Neutral Citation Number: [2019] EWCA Civ 1988

Case No: A2/2018/2615

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
His Honour Judge Wulwik
Claim number: A06YQ205

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/11/2019

Before:

SIR GEOFFREY VOS, Chancellor of the High Court
LORD JUSTICE NEWEY
and
LORD JUSTICE MALES

- -

Between:

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

- -
- -

Mr Andrew Roy (instructed by **Taylor Rose TTKW**) for the **Appellant**
Mr Roger Mallalieu (instructed by **Bolt Burdon**) for the **Respondent**

Hearing date: 31 October 2019

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Approved Judgment

Lord Justice Newey:

1. In April 2017, the parties to this appeal compromised a claim which the respondent, Miss Seyi Adelekun, had brought against the appellant, Mrs Siu Lai Ho, following a road traffic accident. What is now at issue is the extent of the appellant's liability for costs. The respondent contends that the appellant is liable to pay her costs on what might be called the "conventional" basis, under which costs are assessed item by item by reference to the work done. The appellant, on the other hand, maintains that the fixed costs regime for which Section IIIA of CPR Part 45 provides is applicable.

2. We were told that our decision could affect many other cases. It is noteworthy in that context that more than six million claims have apparently been made pursuant to the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the RTA Protocol") (see *Aldred v Cham* [2019] EWCA Civ 1780, at paragraph 1).

The facts

3. The accident giving rise to the litigation happened on 26 June 2012. On 15 January 2014, the respondent notified the appellant's insurer of a claim in accordance with the RTA Protocol. The appellant not having admitted liability, the claim left the RTA Protocol and proceedings were issued on 7 January 2015. The claim was allocated to the fast track, but on 18 January 2017 the respondent issued an application for re-allocation to the multi-track pursuant to CPR 26.10 on the basis that the value of the claim had increased. The application was listed to be heard on 24 April 2017, but on 19 April 2017 the appellant's solicitors sent the respondent's solicitors what was described in the document as a "Part 36 Offer Letter". This read as follows:

> "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….
>
> 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."

4. On the following day, 20 April 2017, the appellant's solicitors emailed the respondent's solicitors asking them to confirm whether they had received instructions on the appellant's "Part 36 offer" and also stating that they (the appellant's solicitors) could "consent to the matter being multi-track".

5. On 21 April 2017, the respondent's solicitors sent the appellant's solicitors an email in which they said this:

> "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."

6. The draft order attached to the email was in "*Tomlin*" form. It recited that the parties had agreed the terms of settlement set out in the schedule and provided for all further proceedings to be stayed except for the purpose of carrying those terms into effect. There was also provision for the hearing listed for 24 April 2017 to be vacated and for the appellant to pay "the reasonable costs of the [respondent] on the standard basis to be the subject of detailed assessment if not agreed". An order in that form was thereafter made by consent on 24 April.

7. The parties subsequently parted company over costs. According to the appellant, the respondent was entitled to no more than fixed costs, which Mr Andrew Roy, who appeared for the appellant, told us had been estimated at about £14,500 to £16,000. The respondent, in contrast, argued that she was not limited to fixed costs and claimed some £42,000.

8. The dispute came before Deputy District Judge Harvey, sitting in the County Court at Central London, on 7 February 2018. He concluded that the fixed costs regime applied, but he was reversed on appeal by His Honour Judge Wulwik, who held that the fixed costs regime was not applicable. The appellant now challenges that decision in this Court.

The context

The fixed costs regime

9. CPR Part 45 provides for fixed costs to be payable in a number of situations. Section IIIA deals with, among other things, claims initiated under the RTA Protocol, as the respondent's was. CPR 45.29B states that, "Subject to rules 45.29F, 45.29G, 45.29H and 45.29J, and for so long as the case is not allocated to the multi-track", the only costs allowed in a claim started under the RTA Protocol are "the fixed costs in rule 45.29C" and "disbursements in accordance with rule 45.29I". So far as disbursements are concerned, CPR 45.29I(1) provides that, subject to specified exceptions, the Court will not allow a claim for any type of disbursement other than those mentioned in paragraphs (2) or (3), which are in these terms:

> "(2) In a claim started under the RTA Protocol, the EL/PL Protocol or the Pre-Action Protocol for Resolution of Package Travel Claims, the disbursements referred to in paragraph (1) are—

> (a) the cost of obtaining medical records and expert medical reports as provided for in the relevant Protocol;
>
> (b) the cost of any non-medical expert reports as provided for in the relevant Protocol;
>
> (c) the cost of any advice from a specialist solicitor or counsel as provided for in the relevant Protocol;
>
> (d) court fees;
>
> (e) any expert's fee for attending the trial where the court has given permission for the expert to attend;
>
> (f) expenses which a party or witness has reasonably incurred in travelling to and from a hearing or in staying away from home for the purposes of attending a hearing;
>
> (g) a sum not exceeding the amount specified in Practice Direction 45 for any loss of earnings or loss of leave by a party or witness due to attending a hearing or to staying away from home for the purpose of attending a hearing; and
>
> (h) any other disbursement reasonably incurred due to a particular feature of the dispute.
>
> …
>
> (3) In a claim started under the RTA Protocol only, the disbursements referred to in paragraph (1) are also the cost of—
>
> (a) an engineer's report; and
>
> (b) a search of the records of the—
>
> (i) Driver Vehicle Licensing Authority; and
>
> (ii) Motor Insurance Database."

10. CPR 45.29J (termed a "safety valve" by Briggs LJ in *Qader v Esure Services Ltd* [2016] EWCA Civ 1109, [2017] 1 WLR 1924, at paragraph 59) allows sums in excess of fixed costs to be recovered in exceptional circumstances. It provides:

> "(1) If it considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred to in rules 45.29B to 45.29H.
>
> (2) If the court considers such a claim to be appropriate, it may—

> (a) summarily assess the costs; or
>
> (b) make an order for the costs to be subject to detailed assessment.
>
> (3) If the court does not consider the claim to be appropriate, it will make an order—
>
> (a) if the claim is made by the claimant, for the fixed recoverable costs; or
>
> (b) if the claim is made by the defendant, for a sum which has regard to, but which does not exceed the fixed recoverable costs,
>
> and any permitted disbursements only."

11. The fixed costs regime for which CPR Part 45 provides is comprehensive in nature (see *Hislop v Perde* [2018] EWCA Civ 1726, [2019] 1 WLR 201, at paragraphs 29, 30 and 49). In *Solomon v Cromwell Group plc* [2011] EWCA Civ 1584, [2012] 1 WLR 1048, Moore-Bick LJ noted at paragraph 20 that the "whole purpose" of introducing the fixed costs rules in Section II of Part 45 was:

> "to impose a somewhat rough and ready system in a limited class of cases because the commercial interests behind the parties who bear the burden of large numbers of such cases considered that, taken overall, it was fair and saved both time and money".

As Briggs LJ observed in *Sharp v Leeds City Council* [2017] EWCA Civ 33, [2017] 4 WLR 98 at paragraph 31, "the plain object and intent of the fixed costs regime in relation to claims of this kind is that, from the moment of entry into the Portal pursuant to the EL/PL Protocol (and, for that matter, the RTA Protocol as well) recovery of the costs of pursuing or defending that claim at all subsequent stages is intended to be limited to the fixed rates of recoverable costs, subject only to a very small category of clearly stated exceptions". In a similar vein, Coulson LJ said this about the fixed costs regime in *Hislop v Perde* at paragraph 50:

> "The whole point of the regime is to ensure that both sides begin and end the proceedings with the expectation that fixed costs is all that will be recoverable. The regime provides certainty. It also ensures that, in low value claims, the costs which are incurred are proportionate. In addition, whatever the perceived injustice in any given case, the 'swings and roundabouts' identified by Briggs LJ in *Sharp's* case … will still apply."

12. On the other hand, there is no bar on contracting out of the fixed costs regime. In *Solomon v Cromwell Group plc*, Moore-Bick LJ spoke at paragraph 21 of parties being unable to recover more or less by way of costs than is provided for under the fixed costs regime "subject to any agreement between the parties to the contrary".

Part 36

13. CPR 36.1(1) explains that CPR Part 36 contains a "self-contained procedural code" about offers to settle made pursuant to the procedure set out in it. As its heading indicates, CPR 36.5 deals with the "Form and content of a Part 36 offer", stating in paragraph (1) that such an 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;
>
> (d) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue; and
>
> (e) state whether it takes into account any counterclaim."

14. CPR 36.13 addresses "Costs consequences of acceptance of a Part 36 offer". It provides:

> "(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.)
>
> …
>
> (3) Except where the recoverable costs are fixed by these Rules, costs under paragraphs (1) and (2) are to be assessed on the standard basis if the amount of costs is not agreed.
>
> (Rule 44.3(2) explains the standard basis for the assessment of costs.)
>
> …
>
> (Part 45 provides for fixed costs in certain classes of case.)
>
> … "

15. CPR 36.20, headed "Costs consequences of acceptance of a Part 36 offer where Section IIIA of Part 45 applies", reads as follows:

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

16. Practice Direction 4 explains that the forms listed in the annex to it "may be used where appropriate in circumstances arising under the Civil Procedure Rules and Schedule Rules". One such form is N242A, which states that it "may be used to settle the whole or part of, or any issue that arises in, a claim, appeal or cross-appeal". The form includes this:

> "If the offer is accepted within _____ days of service of this notice, the defendant will be liable for the claimant's costs in accordance with rule 36.13."

A note against these words reads:

> "Specify a period which, subject to rule 36.5(2), must be at least 21 days".

17. An offer that contains terms as to costs departing from the provisions of CPR Part 36 cannot be a Part 36 offer. Authority to that effect can be found in *Mitchell v James* [2002] EWCA Civ 997, [2004] 1 WLR 158, and *James v James* [2018] EWHC 242 (Ch), [2018] 1 Costs LR 175.

Assessment

18. CPR 44.1(1) defines "detailed assessment" as "the procedure by which the amount of costs is decided by a costs officer in accordance with Part 47". CPR 44.3(1) explains that, where the Court is to assess the amount of costs, it will assess them on either the standard basis or the indemnity basis. CPR 44.6 is in these terms:

> "(1) Where the court orders a party to pay costs to another party (other than fixed costs) it may either—
>
> (a) make a summary assessment of the costs; or

> (b) order detailed assessment of the costs by a costs officer,
>
> unless any rule, practice direction or other enactment provides otherwise.
>
> …
>
> (2) A party may recover the fixed costs specified in Part 45 in accordance with that Part."

CPR Part 47 contains, as its heading indicates, "Procedure for detailed assessment of costs and default provisions".

19. CPR Part 45 does not itself explain how the amount recoverable in respect of disbursements under CPR 45.29I is to be determined, but it was common ground between counsel that the provisions relating to detailed assessment found in CPR Part 47 would apply. Mr Roy illustrated the point by reference to *Aldred v Cham*. That case involved an issue as to whether a fee in respect of advice from counsel was within the fixed costs regime in Section IIIA of Part 45. As can be seen from paragraphs 8 and 9 of the judgment of Coulson LJ, the matter was the subject of first a provisional assessment and then an oral assessment, in accordance with CPR 47.15.

20. Moore-Bick LJ referred in the *Solomon* case to the significance of "assessment" in the context of the fixed costs regime in CPR Part 45. He said at paragraph 19:

> "Although I accept that that regime does involve an assessment of some kind (particularly in relation to disbursements and cases where the court is satisfied that exceptional circumstances exist), I do not think that one can properly regard it as representing an assessment on the standard basis in those cases to which it applies."

In *Broadhurst v Tan* [2016] EWCA Civ 94, [2016] 1 WLR 1928, Lord Dyson MR said at paragraph 30 that "fixed costs and assessed costs are conceptually different". He explained:

> "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."

Re-allocation

21. Under CPR 26.10, a claim allocated to one track may subsequently be re-allocated to a different one. In that event, CPR 46.13 is in point. CPR 46.13(2) states:

> "Where—
>
> (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—
>
> (i) to the first track, will apply to the claim up to the date of re-allocation; and
>
> (ii) to the second track, will apply from the date of re-allocation."

22. Kitchin LJ said this about CPR 46.13 in *Conlon v Royal Sun Alliance Insurance plc* [2015] EWCA Civ 92, [2015] CP Rep 23 (at paragraph 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 CPR r.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."

On the facts, the Court declined to re-allocate.

The scope of the dispute

23. Both parties focused their submissions on the offer made in the appellant's solicitors' letter of 19 April 2017. Neither Mr Roy nor Mr Roger Mallalieu, who appeared for the respondent, sought to argue that the respondent's solicitors' response to the letter represented a counter-offer or that the consent order was important. Each side essentially approached the case on the footing that the respondent had accepted the 19 April offer and, hence, that that was key. By way of fallback, Mr Mallalieu invoked CPR 26.10 and 46.13. The claim ought, he said, to have been re-allocated to the multi-track with an order applying the costs rules applicable to that track retrospectively.

24. Two principal issues therefore arise:

    i) Did the appellant's solicitors, by their letter of 19 April 2017, offer to pay "conventional" rather than fixed costs? [Issue 1]

    ii) If not, should the claim be re-allocated to the multi-track with retrospective disapplication of the fixed costs regime? [Issue 2]

25. The issues were very well argued on both sides.

Issue 1: The offer letter

26. Issue 1 turns on the correct interpretation of the offer letter of 19 April 2017. That involves assessment of the "objective meaning of the language" (to quote Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, at paragraph 10) or, in the words of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912, "ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".

27. The respondent's case is that, properly construed, the letter offered conventional rather than fixed costs. Mr Mallalieu relied on the reference in the letter to CPR 36.13 and, especially, the words, "such costs to be subject to detailed assessment if not agreed". He suggested in his skeleton argument that CPR 36.5(1)(c) requires someone making a Part 36 offer to specify which out of CPR 36.13 and CPR 36.20 is intended to apply as regards costs and that, here, the appellant's solicitors could be seen to have selected CPR 36.13, not CPR 36.20. In his oral submissions, Mr Mallalieu was inclined to accept that CPR 36.5(1)(c) was concerned with the period within which the offer was to be accepted rather than the costs regime that would apply. He nonetheless argued that the reference in the offer letter to CPR 36.13 indicated that the appellant was offering conventional costs rather than the fixed costs to which CPR 36.20 relates. He placed particular emphasis, however, on the concluding words of paragraph 3 of the letter ("such costs to be subject to detailed assessment if not agreed"). These, he said, would have confirmed to the reasonable recipient that the appellant was not proposing fixed costs: "assessment", he said, is conceptually different from fixed costs. Further, the circumstances were such that an agreement to pay costs to be assessed on the standard basis was entirely logical. The value of the claim had come to exceed the normal limit for allocation to the fast track (viz. £25,000 – see CPR 26.6(4)(b)(i)) and the respondent had applied for re-allocation to the multi-track. It could be anticipated that re-allocation would occur and that conventional costs would then become payable retrospectively, either because the Court could be expected to make an order to that effect under CPR 46.13 or because CPR 45.29B applies only "for as long as the case is not allocated to the multi-track". Alternatively, the Court might consider that there were "exceptional circumstances" within the meaning of CPR 45.29J making it appropriate to depart from the fixed costs regime even as to the events pre-dating re-allocation.

28. In my view, however, the 19 April letter, correctly construed, did not offer to pay conventional rather than fixed costs. In the first place, I do not think that CPR 36.5(1)(c) is of any help to the respondent. Its concern is not with the basis on which costs are to be determined but with the period within which the offer is to be accepted. What it is saying is that the offeror must specify a period of not less than 21 days during which, if the offer is accepted, the offeror will become liable for costs in accordance with either CPR 36.13 or CPR 36.20, as applicable. It does not impose any obligation on the offeror to say which rule (CPR 36.13 or CPR 36.20) would be in point.

29. Secondly, I do not think the fact that the 19 April letter refers to CPR 36.13 instead of CPR 36.20 is of any great significance. Mr Roy pointed out that the standard form, N242A, similarly contains a reference to CPR 36.13, and none to CPR 36.20, but, as

Mr Mallalieu observed, an offeror is under no obligation to use N242A and the appellant did not merely adopt N242A without modification in the present case, notably because she added on, "such costs to be subject to detailed assessment if not agreed". What matters more, it seems to me, is that CPR 36.13 itself highlights the fact that CPR 36.20 applies to a claim formerly under the RTA Protocol and, in effect, sends the reader on to that latter rule. Thus, CPR 36.13 provides for paragraph (1) to operate subject to CPR 36.20, a note to paragraph (1) records that CPR 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", paragraph (3) provides for costs to be assessed on the standard basis "Except where the recoverable costs are fixed by these Rules" and a note to paragraph (3) states that Part 45 "provides for fixed costs in certain classes of case". Mr Roy submitted that, had paragraph 3 of the offer letter stopped after the words "Part 36 Rule 13 of the Civil Procedure Rules", there could have been no real question of the appellant having offered anything but fixed costs. I agree. Mr Mallalieu himself accepted that a simple reference to CPR 36.13 probably would not have sufficed to take the case out of the fixed costs regime.

30. A third point arises from the fact that it is abundantly clear from the 19 April letter that the appellant was intending to make an offer to which CPR Part 36 applied. That is evident both from the reference to CPR 36.13 and from the overall description of "Part 36 Offer Letter". Yet the letter will not, I think, have contained a Part 36 offer if it proposed anything other than the fixed costs regime. The "self-contained procedural code" for which Part 36 provides makes it plain that the fixed costs regime found in Part 45 is to apply "where … a claim no longer continues under the RTA … Protocol pursuant to rule 45.29A(1)": see CPR 36.20 (1) and also the passages from CPR 36.13 quoted in the previous paragraph of this judgment. If, therefore, a party to a claim that no longer continues under the RTA Protocol offers to pay costs on a basis that departs from Part 45, the offer will be incompatible with Part 36 and cannot be an offer under that Part (see paragraph 17 above).

31. Fourthly, while the 19 April letter's reference to "detailed assessment" was far from ideal if the appellant intended the fixed costs regime to apply, it was not wholly inapposite. "Assessed costs" in the sense of costs assessed item by item by reference to work actually done are, as Lord Dyson MR said in *Broadhurst v Tan*, conceptually different from fixed costs, and such "assessment" as the fixed costs regime may call for is not to be equated with an assessment on the standard basis (see the quotation from Moore-Bick LJ's judgment in the *Solomon* case set out in paragraph 20 above). As, however, Moore-Bick LJ also noted, the fixed costs regime "does involve an assessment of some kind (particularly in relation to disbursements and cases where the court is satisfied that exceptional circumstances exist)". I do not think, therefore, that reference to "detailed assessment" should be taken to imply an intention to displace the fixed costs regime where there are other indications that that was not intended.

32. Fifthly, it is inherently improbable, as a reasonable recipient of the 19 April letter should have appreciated, that the appellant intended to offer conventional rather than fixed costs. The fixed costs regime could be expected to be considerably more favourable to the appellant than conventional costs and, on the face of it, the appellant would be vulnerable to the latter as regards costs to date only if a Court were

persuaded that there were "exceptional circumstances" warranting an award of extra costs under CPR 45.29J or that there should be a direction disapplying the fixed costs regime retrospectively under CPR 46.13 following re-allocation to the multi-track pursuant to CPR 26.10. None of this was obviously inevitable and it is improbable that the appellant would have been willing to concede the higher costs in her offer.

33. As I have mentioned, Mr Mallalieu also relied on the fact that CPR 45.29B provides for the fixed costs regime to apply "for as long as the case is not allocated to the multi-track" and suggested that, in consequence, the regime would automatically cease to apply from the start on re-allocation. This, however, is very far from obvious. The more natural interpretation of CPR 45.29B might be thought to be that, where a case is transferred from the fast track to the multi-track, the fixed costs regime ceases to apply prospectively, not in relation to past costs, incurred when the case was in the fast track. Nor, as I see it, does *Qader v Esure Services Ltd*, where the insertion into CPR 45.29B of the words "and for so long as the claim is not allocated to the multi-track" was suggested (see paragraph 56), lend any support to Mr Mallalieu's contention. The *Qader* case did not concern a situation in which a claim was transferred to the multi-track from the fast track.

34. Sixthly, it is of some relevance in construing the 19 April letter that, as Coulson LJ has observed more recently, the fixed costs regime is designed to ensure that "both sides begin and end the proceedings with the expectation that fixed costs is all that will be recoverable" (see paragraph 11 above). That makes it the more unlikely that the letter would reasonably have been understood to be offering something other than fixed costs.

35. For completeness, I should mention a further argument that Mr Roy advanced by reference to *Solomon v Cromwell Group plc*. That case concerned two Part 36 offers. In one instance the defendant had expressed willingness to pay the claimant's "reasonable costs" to be assessed if not agreed, in the other the defendant had said that she would "be liable for your client's reasonable costs in accordance with CPR 36.10" (see paragraphs 23 and 24). At the time, CPR 36.10 provided for a claimant who accepted a Part 36 offer to be entitled to the costs of the proceedings to be "assessed on the standard basis if the amount of costs is not agreed". The Court of Appeal nonetheless concluded that neither claimant could recover any more by way of costs than was provided for under the fixed costs regime (paragraph 21). Mr Roy submitted that the decision is binding authority that the fixed costs regime is not displaced by an agreement to pay costs to be assessed on the standard basis. I do not agree. Part 36 not yet having been revised to take account of the fixed-costs regime, there was an inconsistency between CPR 36.10 and Section II of Part 45 which the Court resolved by reference to "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" (paragraph 21). Now that Part 36 has been revised to take account of the fixed costs regime, the basis for the decision in *Solomon* has disappeared. Parts 36 and 45 are no longer inconsistent. I do not therefore accept this particular contention of Mr Roy.

36. Even so, for the reasons I have already given, I consider that the 19 April letter, correctly construed, did not offer to pay conventional rather than fixed costs. The parties did not, therefore, contract out of the fixed costs regime and the respondent has

no contractual entitlement to conventional costs. It follows that the appeal should be allowed unless the respondent succeeds on Issue 2.

37. For the future, a defendant wishing to make a Part 36 offer on the basis that the fixed costs regime will apply would, of course, be well-advised to refer in the offer to CPR 36.20, and not CPR 36.13, and to omit any reference to the costs being "assessed".

Issue 2: Re-allocation

38. Mr Mallalieu's fallback position, as I have indicated, was that, notwithstanding the respondent's acceptance of the 17 April 2017 offer, the claim should have been (and should now be) re-allocated to the multi-track under CPR 26.10 with a direction under CPR 46.13 disapplying the fixed costs regime with retrospective effect. He acknowledged that, once the respondent's offer had been accepted, the claim was stayed pursuant to CPR 36.14(1), but a stay arising under that rule, he pointed out, does "not affect the power of the court … to deal with any question of costs … relating to the proceedings" (see CPR 36.14(5)). The question whether the claim should be re-allocated with a view to disapplication of the fixed costs regime is, Mr Mallalieu argued, one "of costs ... relating to the proceedings" and so unaffected by the stay.

39. Judge Wulwik was not persuaded by this argument. He said this on the subject in paragraph 53 of his judgment:

> "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."

40. In my view, Judge Wulwik arrived at the correct conclusion. The fact that the stay imposed by CPR 36.14 did not prevent the Court from dealing with "any question of costs … relating to the proceedings" cannot, I think, assist the respondent. The words do not extend to the respondent's application for re-allocation. The question of re-allocation was not one of "costs … relating to the proceedings" regardless of whether re-allocation was being sought with a view to obtaining a costs direction under CPR 46.13. For good measure, the *Tomlin* order of 24 April 2017 provided for the proceedings to be stayed except for the purpose of carrying the terms set out in the schedule into effect, and those terms made no reference to either re-allocation or disapplication of the fixed costs regime. Further still, it seems to me that if, contrary to my view, it was open to Deputy District Judge Harvey or Judge Wulwik to entertain an application for re-allocation and disapplication of the fixed costs regime, there was very good reason to refuse it. If, as I consider to be the case, it was no part of the agreement that the parties had reached that the fixed costs regime should be

displaced, to make an order subsequently having that effect would run counter to the agreement. Deputy District Judge Harvey was undoubtedly entitled to decline to re-allocate even supposing that he had power to do so.

Conclusion

41. I would allow the appeal.

Lord Justice Males:

42. I agree that the appeal must be allowed for the reasons given by Newey LJ. I wish to emphasise two points.

43. First, Mr Mallalieu advanced a powerful argument that assessed costs and fixed costs are "conceptually different" (see *Broadhurst v Tan* [2016] EWCA Civ 94, [2016] 1 WLR 1928 at [30] and [33]), so that the words "costs to be subject to detailed assessment if not agreed" in the offer letter indicated an intention to depart from the fixed costs regime. In the end I have concluded, in agreement with Newey LJ, that taking the letter as a whole those words are not sufficiently clear to demonstrate such an intention and are outweighed by other considerations. It is unfortunate, however, that it has taken a trip to the Court of Appeal for this to be determined. If parties wish to settle on terms that fixed costs will be payable if an offer is accepted, it is easy enough to say so and thereby to avoid any scope for argument.

44. Second, although the judge decided the case by reference to the terms of the consent order, Mr Mallalieu has taken his stand firmly on the offer letter and has disclaimed any submission that the terms of the consent order should lead to a different result. It has therefore been unnecessary for us to consider whether the appellant's acceptance of the offer was in fact a counter offer or whether the consent order, with its reference to payment of costs "on the standard basis", operated as a variation of an agreement previously made in correspondence. I will merely say, therefore, that parties who wish to settle on terms that fixed costs will be payable would be well advised to avoid reference to assessment "on the standard basis" in any offer letter or consent order which may be drawn up following acceptance of an offer.

The Chancellor of the High Court:

45. I agree with both judgments.