Case No: A06YQ205

IN THE COUNTY COURT
AT CENTRAL LONDON

Thomas More Building
Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/10/2018
Start Time: **10:04** Finish Time: **11:32**

Page Count: 23
Word Count: 9615
Number of Folios: 134

Before:

HIS HONOUR JUDGE WULWIK

- -

Between:

MISS SEYI ADELEKUN	**Claimant/Appellant**
- and -	
MRS SIU LAI HO	**Defendant/Respondent**

- -
- -

Roger Mallalieu (instructed by **Bolt Burdon Kemp**) for the **Claimant/Appellant**
Andrew Roy (instructed by **Taylor Rose TTKW**) for the **Defendant/Respondent**

- -

APPROVED JUDGMENT
(As approved by HHJ Wulwik)

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His Honour Judge Wulwik:

Introduction

1. This is an appeal by the claimant, Miss Seyi Adelekun, against a decision of Deputy District Judge Harvey made on 7 February 2018 whereby he decided that the costs of a road traffic accident personal injury claim, following the acceptance by the claimant of the defendant's Part 36 offer in the sum of £30,000 gross and a subsequent consent order, were to be determined under the fixed costs regime under Section IIIA of CPR Part 45. The Deputy District Judge refused permission to appeal. On 15 March 2018 His Honour Judge Roberts granted permission to appeal on the papers. Neither counsel who appeared before me on the appeal appeared before the Deputy District Judge.

2. There were four grounds of appeal attached to the claimant's notice of appeal dated 1 March 2018, namely:

   (1) That the Deputy District Judge wrongly varied a consent order dated 24 April 2017, it being said that the Deputy District Judge had no power to vary the consent order containing the parties' contractual agreement that the claimant's costs were to be subject to detailed assessment on the standard basis in the absence of fraud, mistake, misrepresentation or incapacity.

   (2) That the Deputy District Judge did not give due consideration to the reallocation of the claim to the multi-track, with the Deputy District Judge being asked to reallocate the claim to the multi-track.

   (3) That the Deputy District Judge, in making the decision he did, wrongly interfered with the detailed assessment proceedings, it being said that notwithstanding any power to vary the consent order dated 24 April 2017 the fixed costs issue should have been taken by the defendant on detailed assessment.

   (4) That, on the basis the claimant's appeal was successful, the claimant should have her costs below.

3. With regard to the third ground of appeal, that the fixed costs issue should have been taken on detailed assessment, the claimant's counsel on the hearing of the appeal indicated that he was not pursuing ground 3 as a stand alone ground of appeal, and was not suggesting that on appeal I should not decide the fixed costs issue. The third ground of appeal therefore, to all intents and purposes, fell by the wayside.

4. On 29 March 2018 the defendant filed a respondent's notice asking the Court to uphold the order made by the Deputy District Judge on the ground that properly construed an order for reasonable costs on the standard basis to be the subject of detailed assessment if not agreed, or any similarly worded form of order, did not oust the fixed recoverable costs provided by the CPR in respect of all or part of the costs claimed. In relation to this additional ground, the defendant stated that it did not necessarily require the variation of the consent order dated 24 April 2017, the important consequence of the Deputy District Judge's order being that the claimant

recovered fixed recoverable costs in accordance with CPR 45 Section IIIA, subject to any successful application by the claimant on detailed assessment for higher costs under CPR 45.29J, an avenue which the Deputy District Judge's order of 7 February 2018 left open to the claimant to pursue, if so advised.

5. It was partly in consequence of this additional ground for upholding the Deputy District Judge's decision that the defendant in the respondent's notice cross-appealed against the Deputy District Judge's order that there be no order for costs, it being said that the Deputy District Judge having misdirected himself in law on the effect of the order was consequently wrong to find that the defendant was the author of its own misfortune and should not have the costs of the various applications, and that he should have ordered the claimant to pay the defendant's costs of the applications.

Background

6. The claim resulted from a road traffic accident on 26 June 2012. The claim was commenced by a claim notification on 15 January 2014 under the pre-action protocol for personal injury claims in road traffic accidents, which applies to claims valued at up to £25,000. In the absence of an admission of liability, the claim exited the portal on 6 February 2014, and proceedings were issued in December 2014. On 31 March 2015 I allocated the claim to the fast-track and gave directions. The claim was originally listed for trial on 7 January 2016, but on 28 September 2015 that trial date was vacated. Further directions were given on 18 November 2015 and 6 July 2016. On 18 January 2017 the claimant issued an application to reallocate the claim to the multi-track, the application being listed to be heard on 24 April 2017. On 19 April 2017, that is some five days before the claimant's application to reallocate the claim to be multi-track was due to be heard, the defendant made a Part 36 offer gross of recoverable benefits. The Part 36 offer letter is at tab 5, page 53 of the appeal bundle:

> "19 April 2017
>
> Part 36 Offer Letter:
>
> Dear Sirs
>
> Our clients: Cheuk/Ho,
>
> Your client: Seyi Adelekun
>
> We are instructed by the defendant to offer £30,000.00 gross in full and final satisfaction of this claim.
>
> This offer is made in accordance with Part 36 of the Civil Procedure Rules. The terms of the offer are as follows:
>
> (1) Our client offers £30,000.00 by way of a gross lump sum in full and final settlement of your client's claim. This offer is made in relation to the whole of your client's claim.

(2) The sum is gross of benefits repayable to the CRU. Accordingly, if the offer is accepted, any such benefits will be deducted from this sum. We have obtained an up to date CRU certificate valid until 02/10/17 confirming nil recoverable benefits are owing. The net amount offered is therefore £23,737.00.

(3) If the offer is accepted within 21 days, our client will pay your client's legal costs in accordance with Part 36 Rule 13 of the Civil Procedure Rules, such costs to be subject to detailed assessment if not agreed.

If your client accepts the offer after the 21 day period, then either we will need to agree the costs liability or the Court will have to make an order as to costs".

7. On the following day, 20 April 2017, the defendant's solicitors emailed the claimant's solicitors asking them to confirm if they had received instructions on the defendant's Part 36 offer, and at the same time indicating that the defendant's solicitors could consent to the matter being multi-tracked, the email from the defendant's solicitors being at tab 5, page 54 of the main bundle:

"Hi Stephanie

I have just left you a voicemail on this one.

Can you confirm if you have received instructions on our Part 36 offer?

With regard to the application, we can consent to the matter being multi track. I note that when we spoke yesterday you had advised that you may be looking at applying to provide an updated schedule of loss: if so, I can agree to this, but on the provision that it should just relate to the change in discount rate only and would request that we have permission to file a revised updated counter-schedule. I would also request permission for questions to the expert given the potential increase.

Can you call/email me to discuss and see if we can deal with the above by way of consent?

I look forward to hearing from you".

8. On the next day, 21 April 2017, the claimant's solicitors emailed the defendant's solicitors accepting the defendant's offer of settlement in the sum of £30,000, the email from the claimants solicitor's being at tab 5, page 56 of the main bundle:

> "Hi Gemma
>
> As discussed, I am pleased to confirm that the claimant will accept your offer of settlement in the sum of £30,000. I have attached a consent order setting out the terms of settlement.
>
> The Court have requested that we submit a consent order so that the hearing on Monday may be vacated. I should be grateful if you could sign the attached consent order and return it to me so that I may file it at Court.
>
> I look forward to hearing from you".

9. A consent order in Tomlin form was forwarded by the claimant's solicitors to the defendant's solicitors for signature. At the same time the claimant's solicitors emailed the Court to confirm that the matter had settled, that they were in the process of agreeing a consent order with the defendant, and asking for the hearing on 24 April to be vacated, that hearing having been listed in respect of the claimant's application to reallocate the claim to the multi-track. Both parties' solicitors signed the Tomlin Order, and on 21 April 2017 the claimant's solicitors emailed the consent order to the Court, the Tomlin Order being at tab 5, pages 61-62 of the main bundle:

> "TOMLIN ORDER
>
> UPON the parties having agreed the terms of settlement set out in the attached schedule
>
> BY CONSENT IT IS ORDERED that:
>
> (1) All further proceedings in this action be stayed except for the purpose of carrying the said terms into effect and that there be liberty to apply for that purpose.
>
> (2) The claimant's application listed for 24 April 2017 be vacated.
>
> (3) The defendant do pay the reasonable costs of the claimant on the standard basis to be the subject of detailed assessment if not agreed…..
>
> SCHEDULE
>
> (1) The claimant do accept the gross sum of £30,000 (thirty thousand pounds) having already received £6,263 (six thousand two hundred and sixty three pounds) by way of interim payments, in full and final settlement of her claim for damages inclusive of interest.

> (2) The defendant do discharge any monies owing to the Compensation Recovery Unit of the Department for Work and Pensions. We understand that there is a valid certificate in place showing a balance of nil.
>
> (3) The balance of £23,737 (twenty three thousand seven hundred and thirty seven pounds) be paid to the claimant's solicitors within 14 days of this order.
>
> (4) Upon payment of the damages and costs referred to above, the defendant be discharged from any further liability in respect of this claim."

10. The claimant's application to reallocate the claim to the multi-track was never heard by the Court on 24 April 2017, the parties agreeing that all further proceedings in the action be stayed except for the purpose of carrying the agreed terms of settlement into effect, and it being agreed that the hearing of the claimant's application listed for 24 April 2017 should be vacated. The Tomlin Order was approved by the Court and embodied in an order made by District Judge Brooks on 24 April 2017, the order being at tab 13, pages 189-190 of the main bundle. The order as drawn up by the Court followed the wording of the consent order in Tomlin form signed by the parties' solicitors and sent to the Court on 21 April 2017.

11. The parties were subsequently unable to agree whether or not the fixed costs regime applied, the defendant contending that the fixed costs regime applied and the claimant disagreeing and seeking costs of £42,856.34.

12. On 1 August 2017 the defendant issued an application to determine whether or not the fixed costs regime applied, the application being subsequently amended on 30 August 2017. It was that application which came before Deputy District Judge Harvey on 7 February 2018.

The hearing before the Deputy District Judge on 7 February 2018

13. The Deputy District Judge rejected by way of preliminary issue the claimant's contention that he had no jurisdiction to hear the defendant's application and that the issue of whether or not the fixed costs regime applied should be left for detailed assessment. He proceeded to determine the issue and found that the fixed costs regime applied. He nevertheless recorded in his order that it was open to the claimant to argue on detailed assessment that she should recover costs in excess of fixed costs by reference to the exceptional circumstances provisions of CPR 45.29J. The order made by the Deputy District Judge on 7 February 2018 was in the following terms:

> "Upon application notice by the defendant dated 1 August and amended on 30 August 2017
>
> And upon hearing the legal executive for the claimant and counsel for the defendant
>
> IT IS ORDERED THAT

(1) Paragraph 3 of the order dated 24 April 2017 is varied so that the claimant recovers from the defendant her fixed costs under CPR 45IIIA pursuant to the Part 36 offer dated 19 April 2017 being accepted on 21 April 2017, subject to the claimant's right to apply for the operation of exceptional circumstances under CPR 45.29J (such application to be made if so advised in detailed assessment proceedings to the SCCO).

(2) No order as to costs.

(3) Permission to appeal refused - on points of the preliminary issue (the Court had jurisdiction) and on the point of fixed costs regime (no prospect of success)."

14. A number of transcripts are before the Court:

(1) There is a transcript of the proceedings before the Deputy District Judge at tab 6, pages 63-99 of the main bundle.

(2) There is a transcript of the short judgment of the Deputy District Judge on the preliminary issue of the Deputy District Judge's jurisdiction to determine whether the fixed costs regime applied, that being at tab 1, page 2 of the supplemental bundle.

(3) There is a transcript of the judgment of the Deputy District Judge on the main issue of whether the fixed costs regime applied, that being at tab 6, pages 102-103 of the main bundle.

(4) There is a transcript of the short judgment of the Deputy District Judge on the issue of costs, that being at tab 2, page 5 of the supplemental bundle.

The grounds of appeal

15. The first ground of appeal is that it is said that the Deputy District Judge wrongly varied the consent order dated 24 April 2017, it being said that the Deputy District Judge had no power to vary the consent order containing the parties' contractual agreement that the claimant's costs were to be subject to detailed assessment on the standard basis in the absence of fraud, mistake, misrepresentation or incapacity.

16. The defendant in its respondent's notice asks the Court to uphold the order made by the Deputy District Judge on the ground that properly construed an order for reasonable costs on the standard basis to be the subject of detailed assessment if not agreed or any similarly worded form of order did not oust the fixed recoverable costs provided by the CPR in respect of all or part of the costs claimed. It is in relation to this additional ground that the defendant stated that it did not necessarily require the variation of the consent order dated 24 April 2017, the important consequence of the Deputy District Judge's order being that the claimant recovered fixed recoverable costs in accordance with CPR 45 Section IIIA, subject to any

successful application by the claimant on detailed assessment for higher costs under CPR 45.29J.

17. The focus of the first ground of appeal is on the Deputy District Judge's power to vary the consent order dated 24 April 2017, whereas the focus of the respondent's notice is on the effect of the consent order in the light of the fixed costs regime. The transcript of the judgment of the Deputy District Judge on the main issue of whether the fixed costs regime applied is at tab 6, pages 102-103 of the main bundle. In a relatively short judgment the Deputy District Judge said this:

> "(1) This is an application brought by the defendant, Siu Lai Ho, for effectively an order that the fixed costs or standard costs under CPR 45 Section 3A should operate in circumstances where a consent order had been drawn up and issued by the Court on 24 April 2017 by District Judge Brooks. That consent order was in usual Tomlin order terms but it provided in the body of the order under paragraph 3 the defendant do pay the reasonable costs of the claimant on the standard basis to be the subject of detailed assessment if not agreed. That consent order had been generated as a result of a Part 36 offer having been accepted. The Part 36 offer had been made on 19 April for the sum of £30,000. I should add this is a personal injury claim involving a pedestrian who I think was run down and the Part 36 offer stated that £30,000 gross lump sum and the net amount after the CRU element had been accounted for was £23,737. The Part 36 offer gave 21 days in which to accept the offer and it also said that Part 36 rule 13 of the CPR would apply if it was not agreed. It did not actually say that the Part 36 costs consequences would apply, but be that as it may it still does not invalidate it as a Part 36 offer.
>
> (2) The offer was accepted by the claimant on 21 April and as I said, from there a consent order was drafted and signed by both parties and submitted to the Court. In my judgment the consent order was not necessary at that point because Part 36 provided everything for the claimants to have their costs assessed and when one looks at the machinery of Part 36, it actually states in 36.21(1) and (2) that this rule applies where a claim no longer continues under the RTA Protocol pursuant to 45.29, and so in my judgment this is a case where 36.21 would apply. 36.20(2) says where a Part 36 offer is accepted within the relevant period, the claimant is entitled to the fixed costs in Table 6B etc. of Part 45 for the stage applicable on the date on which the notice of acceptance was served on the offeror.

(3) In summary, what Part 36 does is to still put the costs into the fixed costs regime. What the mischief is here is the consent order purported to give the claimant the advantage of having taken it out of the fixed costs regime; however, the rules clearly say in Part 45.29A that effectively the fixed costs regime must apply and therefore the question to be decided in this case is can the consent oust all that? Can the parties agree, as indeed they purported to agree, to come out of the fixed costs regime by the signing of a consent order? In my judgment the consent order is irregular because the Court, when approving that order, ought to have looked at the rules and recognised that it is an order which the Court ought not to have made because of the wording of 45.29 which clearly puts the proceedings within the fixed costs regime. As I have said, the consent order was otiose in this case. It was not necessary really.

(4) Effectively, the defendant's application could be one to set aside paragraph 3 of the consent order and substitute the fixed costs regime. Effectively, I think that is what the defendant seeks, and Ms Kennedy has helpfully and very thoroughly taken me through a very detailed skeleton argument prepared by her instructing solicitors which I have read and I think is sound, and I accept the submissions made in that skeleton argument including the case law of *Solomon v Cromwell Group Plc* [2011] EWCA Civ 1584, where Moore-Bick LJ dismissed the appeal that rule 36.10 contained rules of a general application, whereas Section II of Part 45 contained rules specifically directed to a narrow class of cases, and he enunciated the principle that the general gave way to the specific. That was his thinking at the time, although the case pre-dated this particular regime. It was in 2011. The same rationale applies to this case, and clearly in my view the consent order one could say was *ultra vires* and it was not correct that the Court approved that order.

(5) Dealing with Mr Jenkinson's submissions, I dealt with his preliminary issue which says that basically he wants me to transfer the matter or rather strike it out because he says this is a matter for the SCCO. I do not agree with that for the reasons I have already given, but he also submits that exceptional circumstances apply because the case was agreed to be reallocated to the multi-track prior to the acceptance of the Part 36 offer. The answer to that, however, is that first of all the exceptional circumstances that he points me to are

> only exceptional circumstances under the fixed costs regime. They are not exceptional circumstances which would help the claimant in upholding the consent order, I do not think, and my view is that it is the consent order, as I have said, ought not to have been drawn in that way. I think it was an error to do so and therefore it ought to be amended and furthermore if there is an argument on exceptional circumstances it ought to be made within the fixed costs regime and that is a matter which probably ought to go to the SCCO.
>
> (6) I do not know if it is right for me to determine that today because there is no extant application for it to be treated as an exceptional circumstance. It is a matter that should be made in my view by the claimant bringing a proper application notice. For those reasons I am going to grant the defendant's application but I shall leave it open for Mr Jenkinson if he wants to make a proper application for exceptional circumstances."

18. CPR 36.5 contains provisions as to the form and content of a Part 36 offer. It provides, so far as relevant, as follows:

> "36.5(1) A Part 36 offer must-
>
> (a) be in writing;
>
> (b) make clear that it is made pursuant to Part 36;
>
> (c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.13 or 36.20 if the offer is accepted…."

19. CPR 36.13 deals with the costs consequences of acceptance of a Part 36 offer. It provides, again insofar as relevant, as follows:

> "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)……

> (4) Except where the recoverable costs are fixed by these Rules, costs under paragraphs (1) and (2) are to be assessed on the standard basis if the amount of costs is not agreed……
>
> (Part 45 provides for fixed costs in certain classes of case)."

20. CPR 36.20 deals with the costs consequences of acceptance of a Part 36 offer where Section IIIA of Part 45 applies. It provides, again insofar as relevant, as follows:

> "36.20(1) This rule applies where a claim no longer continues under the RTA or EL/PL Protocol pursuant to Rule 45.29A(1).
>
> (2) Where a Part 36 offer is accepted within the relevant period, the claimant is entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which notice of acceptance was served on the offeror."

21. CPR 45.29B deals with the application of fixed costs and disbursements under the RTA Protocol. It provides as follows:

> "45.29(B) Subject to rules 45.29F, 45.29G, 45.29H and 45.29J, and for as long as the case is not allocated to the mutli-track, if in a claim started under the RTA Protocol the Claim Notification Form is submitted on or after 31st July 2013, the only costs allowed are-
>
> (a) the fixed costs in rule 45.29C;
>
> (b) disbursements in accordance with rule 45.29I".

22. The rule was amended to add the words 'and for so long as the case is not allocated to the multi-track" with effect from 6 April 2017 following the case of *Qader v Esure Services Limited* [2016] EWCA Civ 1109.

23. The claim in the present case started under the RTA Protocol. The claim notification form was submitted after 31 July 2013. It was submitted on 15 January 2014. The claim was not allocated to the multi-track prior to the settlement of the claim. The claim was settled by acceptance of the defendant's Part 36 offer on 21 April 2017, that is after the amendment of the wording to CPR 45.29B. Therefore, subject to any exception within which the claimant can bring herself and to the parties' terms of settlement, the fixed costs regime applied.

24. CPR 45.29F (defendants' costs), 45.29G (counterclaims under the RTA Protocol) and 45.29H (interim applications) are not relevant to the present claim. CPR 45.29J deals with claims for an amount of costs exceeding fixed recoverable costs and provides, so far as relevant, as follows:

> "45.29(J)(1) If it considers that there are exceptional circumstances making it appropriate to do so, the Court will consider a claim for an amount of costs (excluding

> disbursements) which is greater than the fixed recoverable costs referred to in rules 45.29B to 45.29H."

25. The Deputy District Judge left it open for the claimant to argue that there are exceptional circumstances in this case.

26. I was referred by the parties to a number of authorities. I will refer to three cases, namely *Solomon v Cromwell Group Plc & Ors* [2012] 1 WLR 1048, *Sharp v Leeds City Council* [2017] EWCA Civ 33, and *Hislop v Perde & Ors* [2018] EWCA Civ 1726. All three decisions are decisions of the Court of Appeal.

27. In *Solomon*, the Court of Appeal was concerned with two road traffic accident cases where the claimant accepted the defendant's Part 36 offer of damages of less than £10,000 and with the defendant agreeing to pay the costs of the proceedings, but with the amount not being agreed. The claimant sought to have the costs of the proceedings assessed on the standard basis under what was then CPR 36.10(3). The version of CPR Part 36 then in force did not have distinct rules dealing with the effect of acceptance of a Part 36 offer in a conventional case and in a portal case. There was a similar fixed costs rule in Section II of CPR Part 45 to that now contained in CPR 45.29B. It had been held by the lower Court in each case that since the cases fell within Section II of CPR Part 45, rule 36.10(3) did not apply. The Court of Appeal dismissed the appeals, it being held that CPR 36.10 contained rules of general application whereas Section II of CPR Part 45 contained rules specifically directed to a narrow class of cases, and that the principle that the general gave way to the specific applied; that Section II of CPR Part 45 governed the cases to which it applied to the exclusion of other rules which made different provisions for the general run of cases; and that, subject to any agreement between the parties to the contrary, neither party could recover more or less by way of costs than was provided for under the fixed costs regime of Section II of CPR Part 45.

28. I refer to the judgment of Moore-Bick LJ at paragraphs 22-26, on pages 1055-1056 of the report where he dealt with the terms of settlement in the two cases. He said this:

> "Terms of settlement:
>
> > 22. Having identified the ordinary consequences of settling under Part 36 a claim to which Section II of Part 45 applies, it is necessary to consider whether the particular terms of settlement provided for a different result. Mr Morgan submitted that it is not possible for parties to contract out of the fixed costs regime, but in my view that is true only in part. There is nothing in the rules to prevent parties to a dispute settling it on whatever terms they please, including as to costs. Section II of Part 45 is concerned with proceedings under rule 44.12A, and prescribes what the receiving party is to be allowed by way of costs in such proceedings. I do not think that it is open to the

parties by their agreement to expand or limit the Court's powers, and if the claimant chooses to proceed under rule 44.12A he will be unable to recover more than the amount for which Section II of Part 45 provides. However, there is no reason in principle why, if parties choose to agree different terms, the agreement should not be enforceable by ordinary process.

23. In *Solomon v Cromwell*, both offers that finally resulted in the settlement of the claim were expressed to be made by reference to Part 36. Nothing further was said about the consequences of acceptance, apart from a willingness on the part of the defendant to pay the claimant's "reasonable costs" to be assessed if not agreed. There was nothing in either offer to suggest that the defendant was willing to incur a liability in costs beyond that for which the rules provide.

24. The offer that led to the settlement in *Oliver v Doughty* was made by the defendant's insurers to the claimant's solicitors in a letter dated 1 September 2009. The material part was couched in the following terms:

'Pursuant to Part 36 of the Civil Procedure Rules (CPR) we offer to settle the remaining aspects of your client's claim in the sum of £5,250. This offer is to settle the whole of the remaining aspects of your client's claim for general and special damages, and is intended to have the consequences of Part 36 of the CPR….. We will be liable for your client's reasonable costs in accordance with CPR 36.10…..'

25. Mr Hutton submitted that the express offer to pay the claimant's costs in accordance with rule 36.10 gave rise on acceptance to a contract to pay costs on the standard basis, but in my view that is not how the letter is to be understood. Taken as a whole, I think that the letter was intended to contain a Part 36 offer carrying the consequences for which the rules provide, hence the use of the expression 'is intended to have the consequences of Part 36 of the CPR.' I do not think that the reference to Rule 36.10 can properly be read as anything more than an offer to pay costs on the usual basis, certainly not an offer to pay costs on a

> basis more or less generous than that set out in the rules. There is no reason to think that the issue that has now arisen was present to either parties' mind at the time and it is difficult to see why the defendant's insurers should be understood to have offered something for which the rules do not provide. I do not think that the parties agreed to depart from the consequences for which the rules provide. All this only goes to show, however, that parties should do their best to avoid any ambiguity about costs when making offers to settle.
>
> 26. For these reasons, I do not think that either claimant can recover more by way of costs than the amounts prescribed in Section II of Part 45. Accordingly, I would dismiss both appeals."

29. In the present case the defendant's Part 36 offer dated 19 April 2017 which the claimant accepted on 21 April 2017 provided, in paragraph 3 that:

> "If the offer is accepted within 21days our client will pay your client's legal costs in accordance with Part 36 Rule 13 of the Civil Procedure Rules, such costs to be subject to detailed assessment if not agreed."

30. CPR 36.13 deals with the cost consequences of acceptance of a Part 36 offer in a conventional case, though expressed to be subject to rule 36.20 where Section 3A of Part 45 applies.

31. However, the subsequent consent order in Tomlin form signed on 21 April and embodied in the order dated 24 April 2017 provided in paragraph 3 that:

> "The defendant do pay the reasonable costs of the claimant <u>on the standard basis</u> (my emphasis), to be the subject of detailed assessment if not agreed."

32. That was not an agreement to pay costs on the usual basis of fixed costs, but on the standard basis. The position was different in *Solomon* in the two cases that the Court of Appeal had to consider, there being no subsequent consent order as in the present case. Further, unlike the position in the two cases considered by the Court of Appeal in *Solomon*, there is every reason to think that the issue that has now arisen was present in the parties' minds at the time. The claimant had applied for the claim to be reallocated to the multi-track, and the defendant agreed that the matter should be reallocated to the multi-track before the claimant accepted the defendant's Part 36 offer and before the consent order was signed by the parties on 21 April 2017 and embodied in the order dated 24 April 2017.

33. In *Sharp v Leeds City Council* the Court of Appeal was concerned with the costs of an application for pre-action disclosure, and whether the fixed costs regime for such claims applied. It was held that the fixed costs regime applied to the application, the

Court reiterating that the plain object and intent of the fixed costs regime for claims started but not continuing under the EL/PL Protocol contained in Section IIIA of CPR Part 45 was that, from the moment of entry into the portal pursuant to the EL/PL Protocol, recovery of the costs of pursuing or defending that claim at all subsequent stages was intended to be limited to the fixed rates of recoverable costs, subject only to a very small category of clearly stated exceptions. The Court did not have to consider the position where it was suggested that the parties had reached a contrary agreement.

34. Finally, in *Hislop v Perde,* the Court of Appeal had to consider two cases where a defendant to a claim under the fixed costs regime accepted the claimant's offer to settle under CPR Part 36 many months after the offer was made. It was held, allowing the defendant's appeal in both cases, that in those circumstances the case remained within the fixed costs regime. Coulson LJ, in paragraph 2 of his judgment, referred to the case of *Solomon v Cromwell Group Plc* as establishing that where a Part 36 offer is accepted within 21 days in a case governed by the fixed costs regime, neither party can recover more or less by way of costs than is provided for by that fixed costs regime. In paragraph 32 of the judgment, he cited extensively from paragraphs 19-21 of the judgment of Moore-Bick LJ in *Solomon* as showing that the fixed costs regime took precedence over CPR Part 36. Again, in paragraph 41 of the judgment, he referred to *Solomon* as being authority for the proposition that the fixed costs regime made mandatory by rules 45.29B and 45.29D would continue to apply to those cases covered by it unless there was an express exception. Coulson LJ did briefly consider the exceptional circumstances provisions of Rule 45.29J, stating at paragraphs 54-58 of his judgment as follows:

> "54. Finally it remains the position that in an exceptional case of delay it may be possible for the claimant to escape the fixed costs regime. That arises under r.45.29J. In this way, my interpretation of the specific rules within Part 36 does not lead to a dogmatic or rigid conclusion because the draughtsman of the rules already had one eye on ensuring that, in an exceptional case, it might be possible for a claimant to escape, at least in part, the fixed costs regime. In that way there remains a clear incentive for a defendant not to delay in accepting a claimant's Part 36 offer.
>
> 55. I am anxious not to express detailed conclusions about the scope and extent of r.45.29J because, other than acknowledging that it provides a potential escape route in an appropriate case, I do not consider that its general ambit is directly relevant to this appeal. The point did not arise in the *Hislop* case at all (so was not argued before us) and for the reasons set out in paragraphs 65-68 below, I consider that the reference to the rule by DJ Reed in the *Corr* case was based on a false premise. However, two particular issues were raised as to the scope of Rule 45.29J and I address each briefly.

> 56. First, I do not consider that a defendant's late acceptance of a claimant's Part 36 offer can always be regarded as an exceptional circumstance. On the contrary, I take the view that my reasoning in *Fitzpatrick* as to why there can be no presumption in favour of indemnity costs in these circumstances (see paragraph 37 above) is also applicable, at least in general terms, to the suggestion that there is a presumption that a late acceptance of a Part 36 offer is an exceptional circumstance for the purposes of r.45.29J. Again, what matters are the particular facts of each case. A long delay with no explanation may well be sufficient to trigger r.45.29J; a short delay with a reasonable explanation will not.
>
> 57. Secondly, I reject the argument advanced by Mr Post QC in the *Corr* appeal that this provision would only come into play if it could be shown that the exceptional circumstances had caused the litigation to be more expensive for the claimant. In support of this proposition he relied on r.29J and r.29K which are concerned with the circumstances in which a party seeks to recover more than fixed costs. The rules make that party liable for the costs consequences if the assessment gives rise to a sum which is less than 20% greater than the amount of the fixed recoverable costs.
>
> 58. I do not accept Mr Post's gloss on r.45.29J. His suggestion that a claimant must demonstrate a precise causative link between the exceptional circumstances and any increased costs, would in my view lead to an unnecessarily restrictive view of the rule. It goes without saying that a test requiring exceptional circumstances is already a high one. It is not a proper interpretation of the rules to suggest that there should be further obstacles placed in the way of a party who wishes to rely on that provision."

35. As in the case of *Sharp*, the Court of Appeal in *Hislop v Perde* did not have to consider the position where it was suggested that the parties had reached a contrary agreement to the ordinary consequences of settling a claim under Part 36 to which the fixed costs regime applied. There was nothing said in either *Sharp* or *Hislop* to cast doubt on what Moore-Bick LJ had said in paragraph 22 of his judgment in *Solomon*, namely that there was no reason in principle why, if parties choose to agree different terms, the agreement should not be enforceable by ordinary process.

36. As I have found, the parties agreed in the consent order which they signed on 21 April and which was embodied in the order dated 24 April 2017 that the defendant was to pay the reasonable costs of the claimant "on the standard basis" (again my emphasis) to be the subject of detailed assessment if not agreed. That cannot be construed as an agreement to pay costs on the usual basis of fixed costs. By the

time the consent order was signed on 21 April 2017 and embodied in the order dated 24 April 2017, the defendant had agreed to the matter being reallocated to the multi-track. The costs order that was agreed by the parties in paragraph 3 of the consent order was entirely consistent with the parties' agreement that the claim should be reallocated to the multi-track.

37. It would have been sensible if the claimant's solicitors had included as a term of the consent order that the claim be reallocated to the multi-track, but I can see no reason in principle why the Court should not give effect to the parties' agreement that the defendant is to pay the reasonable costs of the claimant on the standard basis.

38. In the circumstances, I can see no basis for the Deputy District Judge varying paragraph 3 of the consent order of 24 April 2017 containing the parties' agreement that the claimant's reasonable costs should be paid by the defendant on the standard basis. It was not suggested that the consent order was vitiated by fraud, mistake, misrepresentation or incapacity. The claimant's first ground of appeal succeeds.

39. The additional ground relied on by the defendant in the respondent's notice for seeking to uphold paragraph 1 of the order dated 7 February 2018, namely that an order for reasonable costs on the standard basis to be the subject of detailed assessment if not agreed does not oust a fixed recoverable cost provided by the CPR, fails on the particular facts of this case.

40. My conclusion on the first ground of appeal in effect means that the claimant's appeal succeeds, but in deference to the arguments of counsel I will briefly consider the remaining grounds of appeal.

41. The second ground of appeal is that it is said that the Deputy District Judge did not give due consideration to the reallocation of the claim to the multi-track, with the Deputy District Judge being asked to reallocate the claim to the multi-track.

42. The possibility of the Deputy District Judge reallocating the claim to the multi-track was raised briefly in argument before the Deputy District Judge. I refer to the transcript of the proceedings at tab 6, page 81 of the main bundle where there are the following exchanges between the claimant's then legal representative, Mr Jenkinson, and the Deputy District Judge:

> "Mr Jenkinson: Yes, Sir, in the secondary and the alternative is that the Court can reallocate the matter to the multi-track now.
>
> The District Judge: Not after the acceptance of the Part 36 offer.
>
> Mr Jenkinson: It is available. There is a Court of Appeal case in that reallocation can occur at any time. The relevant CPR rule is 26.10 in that the Court may subsequently reallocate a claim to a different track.
>
> The District Judge: What, even after the issues have been extinguished by a Part 36 offer?

> Mr Jenkinson: Yes, there is a Court of Appeal case, *Conlon v RSA*, which confirmed at paragraph 29, I have a copy of that judgment if the Court and my friend would like to consider it.
>
> The District Judge: Well I am not going to reallocate it to the multi-track. Sorry.
>
> Mr Jenkinson: Alright.
>
> The District Judge: Anything else you want to say?"

43. The claimant's legal representative did not press the issue of reallocation any further, and the Deputy District Judge did not deal with the issue in his judgment.

44. The claimant's legal representative submitted at the hearing before the Deputy District Judge that, despite the substantive proceedings being concluded, the Deputy District Judge had the power to reallocate the claim to a different track, in this case the multi-track, in reliance on the provisions of CPR 26.10, and the decision of the Court of Appeal in *Conlon v Royal Sun Alliance Insurance Plc* [2015] EWCA Civ 92.

45. CPR 26.10 deals with reallocation and provides that the Court may subsequently reallocate a claim to a different track. CPR 46.13 deals, *inter alia*, with costs following reallocation, CPR 46.13(2) providing that:

> "Where-
>
> (a) a claim is allocated to a track; and
>
> (b) the court subsequently re-allocates that claim to a different track, then unless the court orders otherwise, any special rules about costs applying -
>
> (1) to the first track, will apply to the claim up to the date of reallocation; and
>
> (2) to the second track, will apply from the date of r-eallocation".

46. In *Conlon*, the Court of Appeal accepted that the Court had the power to backdate the reallocation for costs purposes if it were satisfied that there were good reasons for doing so. After referring to the provisions of CPR 26.10 and 46.13, Kitchin LJ at paragraphs 19-20 of his judgment said this:

> "19. I therefore accept that this Court has the power to re-allocate this claim from the small claims track to the multi-track. It is also clear that, were we to make that order, any special rules applying to costs of claims proceeding in the small claims track would continue to apply to the claim up to the date of re-allocation unless we were to order otherwise. It is, I think, implicit in rule 46.13 that the Court has the power to order otherwise and so, effectively, backdate the re-allocation for costs purposes, though any Court contemplating

> making such an order would need to be satisfied that there are good reasons for doing so.
>
> 20. Nevertheless, in my judgment it is now far too late to make an order for re-allocation in this case. As I have explained, the application for re-allocation was not made until 19 December 2014, some four months after the filing of the notice of appeal. I accept that both AEL and RSA have substantial businesses. But up to that point RSA was entitled to assume that the special costs rule set out in rule 27.14 applied to the claim, including this appeal. It behaved entirely reasonably in conducting its defence as is did, and it had no reason to suppose a special order would be made against it. Just a few days later, it indicated that it did not wish to contest the appeal and, as I have indicated, it is now agreed that the judgment of Judge Gosnell should be set aside and judgment entered against it. Again, it cannot be criticised for taking that course. In all these circumstances, Mr Butcher has failed to persuade me that it is appropriate to re-allocate this claim to the multi-track or make a costs order against RSA in respect of the whole or any part, of Mrs Conlon's costs of this appeal."

47. The claimant submitted that the Deputy District Judge failed to give any or any adequate consideration to the alternative argument that the case could and should be reallocated to the multi-track to do what was said to be just in all the circumstances and give effect to the agreed reallocation to the multi-track.

48. The defendant contended that the Deputy District Judge was right not to reallocate the claim to the multi-track, the defendant submitting as follows:

(1) That the manner in which the claimant's legal representative raised the question of reallocation before the Deputy District Judge precludes any complaint that it was summarily dismissed in the way it was. There was no formal application notice before the Deputy District Judge to reallocate the claim to the multi-track, the previous application to reallocate to the multi-track not being pursued when the consent order was agreed on 21 April 2017 and subsequently embodied in the order dated 24 April 2017. The possibility of reallocation to the multi-track was not raised in the skeleton argument of the claimant's legal representative before the Deputy District Judge. It was raised for the first time in oral submissions by the claimant's legal representative, the defendant's counsel having already made her submissions. It was said to be not surprising in the circumstances that the Deputy District Judge gave the question of reallocation to the multi-track short shrift, the claimant's legal representative appearing to have accepted the position and not requesting that the Deputy District Judge deal with the alternative argument of reallocation to the multi-track in his judgment if the claimant's legal representative felt that something was missing from the judgment and that he wanted to reserve his position on the issue.

(2) That the Deputy District Judge had no jurisdiction to reallocate the claim to the multi-track following settlement under CPR Part 36, with rule 36.14(1) providing that:

"If a Part 36 offer is accepted, the claim will be stayed".

It was said that the settlement in *Conlon* was not under CPR Part 36, and the jurisdiction point was not argued.

(3) That if there was discretion to reallocate a settled claim which fell to be exercised afresh, it should not be exercised in the claimant's favour, it being said that it was far too late to do so.

49. In his submissions in reply, the claimant's counsel sought to rely, *inter alia*, on the provisions of CPR 36.14(5)(b) that:

"Any stay arising under this rule will not affect the power of the Court –

… (b) to deal with any question of costs (including interest on costs) relating to the proceedings".

50. The starting point, it seems to me, is the terms of the consent order signed by the parties on 21 April 2017 and embodied in the order dated 24 April 2017, the order providing in this respect, so far as relevant, as follows:

(1) All further proceedings in this action be stayed except for the purpose of carrying the said terms [that is the terms of settlement set out in the attached schedule] into effect and that there be liberty to apply for that purpose.

(2) The claimant's application listed for 24 April 2017 be vacated".

51. The claimant's application listed for 24 April 2017 was the claimant's application of 18 January 2017 to reallocate the claim to the multi-track. It was a term of the parties' consent order that the hearing of the claimant's application to reallocate the claim to the multi-track should be vacated.

52. The proceedings were stayed. There was no application to remove the stay or any basis for an application to remove the stay.

53. The claimant seeks to rely on the provisions of CPR 36.14(5)(b) which enables the Court to deal with any question of costs notwithstanding any stay under CPR Part 36. However, it appears to me that the claimant is impermissibly trying to piggy back the provisions of CPR 36.14(5)(b) with an application to reallocate the claim to the multi-track. I do not consider that rule 36.14(5)(b) enables the claimant to do this. Further, the terms of the consent order signed by the parties, and embodied in the order dated 24 April 2017, provided in paragraph 2 that the claimant's application listed for 24 April 2017 be vacated. It would run contrary to the parties' consent order if that application could be resuscitated subsequently. Ground 2 of the claimant's grounds of appeal fails.

54. The third ground of appeal is that it is said that the Deputy District Judge, in making the decision he did, wrongly interfered with the detailed assessment proceedings, it

being argued that notwithstanding any power to vary the consent order dated 24 April 2017 the fixed costs issue should have been taken by the defendant on detailed assessment. The transcript of the short judgment of the Deputy District Judge on the preliminary of the Deputy District Judge's jurisdiction to determine whether the fixed costs regime applied is at tab 1, page 2 of the supplemental bundle:

> "(1) This is a preliminary issue about jurisdiction of this Court raised by Mr Jenkinson, the legal executive for the claimant, who says that rule 47.41 catches the defendant's application. The defendant's application is effectively for the general rules as to costs to be disapplied, and for the special regime to kick in and indeed the defendant would argue that is what should have happened when the consent order was made in the Central London County Court on 24 April. The consent order said the defendant do pay reasonable costs of the claimant on the standard basis to be subject to detailed assessment if not agreed.
>
> (2) Mr Jenkinson submits that the detailed assessment proceedings have begun and he prays in aid not just the notice of commencement as I understand it but also the pre-action protocol for the costs proceedings, and he says that this application is clearly an application in detailed assessment proceedings, and the rule says that such an application must be made to or filed at the appropriate office. The appropriate office is the SCCO.
>
> (3) I am not persuaded by Mr Jenkinson's submissions. Firstly, this application deals with primarily a consent order drawn up in the main proceedings, not in any detailed assessment proceedings, and it relates back to the acceptance of a Part 36 offer. Therefore, it seems to me that it is quite appropriate for this Court to have jurisdiction and to deal with the defendant's application and not to transfer it to the SCCO. Mr Jenkinson is in fact asking me to strike it out which I have already indicated I would not consider, even if I were with him. I would just transfer it if Mr Jenkinson were right about the interpretation of the rule because the overriding objective seeks to save costs on that, but also the overriding objective states that we should try to, as a Court, deal with all points at the same time.
>
> (4) It seems to me that 47.4 does not operate to oust my jurisdiction to determine the defendant's application. Therefore, I am not going to go with what Mr Jenkinson says. I would add, as Ms Kennedy has indicated, that this was not a matter put in his skeleton

argument or position statement filed by the claimant's solicitors."

55. CPR 47.4(1) provides that:

"All applications and requests in detailed assessment proceedings must be made to or filed at the appropriate office".

56. The appropriate venue for detailed assessment proceedings in this case is the Supreme Court Costs Office.

57. However, the defendant's application was not an application in detailed assessment proceedings. It was an application to determine a point of principle of whether the fixed costs regime applied. The Deputy District Judge, in my view, was entitled to accept that he had jurisdiction to determine the issue, though in point of fact he had no power to vary the consent order dated 24 April 2017. In any event, as I have already remarked, the claimant's counsel on the hearing of the appeal indicated that he was not pursuing ground 3 that the fixed costs issue should have been taken on detailed assessment as a stand alone ground of appeal, and was not suggesting on the appeal that I should not decide the fixed costs issue. As I have said, the third ground of appeal fell by the wayside in these circumstances.

58. The fourth ground of appeal is that on the basis the claimant's appeal was successful, the claimant should have her costs below.

59. The cross-appeal in the respondent's notice that the defendant should have her costs below does not arise since the claimant's appeal succeeds on the basis of the first ground of appeal.

60. I will hear from counsel as to the issue of costs. However, my preliminary view is that the costs of both the hearing below and of the appeal should be the claimant's costs, the claimant being the successful party on the appeal.

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