only reason that restriction not being enacted in s.IIIA of Pt 45 appears to be inadvertence, rather than a deliberate decision by the Rule Committee to take a difference course. Similarly the substance of the provision which the Rule Committee would have made, if it had taken steps to enact that restriction would have been to provide that, from the moment when a case was in fact allocated to the multi-track, the s.IIIA fixed costs regime should cease to apply to that case. [emphasis added]
>
> 55 By contrast, I do not consider that the Rule Committee would have carried back to a pre-allocation stage a policy to dis-apply fixed costs, merely because a claim properly started in the Protocols had grown in value beyond £25,000,or had become the subject of a pleaded defence of fraud or dishonesty. As I have said, it by no means follows that every such case would be inappropriate for management and determination in the fast track. To require the parties to guess, or the court to decide, whether a case which settled prior to allocation (to which therefore part A or the first column of part B of Table 6B would apply) was or was not subject to fixed costs would introduce a damaging and unnecessary degree of uncertainty into a scheme which depends upon its predictabilityfor its contribution towards the proportionate, speedy and effective disposal of civil proceedings."

43. Adopting a purposive construction, he concluded that the best way to give effect to the government's intention would be, after the reference to 45.29J, to add to CPR 45.29B the following phrase:

> "..and for so long as the claim is not allocated to the multi-track"

44. The Civil Procedure Rule Committee duly made the suggested amendment as noted in the commentary to the White Book set out above.

45. In deference to the time spent by counsel in their submissions I shall consider the other authorities that were also relied on, although for reasons which will become apparent, none were particularly on point and were of limited assistance. *Sharp v Leeds City*

Council [2017] 4 WLR 98, heard shortly after *Qader*, was relied on by the defendant. Once again the judgment was given by Briggs LJ with whom both LJJ Jackson and Irwin agreed. The court refused to recognise an implied exception to the fixed costs regime for a successful pre-action disclosure application in a claim that was within a relevant Protocol. It was a relatively low value claim for a tripping accident on a footpath which then exited the EL/PL Protocol. The court held that the application fell within the description of interim applications in CPR rule 45.29H which expressly limited such application to fixed costs and disbursements by the clear words of rules 45.29A(1) and 45.29D. The court also found that to assess the costs of the application on the standard basis would destroy the clear purpose of the fixed costs regime. Reference to *Qader* in paragraph 14 of the judgment was relied on by Mr Roy.

> "14. Section IIIA of Part 45 provides almost as comprehensively for fixed recoverable costs in relation to claims which start within one of those Protocols, but no longer continue under them. I say "almost as comprehensively" because there are a small number of limited exclusions and exceptions from the applicability of the fixed costs regime, to some of which I will refer in due course. With one exception, those exclusions were all expressly made. The exception consists of the very occasional RTA or EL/PL claim which, having ceased to continue under the relevant Protocol, is allocated to multi-track. The absence of an express exclusion for such cases was the result of a drafting error which has now been rectified: see *Qader v Esure Services Ltd* (Personal Injury Bar Association intervening) [2016] EWCA Civ 1109; [2017] 1 WLR 1924, para 44, and the Civil Procedure (Amendment) Rules 2017 (SI 2017/95), paragraph 8."

46. The intention of the fixed costs regime was to be subject to only a very small category of clearly stated exceptions:

> "To recognise implied exceptions to such claim-related activity and expenditure would be destructive of the clear purpose of the fixed costs regime, which is to pursue the elusive objective of proportionality in the conduct of the small or relatively modest types of claim to which the regime currently applies." [31]

47. In any event a pre-application discovery application fell within the description of interim applications in rule 45.29H and was expressly excluded.

48. In *Solomon v Cromwell Group plc* [2012] 1 WLR 1048 the court resolved the conflict in the rules as between the fixed costs regime in Part 45 and the provisions as they were then drafted in rule 36.10(3) that provided for costs to be assessed on the standard basis where a claimant had accepted a defendant's Part 36 offer. The court (Moore-Bick LJ giving the lead judgment) found that it cannot have been the intention of the Rule Committee for a claimant in a low-value road traffic accident who accepts a defendant's Part 36 offer to be entitled to assessed costs on the standard basis – it would be inimical to the purpose of the fixed costs regime. He also relied on the following established principle:

> "21. In my view the rules must be read in accordance with the established principle that where an instrument contains both general and specific provisions some of which are in conflict the general are intended to give way to the specific. Rule 36.10 contains rules of general application, whereas Section II of Part 45 contains rules specifically directed to a narrow class of cases."

49. The conjoined cases of *Broadhurst v Tan* and *Smith v Taylor* [2016] 1 WLR 1928 explored a tension between Parts 36 and 45 (in their then iteration in rules 45.29B and 36.14A respectively). How was the indemnity costs principle of Part 36 - intended to reward a claimant who had succeeded at trial in obtaining judgment that was more advantageous than a Part 36 offer that the claimant had previously made - to apply to a case that was subject to the fixed costs regime under Part 45? Drawing on *Solomon* the court noted that fixed costs and assessed costs are conceptually different:

> "30. The starting point is that fixed costs and assessed costs are conceptually different. Fixed costs are awarded whether or not they were incurred, and whether or not they represent reasonable or proportionate compensation for the effort actually expended. On the other hand, assessed costs reflect the work actually done. The court examines whether the costs were incurred, and then asks whether they were incurred reasonably and (on the standard basis) proportionately."

50. The Court resolved the tension in favour of Part 36 and found that rule 45.29B does not stand alone but Part 36 makes specific provision for "costs consequences following judgment where Section 111A of Part 45 applies." The tension between rule 45.29B and rule 36.14A was resolved by the principle that the general provisions yield to specific provisions (*Solomon* [21]) and that because rule 36.1 is a self-contained procedural code it indicates that rule 36.14A was intended to prevail over rule 45.29B which is a rule of a more general nature.

51. *Williams* was relied on by the defendant in support of its alternative ground – that if the claimant was entitled to assessed costs, the judge should have assessed costs at no more than would have been the applicable fixed costs. In *Williams* the dispute was over the appropriate costs when an offer was made and accepted in accordance with Part 36. CPR 36.20 did not apply since the relevant Protocol had never been used, although it was found that it should have been. The Court of Appeal (Coulson LJ) held that CPR 45.24 – which would have limited the claimant's costs to fixed costs – did not apply and costs fell to be assessed in accordance with the normal rules under Part 44. The Part 36 regime is "a self-contained procedural code for the making and acceptance of settlement offers." [37]. However, the conduct provisions of Part 44 provided a complete answer to the criticism of the claimant's solicitors for their unreasonable failure to follow the relevant Protocol [61]. It was held that there was ample scope to allow only the fixed costs set out in the relevant Protocol in appropriate cases: "…it will usually follow that a claimant who…has only incurred a higher level of costs because he or she has unreasonably failed to follow the EL/PL Protocol, will be restricted under Pt 44 to the fixed costs and disbursements encompassed by that Protocol." [62] and [65].

52. The court went on to find that on the facts of that case an appropriate sum of assessed costs may well be fixed costs and the Circuit Judge should have made findings in respect of Part 44, instead of remitting it back to the court below for an assessment of costs [62].

> "….it will usually follow that a claimant who, on this premise, has only incurred a higher level of costs because he or she has unreasonably failed to follow the EL/PL Protocol, will be restricted under Part 44 to the fixed costs and disbursements encompassed by that Protocol."

53. In that case the appellate judge had offered to conduct a costs assessment after giving his judgment on the point of principle in the appeal, but the claimant, sensing that the judge would be likely to restrict the assessed costs to the level of fixed recoverable costs under the applicable table, successfully argued that the case should be referred back to the court below to conduct the assessment. The Court of Appeal found that the first tier appeal judge should have held his nerve.

Analysis and conclusions

54. It is common ground that the first ground of appeal raises a question of law and interpretation of the CPR, entirely apt to be decided on appeal.

Applicable interpretative principles

55. The statutory intention which underlies the rules was made clear by Briggs LJ in *Qader:* fixed costs were not intended to apply where there had been a judicial determination that a claim issued in Pt 7 should be allocated to the multi-track. *Qader* conducted a thorough analysis of the history and intention of the introduction of the fixed costs regime and the Jackson reforms. The case has done the heavy lifting for us in analysing the legislative purpose of the fixed costs regime to enable a purposive construction of the rules. The rationale was clear – that the relevant Protocols and the fixed costs regime were only suitable for smaller, less complicated claims. A case is only allocated to the multi-track if it is higher value or has other complexities. That principle – that the Protocols are not designed for the resolution of large or complex disputes - is endorsed, adopted and followed in all the cases cited to me (see for example (*Sharp* [31]) and none of the other cases cited to me concerned claims that would ever be considered appropriate for the multi-track. They were only ever low value claims that would need no more than 1 day's hearing.

56. There is nothing in the dicta of Briggs LJ in *Qader* to suggest that it was intended to carve out an exception for Part 36 offers. Mr Roy makes an ingenious argument that the dicta of Briggs LJ in *Qader* [35] that "…section III A of Part 45 should be read as if the fixed costs regime which it prescribes for cases which start within the RTA Protocol but then no longer continue under it is automatically dis-applied in any case allocated to the multi- track" is to be read as meaning that only the fixed costs regime is generally disapplied, not Section IIIA itself. When read in the context of the entire judgment it is apparent that use of the term "fixed costs regime" in the clause of that sentence was shorthand for and a reference to the whole of s.IIIA. He was not seeking to make a distinction between the fixed costs regime and Section IIIA. If that had been

his intention it would have been clearly spelt out. Mr Roy's interpretation is inconsistent with the statutory intention identified in *Qader*:

> "35(d) But careful analysis of the historic origins of the scheme now enshrined in s.IIIA of Pt 45, and in particular the process of consultation which preceded it, demonstrate that it was not in fact the intention of those legislating for this regime in 2013 that it should ever apply to a case allocated to the multi-track."

On the face of it, the claimant's construction would seem to give effect to the enactment's purpose that that of the defendant and the judge below.

Absurdity

57. Mr Roy placed great reliance on what he submitted was the absurd outcome which would arise on the claimant's interpretation. His "overarching point" was that the claimant would gain a significant additional costs benefit at the defendant's expense for accepting an offer which should have been accepted much earlier, within the relevant period in Part 36. It would generate perverse rewards and incentives for tardy behaviour and in particular encourage late acceptance and manipulation of the rules which would be contrary to the overriding objectives of saving expense, proportionality, expedition and fairness. Indeed the concern of the Circuit Judge was that a claimant may 'game' the system if the rules were read in the way contended for by the claimant. In this case there was no suggestion that the claimant or her solicitors were gaming the system by the timing of their acceptance of the offer. True to say there had been some criticism of the claimant's level of costs by the District Judge and the defendant wished to amend its defence to allege fundamental dishonesty in relation to quantum, but those are different issues to the choice of timing of the acceptance of the Pt 36 offer.

58. However, it does not follow that merely because a Part 36 offer is accepted out of time that a claimant is gaming the system in the way that the Defendant submitted. It is easy to imagine circumstances where a claimant perfectly reasonably rejects an offer but sometime later decides to accept it (due, for instance, to a change of circumstances). It does not follow that a claimant who accepts an offer out of time is 'gaming the system'. It plainly therefore does not follow that for a claimant to recover standard costs in circumstances where an offer is made before allocation to multi-track but accepted afterwards should be understood as an absurd outcome.

59. A compelling argument was advanced by the claimant that the interpretation contended for by Mr Roy would result in a clear absurdity and may risk injustice in some cases. It would mean that, subject only to a successful application under CPR 45.29J (exceptional circumstances), the court has no discretion to award a successful claimant costs on a standard basis even in respect of a claim which proves to be valued at (very) substantially above £25,000 in circumstances where a claimant not only accepts the offer out of time but also depending on the timing of the offer and the date of track allocation, when it has accepted the offer in time. Claims which were in a relevant Protocol but are no longer in it, would on Mr. Roy's case be caught by the definition, it would follow that Part 36 offers that had been both made after allocation to multi-track and accepted in time would be the subject to fixed recoverable costs. It would also mean that even though for all other purposes fixed costs did not apply pursuant to CPR

45.29B, that would not be the case for Part 36 offers. That would be wholly inconsistent with the statutory intention as made clear in *Qader*.

60. I note that the defendant could have protected its position by withdrawing the Part 36 offer once the case was allocated to track, or earlier, or when it applied to add a fundamental dishonesty allegation to its defence. It chose not to do so for whatever reason. If there was the risk of unfairness in a particular case, it would always be open to a defendant to withdraw its Part 36 offer in accordance with the usual rules.

61. It might also be observed the harshness acknowledged in *Qader* [55] (for a claimant in accepting a Part 36 offer in an ex-Protocol case that would be destined for multi-track allocation if it had continued to a CMC) could be avoided by counter offers, or settlement negotiations outside the strict parameters of Part 36.

62. For reasons which I have set out there was in any event more force in the claimant's argument that the defendant's argument produced an absurd result:[3] it would lead a claimant who has properly started her claim under a relevant Protocol in what then appeared to be a fairly standard RTA whiplash claim that turned out to be a claim of very significant value requiring very considerable expenditure on expert evidence and legal costs in a claim suitable for the multi-track –to be subsequently penalised in costs. It may well deter claimants from using the RTA Protocol in any case where there was any uncertainty about prognosis and sequelae and thus be counter to the intention of the 2013 reforms and the overriding objective. It could have a deterrent effect on using the relevant Protocols at an early stage and risk preventing cases from being dealt with expeditiously and fairly.

63. As noted by Mr Hutton in his skeleton argument, the logic of the defendant's argument was that where an ex-Protocol case is allocated to the multi-track and then, after that allocation, a defendant's Part 36 offer is made which is accepted by the claimant within the 21 days or outside, then CPR 36.20(2) applies and the claimant is only entitled to fixed costs under its terms, notwithstanding that the case had been allocated to the multi-track. CPR 45.29B and *Qader* would have to be treated as if they did not exist. If the offer is accepted outside the 21 day relevant period, then CPR 36.20(4) applies and the claimant is only entitled to fixed costs incurred up to 21 days after the Part 36 offer was made, notwithstanding that the case had been allocated to the multi-track, so that, once again CPR 45.29B and *Qader* would have to be treated as if they did not exist.

64. The greater unfairness is in the defendant's interpretation which could give a windfall to a defendant whereas in a claim that had properly started life in a relevant Protocol but for a perfectly legitimate reason becomes a multi-track claim, the claimant's legal team will have likely incurred costs way beyond the fixed costs regime appropriate in a multi-track case which it would be unfair for them to be deprived of. In this case, for example, there were expert reports from three specialists attached to the claim form. The high level of expert evidence and greater value inevitably means greater cost which will not be reflected in the fixed costs regime which applies to low value claims capable of resolution in a one day hearing.

[3] There were times during the hearing when the argument almost descended into a competition of who's interpretation was more absurd than the other's.

65. As was common ground, if the case had settled prior to track allocation – whether by acceptance of the Part 36 offer or otherwise - fixed costs only would have been recoverable, absent express agreement by the parties to the contrary. That might be said to be a harsh rule but is justified for the reasons explained by Briggs LJ in *Qader* [55]: an interpretation of the rule which permitted parties to argue about whether the case was suitable for allocation to the multi track before allocation would introduce a damaging and unnecessary degree of uncertainty into a scheme that depends upon predictability for its contribution towards the proportionate, speedy and effective disposal of civil proceedings. There is a potential harshness affecting Claimants who have commenced Part 7 claims but not continued in a relevant Protocol which the parties anticipate will be allocated to the multi-track but wish to settle before track allocation. It is however is always open to them to agree as part of their settlement terms for costs to be assessed and the fixed costs regime disapplied. But the mere fact that Briggs LJ countenanced such harshness in these circumstances cannot, as Mr. Roy submitted, be a reason for accepting the interpretation he pressed upon the court. In this case there has been a judicial determination that the case be allocated to multi- track. The case thus crossed the clear line which Briggs LJ considered was necessary to enable a party to obtain an order for standard costs. Such a line was necessary to provide predictability, avoid uncertainty and consequent satellite litigation [55]. Such harshness is not justified where there has been a judicial determination in respect of allocation.

66. I therefore do not consider that the claimant's interpretation is absurd, and that I should only endorse the claimant's interpretation if the court is unavoidably constrained to do so, which it is not.

67. I agree with the conclusion of the judge below that the fixed costs regime is disapplied retrospectively on allocation to the multi-track for the reasons he states at [14] and [15] of his judgment. This is clear from the wording proposed by Briggs LJ in *Qader* [56] and adopted; the fixed recoverable costs only apply "*for so long as the claim is not allocated to the Multi-Track*". The effect is then, that costs payable when the Part 36 offer were accepted are costs on the standard basis.

68. In this case, although it was thought, and no doubt hoped by Ms Attersley that her injuries would resolve relatively quickly and the issues would be neither large nor complex, with the inevitable consequence that damages would be relatively modest at less than £10,000, nearly three years later that turned out not to be the case. The early optimism 10 days after the accident was not justified with the benefit of hindsight. When the case was allocated to the multi-track permission had been granted for 10 experts to give evidence at a five day hearing and quantum of £150,000 was claimed. When the claim was issued under Part 7 it had all the hallmarks of a multi-track case and there was no surprise when it was duly allocated to that track. However, the claim properly entered the RTA Protocol when it first did so very shortly after the accident. It had grown in value since. Its increased value was recognised by the defendant when the £45,000 Pt 36 offer was made and liability admitted.

69. As I have set out above Briggs LJ explained, "it was not in fact the intention of those legislating for this [the fixed costs] regime in 2013 that it should ever apply to a case allocated to the multi-track" [35(d)] (and see [54] set out above). There is no qualification in *Qader* to that principle as reflected in the amendment to rule 45.29B

which was subsequently adopted by the rule committee. There is, it my mind, no reason why such an intention should not underlie an interpretation of Pt 36 since Part 36 is central to resolution of civil claims. Whilst Part 36 has long been recognised as self contained code, the interpretation of its terms is plainly to be considered in respect of the rules generally and the statutory intent. Mr. Roy's contention that the general principle/aid to interpretation that the general (part 45) yields to the specific (Part 36) and reliance on *Solomon* does not assist him.

70. Do the authorities before and after *Qader* relied on by the defendant modify the position? The difficulty for the defendant is that none of them were about ex-Protocol cases that were, due to their complexity or increased value, suitable for the multi-track and none had been allocated to the multi-track once issued as Pt 7 claims. They all concerned either a "low-value road traffic accident" (*Solomon)*, or other small or relatively modest type of claim that were always suitable for the fast track (*Sharp).* *Sharp* did not discuss the interplay between Pts 36 and 45, but concerned additional work undertaken by a claimant's side in a pre-action disclosure application in a relevant Protocol case. Whilst the other cases relied on by Mr Roy concern the interplay between aspects of the fixed costs regime and Pt 36, they are all predicated on the cases properly being the type of case suitable for the fast track and the fixed costs regime by dint of their value and lack of complexity, unlike the facts here. The cases with specific Pt 36 points, such as how the indemnity principle for a party beating an opponent's Pt 36 offer at trial would apply in fixed costs cases (see *Solomon* and *Broadhurst v Tan* [2016] 1 WLR 1928 (above) and also *Hislop v Perde* [2019] 1 WLR 201) are of little relevance or assistance to the facts here. They all concerned cases that were at all stages of the litigation suitable for the relevant Protocol, the fast-track and thus fixed costs and were cases to which Pt 45 applied.

71. Whilst it is the statute and the rules, not the textbooks, that are to be interpreted, it is informative to see what the leading textbooks say, better to understand the implications of the *Qader* amendment to CPR 45.29B given the specialist and technical nature of the issue. In its commentary of claims which no longer continue under the protocols (Part 45 section IIIA) Cook on Costs, 2025 chapter 44 paragraph 54 says as follows:

> "44.54 It used to be the case that a clamant could escape any fixed costs structures if he could leave the Portal (which many cases did) and, in RTA cases, get to issue proceedings so as to leave the predictable costs regime (in Section II) behind as well. Thereafter, with the exception of the trial costs (which were generally there simply to pay counsel's fees anyway) the solicitor was on to payment by the hourly rate. Section IIIA means that this is no longer so for the great majority of cases. Allocation to the multi-track rather than the fast track is however sufficient: *Qader v Esure Services Ltd* [2016] EWCA Civ 1109. The Court of Appeal were obliged to read extra words into CPR 45.29B to achieve the intention of the rule makers as perceived by the Court. The Rule Committee promptly added the same words to the rule."

72. The authors of Cook have not suggested any qualification to the principle in *Qader* that would support the defendant's argument. In its commentary on *Qader* Friston on Costs

(4th Edition) reaches the same conclusion: "CPR, Part Section IIIA does not apply to claims, that, having ceased to continue under the relevant Protocol, have been allocated to the multi-track" [50.233]. Both leading publications therefore support the claimant's submissions.

Literal interpretation

73. I did not understand either side to be pressing the argument that there was only one literal interpretation possible, which was each of theirs respectively, and have therefore focussed on a purposive construction. But in case I have misunderstood and in order to address all the arguments before me I will consider the matter in the alternative to see if the defendant's interpretation is the one and only possible plain and natural meaning of the words. Is the defendant's interpretation the clear and unambiguous meaning to and Section IIIA r 45.29A and B read with r. 36.13 and 36(20)(4)?

74. The general rule set out in 45.29A that cases that have started in, but have then exited a relevant Protocol, are subject to the fixed costs regime is subject to an exception if and once a case has been allocated to the multi-track: the fixed costs regime applies only "for as long as the case is not allocated to the multi-track." (CPR 45.29B). It therefore follows that on allocation to the multi-track costs fall to be assessed in accordance with Pt 44 and are not fixed and calculated by reference to the tables. So far so good for a plain and ordinary meaning to be gleaned from the words from a literal interpretation. But when the provisions of Part 36 come into play and the general rule as to the costs consequences of the timing of acceptance of a Part 36 offer does not apply "where the recoverable costs are fixed by these Rules" (36.13(3)) it becomes a little harder to follow. The wording of CPR 36.20(1): "This rule applies where – (a) a claim no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A" does not refer to rule 45.29B. Mr Roy describes this as an unambiguous and unqualified self-contained definition of the scope of CPR 36.20 and is therefore not subject to CPR 45.29B.

75. I am however dubious about Mr Roy's literal construction points. An equally possible, and to my mind more natural reading of the provisions arrives at the contrary conclusion. The plain and natural meaning of the words of 45.29A and B is that the general rule that cases that have started in, but then exited a relevant Protocol are subject to the fixed costs regime (45.29A), is subject to an exception when a case has been allocated to the multi-track. The fixed costs regime applies only "for as long as the case is not allocated to the multi-track." (CPR 45.29B). It therefore follows that on allocation to the multi-track costs fall to be assessed in accordance with Pt 44 and are not fixed and calculated by reference to the tables. When a Part 36 offer is made, the provisions of Part 36 come into play. The general rule as to the costs consequences of the timing of acceptance of a Part 36 offer are set out in Pt 36.13. The general rule does not apply where the recoverable costs are "fixed by these Rules" (36.13(3)). Part 36.20 is one such exception to that general rule where Section IIIA of Part 45 applies. The wording of CPR 36.20 is explicit, it sets out the "Costs consequences of acceptance of a Part 36 offer where Section IIIA of Part 45 applies". However, since the effect of 45.29B is to disapply the fixed costs regime where an ex-Protocol case has been allocated to the multi-track, section IIIA of Pt 45 does not apply. It is therefore an exception to the exception and costs fall to be assessed under the principles in r. 36.13.

76. Under the principles in 36.13, the claimant was therefore entitled to her costs to be assessed up to the end of the relevant period. CPR 36.20 did not therefore apply to this case at the moment when the Pt 36 offer was accepted.

77. I do not accept Mr Roy's argument that the combination of the heading of Section IIIA –

> "Claims Which No Longer Continue Under the RTA or EL/PL Pre-Action Protocols"

and the scope and interpretation rule 45.29A(1) that:

> "Subject to paragraph (3) [which has no application here]…this section applies – (a) to a claim started under... the RTA Protocol…where such a claim no longer continues under the relevant Protocol"

means that CPR 45.29A should be read as being subject to CPR 45.29B, so that the fixed costs provisions continue to apply to a case which had been allocated to the multi-track. The reference in CPR 45.29A to "this section" refers to all of IIIA and thus includes CPR 45.29B which is part of that section. CPR 45.29B specifically creates an exception for ex-Protocol cases if they have been allocated to the multi-track and only once they have been allocated to the multi-track, which applies in this case.

78. Mr Roy notes that 45.29A is entitled "scope and interpretation" and that within the wording of 45.29A itself, an exception is identified to s.IIIA. It is a reference to rule 45. 24: a failure to comply or electing not to continue with a relevant Protocol. Surely, he argues, if it was intended for 45.29B also to be an exception it need to be set out in 45.29A. But it is a false analogy because 45.24 is not part of "this section" i.e. IIIA and if it had not been referred to in Section IIIA it would not have been excluded from the scope of IIIA. 45.29B, by contrast is part of s.IIIA and there was no need to refer in 45.29A to the exception contained in 45.29B. A purist might argue it would be otiose.

79. If one was relying on literal construction alone, it seems to be plain that Part 36.20 was intended to reflect the effect of IIIA of Part 45 and that a claim which has been allocated to multi-track would no longer be subject to fixed recoverable costs. It would perhaps have been clearer and avoided some of the argument if there was an express reference in CPR 36.20 that claims that come within 45.29B are excluded from 36.20 and fall back into the general rule in 36.13 and saved much of the argument in this case, but it is not fatal to the claimant's argument. That may be something that the Rule Committee wishes to consider for the purposes of greater clarity but since the issue appears not to have arisen in any other cases since the introduction of the Jackson reforms 12 years ago it may not be necessary. The defendant's argument on literal interpretation therefore also fails.

80. As to the argument that the specific provisions of Pt 36.20 take precedence over the general provisions of Pt 45, on my reading and interpretation of both rules, they marry up and mesh together satisfactorily on a close reading, so it is not a question of one rule trumping another – since, as properly read, they are consistent with each other. The dicta in *Solomon* is of no help to the defendant since the rules are not in conflict with each other.

81. I therefore conclude that both on a purposive and also a literal reading of the rules where an ex-Protocol case is allocated to the multi-track, it comes out of Section IIIA by the wording of CPR 45.29B and Part 36(20) does not apply.

82. Ground 2 was argued in the alternative. Since the appeal has been successful on ground 1, ground 2 falls away and I do not propose to deal with it.

Defendant's Respondent's Notice (indirect fixed recoverable costs)

83. The defendant submitted that even if fixed costs did not apply directly, this court should uphold the judge's decision for a different reason: by exercising its discretion to assess the claimant's costs at a level equivalent to fixed costs, relying on the authority of *Williams*, discussed above at [47]-[49]. Since fixed would have applied had the claimant had acted as she should have done, by accepting the Pt 36 offer within the relevant period, then the claimant's costs should have been assessed under Pt 44 at a level equivalent to fixed costs, thus indirectly applying the fixed costs regime.

84. *Williams* concerned very different facts and an entirely different provision of the rules in CPR 45.24 – where there has been an unreasonable failure to follow a relevant Protocol. But more importantly it concerned an indirect application of fixed costs in an assessment. In this case the judge below did not find unreasonable conduct by the claimant in the timing of the acceptance of the Pt 36 offer and I do not consider that it is open to me to make such a finding. The judge thought the claimant may be able to establish exceptional reasons. His concern that this might avail the claimant in the circumstances of this case to my mind plainly make it inappropriate for me to penalise the claimant in the way suggested.

85. There does not therefore appear to be a good reason to deprive the claimant of costs on the standard basis up to the expiry of the relevant period.

86. There is a different question as to whether, on assessment, some of the costs claimed were unreasonable, as was suspected might be the case by DDJ Balchin at the CMC on 5 January 2022. The proposition in *Williams* - that a claimant who unreasonably fails to follow a relevant Protocol thereby incurring a higher level of costs than would be awarded on a fixed costs basis will be restricted under Pt 44 to the costs they would have been awarded under Pt 45 – does not however read across by way of analogy to late acceptance of a Pt 36 offer after an ex-Protocol case has been allocated to the multi-track. The self-contained code in Pt 36 has its own sanction for late acceptance of a Pt 36 offer of depriving the successful party of their costs beyond the relevant period as set out in 36.13.

87. I allow the appeal. The claimant's costs must now be assessed, if not agreed, up to the end of the relevant period on the standard basis in the normal manner under Part 44 in the County Court at Southend where both parties will be able to make the various points they wish to rely on and appropriate findings can be made. It is not appropriate for this court to lay down any guidance, general principles or presumptions about how the assessment of costs in cases of this nature should be conducted.