**Fixed costs**

**A paper for the ACL Conference 23rd November 2018**

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**Introduction**

1. Fixed costs remain very much in vogue, though we are at one of those curious interim points of procedural reform, where not a lot is happening. Not a lot might ever happen, depending on such political imponderables as Brexit, the passing of the Civil Liability Bill into law, or whether there will be a new government next year.

**The Review of Civil Litigation Costs: Supplemental report Fixed Recoverable Costs**

2. It follows that I can be relatively brief on the first of the big ticket items of reform, the extension of fixed costs across the entirety of civil litigation: the Supplemental Report seems to have fallen into a Black Hole, and there is nothing much to report.

**Civil Justice Council Clinical Negligence Fixed Costs Working Group**

3. After the DOH consultation, the Civil Justice Council established a working group, with brief to report proposals for reform by the end of September 2018. As far as I can determine, nothing has been published.

**A move to a coherent system or not?**

4. One of the more intriguing questions is to ask why there is any enthusiasm to introduce fixed costs at all, as this might shed light on how likely is the prospect of root and branch systemic reform, in furtherance of some philosophical vision, or whether the likely scope of fixed costs reform is governed by the strength of various vested interests. Certainly some of the proponents of fixed costs see their introduction in more philosophical terms, as actively promoting access to justice.

5. In volume two of the Review of Civil Litigation Costs: Preliminary Report published as long ago as May 2009, Jackson LJ noted how the regime of fixed fees, originally introduced in the 19th century in the German courts worked:

*2.3   The quantum of legal costs that a successful party is entitled to recover from an unsuccessful party, and the fees and expenses of the court which are payable, are prescribed by statute. These rules do not seek to provide a successful party with a complete indemnity for his or her legal fees. Instead, they provide for the payment of legal fees and court costs in scales which increase in a regressive, non-linear fashion and with the use of multipliers that vary according to the value of the dispute, the stage at which the case is resolved, and other aspects of the case. Illustrations are given below of how these rules apply to disputes of varying sizes, in respect of the amount payable by the unsuccessful party (leaving aside that party’s own legal fees, which it must bear).*

Amount in dispute = €10,000

|  |  |
| --- | --- |
| Court fees payable | €588.00 |
| Lawyer’s fees payable (for one lawyer) | €1,869.37 |
| Total payable by unsuccessful party | €2,457.37 |

Amount in dispute = €100,000

|  |  |
| --- | --- |
| Court fees payable | €2,568.00 |
| Lawyer’s fees payable (for one lawyer) | €5,123.07 |
| Total payable by unsuccessful party | €7,961.07 |

Amount in dispute = €1,000,000

|  |  |
| --- | --- |
| Court fees payable | €13,368.00 |
| Lawyer’s fees payable (for one lawyer) | €16,900.85 |
| Total payable by unsuccessful party | €30,268.85 |

6. These fees represent the scale applicable in 2004 so are now of historic interest; but it is interesting to note that they represent a small proportion of the amounts in dispute, and far smaller sums than one would anticipate being spent to litigate, substantial claims in this country.

7. They also have a particular policy underpinning them. They are intended to ensure cross subsidisation of the legal profession with larger cases, “carrying” smaller cases, within the same lawyer’s caseload. As Jackson LJ put it:

*A notion which underpins the cost scales used in Germany is that of “cross-subsidisation” which, in summary, posits that a lawyer may earn a reasonable living out of his or her profession by accepting a number of smaller cases where remuneration under the scale of fees is not very great (and there may be only a small profit margin) and in addition accepting a number of medium or large cases where the scale fees are higher. If a lawyer’s practice consists of a mix of small, medium and high value cases, the theory is that the fees from the medium and large value cases will “cross-subsidise” those derived from smaller ones, enabling the lawyer overall to earn a reasonable living.*

8. This is a familiar concept to the English and Welsh regimes of fixed costs known as “swings and roundabouts”, but whereas such a system reflected the German legal profession, when introduced in the time of Bismarck and the Kaisers, it is creaking under the strain of changes in the legal profession and practice of Germany in the 21st century, including an increase in the size of law firms, increasing specialisation, and the fact that smaller firms, undertaking smaller claims, find it difficult to attract and undertake the larger claims which should be cross-subsidising their caseload.

9. In recent years, contingency fees have also been declared to be lawful in Germany, which increases the scope for lawyers to make “own client” charges, which cannot be recovered from the unsuccessful losing party.

10. It is interesting to note however, why fixed costs have been used by Germany on such a large scale. They are seen as integral to the vision of “access to justice” held in that country.

*The use of cost scales is regarded by the courts as beneficial, as their application gives effect to a central value enshrined in the German constitution, being the “rule of law”. The rule of law requires not only that there should be free access to the courts, but that litigation costs should be both predictable and reasonable. It also requires the German legislature to ensure that access to the courts does not depend on the economic situation of an individual. One of the ways in which the legislature ensures access is by offering legal aid to people who meet the relevant criteria for such funding.*

11. Context however is everything. Although Germany has an adversarial, rather than inquisitorial system of courts, there are features of the German system, which are very different from our own: there is no process of disclosure, no exchange of witness statements, cross examination is limited, experts are appointed by the courts, and interlocutory processes are devoted to eliciting what are the relevant issues and disputes, so that the final trial can be very short, rarely lasting more than a day. And with truncated court processes, most cases in the Local Courts run from commencement to final hearing in just over 4 months, and in the Regional Courts just over 7 months.

12. The key point to note here, surely is that if costs are fixed, at a level, which is below the sums in dispute, as a quid pro quo, then the amount of work that the court, and the substantive law requires must be reduced, to ensure that it remains feasible for a lawyer to complete it within the scale of fixed costs and still make a profit.

13. A corollary of a large scale comprehensive scheme for fixed costs across the bulk of civil litigation has been the effect on the legal expense insurance market in Germany, which is unrecognisable in its extent to a lawyer in England and Wales. Such policies are also far more expensive than the modest premiums charged for BTE insurance in the UK.

14. The Interim Report also noted some research called the Soldan study, which revealed that whilst 35% of litigation was funded in Germany, by legal expenses insurance, in the United Kingdom only 4% of litigation was:

*What is evident from the Soldan study is the significant role that legal expenses insurance plays in Germany when compared with England and Wales. It is common for individuals in Germany to take out legal expenses insurance to cover their legal fees in the event that they are involved in litigation, whether as a claimant or a defendant. Legal expenses insurance covers individuals for costs according to the statutory scale. The advantage to insurers is that the scale of costs makes the extent of the insurer’s exposure predictable. The widespread use of legal expenses insurance is seen as the driver of the widespread use of cost agreements according to the cost scales. It is difficult for lawyers whose clients are covered by legal expenses insurance to negotiate an individual fee agreement for remuneration at a rate above the applicable scale.*

15. From these points, some conclusions seem to leap off the page. Should a scheme of fixed costs be introduced in England and Wales, along the lines of Jackson LJ’s proposal, it could well cause, a restructuring, and fragmentation of the legal profession.

16. Secondly, such a scheme would have to march hand in hand with some fairly radical streamlining and cost cutting of the litigation process, with cherished exercises such as disclosure, being ruthlessly curtailed, if not eliminated.

17. Thirdly, such a scheme might be blunted through the rise of irrecoverable own client charges, a concept inherent in the current principle of proportionality.

18. Finally, although such a scheme would undoubtedly reduce a lawyer’s remuneration on individual cases, it might, just might, through encouraging litigation by making it more affordable, not only increase access to justice, but give opportunities to the cannier lawyers to gain more work too through an explosion of new claims.

19. Having said that the current regime of fixed costs, and the proposals to introduce or expand fixed costs, in recent years have very little to do with a philosophical cast of mind. Instead they have patently been introduced to placate or promote the interest of various groups; the insurance industry, the travel industry and notably the government, which would particularly benefit from fixed costs in clinical negligence disputes. If that is so, then the question may then be asked, where is the vested interest in promoting fixed costs across the whole of civil litigation?

**Protecting costs entitlements**

20. I suspect that many lawyers’ objections to fixed costs are not actually grounded in an objection per se to fixed costs but rather due to a fear as to what level those costs might be set at. How much more grievous is it then to a solicitor, when even modest sums of fixed costs might be deemed to be too great a burden for a paying party to bear, who will then attempt to avoid paying costs by, for example, settling directly with a client and cutting the solicitor out of the loop.

21. One of the phenomena of recent years has involved the practice of “third party capture” or “intervention” where insurance companies, despite knowing that a claimant has instructed solicitors will attempt to negotiate a settlement directly with the claimant, for the simple reason that by doing so, they hope to avoid paying a solicitor’s fees.

22. The practice has generated strong opinions on both sides of the litigation fence: solicitors regard it as unbecoming conduct, an attempt to defraud them of their fees. Insurers regard it as a strategy that promotes efficiency and point out that no one compels the claimant to enter into a direct settlement.

23. It is also an interesting example of the ratchet effect in play: the introduction of the Ministry of Justice Portal and the various protocols which apply to low value personal injury claims, with a scheme of fixed fees limiting solicitors’ costs recovery represented a major victory for the insurance industry.

24. A few years later the implementation of LASPO 2012, has had the effect of reducing costs paid out to solicitors by many millions. The Civil Liability Bill next year, if implemented in full, could largely remove the involvement of solicitors from the conduct of whiplash claims. Costs have been on a downward trend for many years now.

25. But these reforms and this trend, was not enough, and hence practices such as intervention have also flourished. In the recent case of [**Gavin Edmondson Solicitors v Haven Insurance Company Limited [2018] UKSC 21**](http://costsbarrister.co.uk/wp-content/uploads/2018/04/Gavin-Edmondson-Solicitors-v-Haven-Insurance-Company-Limited-2018-UKSC-21.pdf) the Supreme Court found decisively for a firm of solicitors representing claimants who had been “intervened”, by invoking the doctrines of equity to provide that a paying party in league  with a client could not escape paying costs due to a solicitor, because to do so would impair access to justice.

26. The substantive judgment was given by Lord Briggs.

1. This appeal tests the limits, in a modern context, of the long-established remedy known as the solicitor’s equitable lien. In its traditional form it is the means whereby equity provides a form of security for the recovery by solicitors of their agreed charges for the successful conduct of litigation, out of the fruits of that litigation. It is a judge-made remedy, motivated not by any fondness for solicitors as fellow lawyers or even as officers of the court, but rather because it promotes access to justice. Specifically it enables solicitors to offer litigation services on credit to clients who, although they have a meritorious case, lack the financial resources to pay up front for its pursuit. It is called a solicitor’s lien because solicitors used to have a virtual monopoly on the pursuit of litigation in the higher courts. Nothing in this judgment should be read as deciding whether the relaxation of that monopoly means that the lien is still limited only to solicitors.

27. The judgment thus begins by raising the intriguing possibility that barristers and other lawyers (such as costs lawyers) may have a similar protection afforded to their fees. The remedy was described succinctly:

4. In the ordinary course of traditional litigation, with solicitors acting on both sides, the amount due under a judgment, award or settlement agreement would be paid by the defendant’s solicitor to the claimant’s solicitor. Or the claimant’s solicitor might recover the sum due to his client by processes of execution. In either case the equitable lien would entitle the solicitor not merely to hold on to the money received, but to deduct his charges from it before accounting to his client for the balance. But equity would also enforce the security where the defendant (or his agent or insurer) paid the debt direct to the claimant, if the payer had either colluded with the claimant to cheat the solicitor out of his charges, or dealt with the debt inconsistently with the solicitor’s equitable interest in it, after having notice of that interest. In an appropriate case the court would require the payer to pay the solicitor’s charges again, direct to the solicitor, leaving the payer to such remedy as he might have against the claimant. This form of remedy, or intervention as it is sometimes called, arose naturally from the application of equitable principles, in which equitable interests may be enforced in personam against anyone whose conscience is affected by having notice of them, either to prevent him dealing inconsistently with them, or by holding him to account if he does.

28. He explained the context in which the appeal came before the Supreme Court:

6. The casus belli for this litigation was a decision by the appellant insurer (“Haven”) to respond to the notification of claims on the RTA Portal by offering to settle direct with claimants, on terms which included no amount for their solicitors’ costs or disbursements (fixed or otherwise), with the twin inducements to claimants of a speedier and more generous payment than would be likely to be available from a settlement using the RTA Protocol and Portal. The motivation of the insurer was the opportunity to avoid having to add, to the settlement amount for the injury, the fixed costs and disbursements payable under the terms of the RTA Protocol to the claimants’ solicitors.

7. Settlements thereby achieved included claims by clients of the respondent solicitors (“Edmondson”) arising from three motor accidents, all of whom retained the respondent firm on a particular type of identically worded CFA retainer, known in the trade as a “CFA Lite”, designed to ensure that in no circumstances would the client have to put his hands in his own pocket for payment of the firm’s charges. Edmondson responded by a claim against Haven for wrongful inducement to the clients to breach their retainer contract, intentional causing of loss by unlawful means and, by amendment, seeking equitable enforcement of its solicitors’ lien. Although the sums involved are individually modest, we were told that this practice by Haven had been repeated on a sufficiently large scale for the determination of the dispute to have financial consequences running to many millions of pounds.

29. He then went on to explain why Haven were liable to pay the solicitors charges:

47. The question of knowledge or notice is in dispute. Absence of notice was the main reason why the claims failed before the judge. In his view it was a fatal objection that Haven did not know the detailed terms of the CFAs. In the Court of Appeal it was held that Haven had both express notice, implied notice and the requisite knowledge in any event. The claim under the traditional principles of equitable lien failed, not because of absence of notice, but because there was no underlying responsibility of the clients to pay Edmondson’s charges.

48. It is common ground that, by the time that Haven paid the settlement sums direct to the claimants, it knew that each of them had retained Edmondson under a CFA, but not its detailed terms. This much was apparent from the CNFs which Edmondson placed on the Portal. Haven also knew, from the fact that Edmondson chose to initiate each claim by using the RTA Portal, that Edmondson was most unlikely to have been paid its charges up front, but rather that it expected, if successful, to obtain payment of its charges from monies paid by Haven under the terms of the RTA Protocol, if the case settled while in the Portal, or by way of a costs order if it went to court. Either way, Haven knew that Edmondson was looking to the fruits of the claim for recovery of its charges. Page 21

49. Haven’s knowledge that, if the claim could not be settled direct, it would have to fund Edmondson’s recoverable charges is also apparent from the recorded telephone conversations with Mr Tonkin and Mr Grannell set out above. The judge found that Haven had this knowledge, and intended by settling direct to avoid having to pay Edmondson’s charges. The claim of collusion failed, not because Haven lacked the requisite intent, but because each of the claimants did.

50. In my judgment the Court of Appeal’s approach to the question of notice is to be preferred to that of the judge. Once a defendant or his insurer is notified that a claimant in an RTA case has retained solicitors under a CFA, and that the solicitors are proceeding under the RTA Protocol, they have the requisite notice and knowledge to make a subsequent payment of settlement monies direct to the claimant unconscionable, as an interference with the solicitor’s interest in the fruits of the litigation. The very essence of a CFA is that the solicitor and client have agreed that the solicitor will be entitled to charges if the case is won. Recovery of those charges from the fruits of the litigation is a central feature of the RTA Protocol.

30. The judgment as an endorsement of this centuries old principle is to be welcomed: it will have many ramifications going forward in many cases in different contexts. But the application of the principle to the RTA sphere is likely to be time limited: if the Civil Liability Bill goes the distance (if the government does not fall, if Brexit proceeds, if, if if…) then within a year or two, circa 95% of these cases will be Small Claims not attracting any significant costs liability. Haven may have lost the battle, but the war has already been won.

31. That in turn invites consideration as to the fundamental question as to whether lawyers should be involved in advancing these claims: or whether the movement of small sums of money in a road traffic accident dispute, a thousand or two thousand pounds, between the opposing parties could be done far more efficiently without frictional costs by an app, an algorithm or some other means.

32. One of the cases due to be heard in the Court of Appeal next year, which is worth keeping an eye on is the appeal from the decision in [**Bott & Co v Ryanair DAC [2018] EWHC 534 (Ch)**](http://costsbarrister.co.uk/wp-content/uploads/2018/10/Bott-Co-v-Ryanair-DAC-2018-EWHC-534-Ch.pdf). In this case a restrictive approach was taken to the solicitor’s equitable lien, which rests uneasily with the decision of the Supreme Court in the case of [**Gavin Edmondson Solicitors v Haven Insurance Company Limited [2018] UKSC 21**](http://costsbarrister.co.uk/wp-content/uploads/2018/04/Gavin-Edmondson-Solicitors-v-Haven-Insurance-Company-Limited-2018-UKSC-21.pdf). The decision of the Court of Appeal will doubtless assist in clarifying the application of the principle. The wider issue thrown up by both of these cases, is to what extent the court will protect the interests of solicitors when a paying party who might otherwise be liable to pay costs attempts to cut out “the middleman” by dealing directly with the solicitor’s client.

33. Of course, it is not just solicitors who present and pursue claims for compensation on the part of clients these days. For myself I have little doubt, that the solicitor’s equitable lien would easily be extended by way of analogy, to cover the situation where a client is represented by a barrister under the Direct Access rules, though doubtless the case would have to go at least to the level of the Court of Appeal for a resolution. Similarly the principle might be extended to costs lawyers, or others who are regulated, insured, owe an overriding duty to the court and operate with the scope of the Legal Services Act 2007.

34. The position is not so clear cut when one considers the position of claims management companies, who operate on a large scale in various fields, promoting low value claims of various types. It can readily be anticipated that one of the effects of the Civil Liability Bill if it becomes law, will be to displace large volumes of low value personal injury claims from regulated lawyers, to the claims management sector.

35. How then will a claims management company deal with the situation that may well arise, when a compensating party decides to cut out “the middleman” and just pay their client directly, when they have no equitable lien to assert? The answer may lie in the tort of inducing breach of contract: an argument that was made (and lost) in the first instance decision in **Gavin Edmondson Solicitors Limited v Haven Insurance Company Limited [2014] EWHC 3062 (QB)** and not further raised in the two appeals. The shortcomings of the position in the **Gavin Edmondson** case can be addressed by careful drafting.

The principles to establish to prove the tort of inducing a breach of contract (paraphrased from paragraph 28 of the judgment) are as follows:

(i)        Inducing a breach of contract is an accessory liability in tort. It can only be committed as an accessory, where there is an actionable breach of contract by the clients;

(ii)       There must be an actual breach by the client of his or her contract with the solicitors,

(iii)      The compensating organisation must have notice of the contract and its terms, although that can arise by wilfully ignoring the obvious.

(iv)      The compensating organisation must have induced the breach of contract by the client.

(v)       The compensating organisation must have known it was inducing the breach of contract.

36. It is possible through careful drafting to draft a retainer agreement between the claims management company and the client to place contractual restrictions in the terms and conditions, upon the client’s ability to deal directly with the insurance company or other compensating party.

37. I emphasise careful drafting, as one would not wish to create terms that infringe the Unfair Terms in Consumer Contracts Regulations 1999 which might have adverse consequences, both in terms of the efficacy of the retainer, but also in terms of possible regulatory consequences. The clients’ interests are given primacy, but that does not mean that the claims management company’s interests need to be jettisoned.

38. The compensating party can then be given notice of these terms. If despite knowledge of the term, the compensating organisation still makes payment to the client, it is difficult to see how they can argue that they did not knowingly induce the client to breach the contract by e.g.: receipt directly of the money contained in a settlement cheque.

39. It will also be observed that the tort of inducing a contract doesn’t just have relevance for the claims management sector. It can for solicitors and other lawyers form a useful argument to supplement any arguments that exist about limitations on the application of the equitable lien.

**Escaping fixed costs**

40. The bane of solicitors practising in the field of personal injury has since at least 2013 been the application of fixed costs to personal injury claims which formerly would have attracted an award of assessed costs. I will now consider to what extent the chances of obtaining an award of assessed costs, whether on the standard basis or the indemnity basis, can be enhanced. In particular terms there are four options which might be usefully explored.

41. The scheme of fixed costs is intended to apply not just to claims which are valued at £25,000 or less, but also to claims which commence under a relevant Protocol and which are not allocated to the Multi-track. Hence an allocation to the Multi-track disapplies the scheme of fixed costs in part 45 CPR.

42. It follows that when considering the proper allocation to track, even in a modestly valued case worth less than £25,000 the arguments for allocation to the Multi-track based on non-monetary factors should be scrutinised very carefully. In **Qader and others v Esure Services Ltd (Personal Injury Bar Association and another intervening) [2017] 1 W.L.R. 1924** the Court of Appeal noted:

*18 The third example, and the one which led to these appeals, arises where a claim is properly started in the RTA Protocol but is met by an allegation in the defence that the claim has been dishonestly fabricated. Sometimes the allegation is simply that the claimant slammed on the brakes to cause the accident, and the issue simply requires the cross-examination of the drivers of the two cars, easily achievable within a one day fast track trial. But some cases involve the allegation of a sophisticated conspiracy to engineer a multi-car incident, the cross examination of numerous witnesses and the deployment of sophisticated engineering expert evidence about the collision. Furthermore, the consequences for a claimant of being found to have been party to the fraudulent contriving of a road traffic accident may well include the inability to obtain vehicle insurance in the future, criminal proceedings or punishment for contempt of court. Such proceedings are therefore inherently likely to be pursued and defended on the basis that no stone is left unturned, and therefore at very substantial cost.*

43. Although it is by no means impossible to litigate a fraud case on the Fast Track, it is not advisable: and if an allegation of fraud, or LVI or some other issue than a straightforward liability and quantum dispute is raised, allocation to the multi-track should be sought. Defendants will doubtless rely on the further views of the Court of Appeal in **Qader:**

*55 By contrast, I do not consider that the Rule Committee would have carried back to a pre-allocation stage a policy to disapply 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.*

44. Should a case involving issues other than straightforward matters of liability or quantum, not be allocated to the Multi-track, there is an escape route in part 45 itself. Rule 45.29J provides as follows:

*(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.*

45. The use of the word “exceptional” is causing problems: most District Judges regard an award of costs under rule 45.29J as being reserved for the angels. But this is not what, in context the word means. In the case of **Costin v Merron [2013] 3 Costs LR 391** Leveson LJ observed:

*11. In my judgment the phrase “exceptional circumstances” in the context of 45.12 speaks for itself. It cannot possibly mean anything other than that, for reasons which make it appropriate to order the case to fall outside the fixed costs regime, exceptionally more money has had to be expended on the case by way of costs than would otherwise have been the case.*

46. It follows that the focus of the application of the rule should be the reason why the costs had to be expended, rather than seeking something novel or ground breaking in the circumstances of the case itself.

47. The decision of the Court of Appeal in **Broadhurst v Tan and another [2016] EWCA Civ 94**, is well known. It reflects the clear public policy in ensuring that part 36 offers are taken seriously, and as many cases settle as possible. Should a defendant now take a case to trial and lose, they will now suffer what have been termed penal consequences.

48. The real question is how each part of the personal injury industry, systematically addresses its use of part 36. For claimants and those representing them, the challenge is now to calculate and issue a part 36 offer as early as possible.

49. It will not be lost, that as part 36 offers can be made on liability only, a part 36 offer of 95% would be effective to set the ball rolling and place the defendant, minded to defend a claim on liability at risk. The balancing act required a little later down the process, is that when a solicitor is instructed, there will often be a continuing loss accruing, such as hire charges in a credit hire claim.

50. At this point more skill will have to be deployed, to judge when to make an offer, as well as what that offer should be. For defendants, a different set of challenges arises. It is well known that many insurance companies utilise software, to value claims, particularly of the bottom end of the scale, and often on the basis of a database which includes all data for settled cases, and skews the value of any part 36 offer downwards.

51. As a seasoned common law barrister observed to me many years ago, insurers like to pay 70 pence in the pound by way of settlement, judged against the true value of a claim. The effect of the **Broadhurst** decision should be to alter the dynamics of that calculation and the variables used, when calculating a settlement offer. If a defendant’s part 36 offer is beaten and the claimants part 36 offer exceeded at a hearing, then the cost of losing the claim will now increase dramatically.

52. Thus in my view, **Broadhurst** should have a double impact in terms of the inflation of claims: first the cost of losing an individual claim at trial will now be higher and secondly across the board, insurers when looking at the book of claims which constitute their exposure, will have to adjust their overall offers upwards, if claimants’ solicitors start systematically making well pitched and early part 36 offers. However, there are many, many cases which still go forward to a hearing, where no effective part 36 offer is in place.

53. In the longer term, given that fixed costs for NIHL and clinical negligence costs are on the horizon, there may well be scope for the impact of those regimes to be blunted. If for example, every time a solicitor is instructed in a clinical negligence case, it is open to them to make a part 36 offer on liability, to the tune of 95%, then straightaway the defendant is on the horns of a dilemma, with its fixed costs protection at risk.

54. A further incentive to use part 36 offers as early as possible, in cases which would otherwise attract fixed costs, concerns the practice by some defendants of accepting claimants part 36 offers months or even years out of time. In the intervening period substantial costs may have been incurred which might have been avoided: who should pay for the luxury of the delay? In summary careful marshalling of the arguments at allocation, a scrutiny of boilerplate defences to see whether fraud, LVI or something out of the norm is alleged, and above all, well judged use of part 36 will go a long way to blunt the impact of fixed costs.

**Problems in interpreting the rules**

55. I have lost count of the number of decisions in the last three years, on various aspects of the rules prescribing fixed costs or governing part 36. Sometimes it has appeared that on an almost monthly basis, an important case has been handed down, which establishes a new set of principles.

56. On a conservative estimate the White Book for 2018, devotes nearly 500 pages to rules and commentary on the rules, concerning costs. The actual page count is far higher, when one takes into account various provisions scattered throughout the sections of the book dealing for example, with case management and interim remedies and the useful supplement that has been published in recent years.

57. At a stroke it can be seen that one of the principal causes of costs litigation in recent years has been the sheer volume of law created by lawyers to govern the field of costs. Lawyers can’t resist tinkering with the law which governs the award and assessment of costs.

58. Most of this law is contained in the Civil Procedure Rules and practice directions drafted to explain the rules, and ever burgeoning case law to explain the effect of the rules and the practice directions. Despite the sheer volume of material, which is thrown out by the creation of new rules, and appellate decisions explaining what they mean, most lawyers who deal with costs will feel a sense of frustration, because the rules do not appear to cover or explain with certainty, what costs are recoverable in certain scenarios, or because the rules are ambiguous. Such frustrations are not new.

59. In order to determine what rules are likely to mean, and thus to be able to predict what the result may be of the rule’s application to any given case, it is necessary to understand how rules are interpreted by the courts: because whatever a rule appears to say, it might actually mean something quite different, when the court declares its meaning.

60. A common complaint often expressed in the case law, is that the rules are poorly drafted and hence obscure. Often a prayer is made that the rules may be amended to be made clearer. But often the reason a rule is made, is to reflect policy announced by the government and legislated for by Parliament. A policy steer may be given, or not given, by the Ministry of Justice as to what the rules should prescribe. The provisions on Qualified One Way Costs Shifting, are a good example of rules which have been made with the lightest of policy touches as to their detail.

61. The Civil Procedure Rules are not made by Parliament. They are delegated legislation made by the Civil Procedure Rules Committee and given force of law by statutory instrument. But this means in turn they are not drafted by Parliamentary counsel, trained for many years in the discipline of statutory drafting.

62. Instead, like all products of a committee they represent a compromise between the views of those who gamely “have a go” at framing general rules to fit particular cases and those who try to anticipate the scenarios within which the rules will be applied.

63. Often the results are unhappy: and an interesting study could take place into the comparative costs of employing parliamentary counsel to produce a more skilled and certain set of provisions, and the wasted costs thrown away in satellite litigation over the years, seeking to achieve the same end.

64. The starting point to note is that delegated legislation is to be construed in the same way as primary legislation. This proposition leads us then to consider what the appropriate ways to consider primary legislation are.

65. Of all the canons of construction, the most important is that the courts should give effect to the purpose behind the legislation. Legislation is thus to be given a purposive construction which considers that the statute as a whole and read in the context of the situation which led to its enactment.

66. Purposive interpretation as a phrase must be considered in context: it certainly does not mean that the court is free to consider in a vacuum what Parliament intended, or to carry out a far ranging review to hypothesise what Parliament meant and give effect to its own view.

67. Instead, a purposive construction is one either following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose or applying a strained meaning where the literal meaning is not in accordance with the legislative purpose.

68. Purposive construction is therefore not a principle which conflicts with the literal wording of a statute, rather the courts take the view that the literal meaning must be taken to reflect the purpose that Parliament intended a set of provisions to have. Parliament uses the literal meaning to explain its purpose, if you like.

69. Statutory interpretation thus requires the court to identify the meaning borne by the words in question in the particular context. The phrase “intention of Parliament” is shorthand for the intention the court reasonably imputes to Parliament in respect of the language used.

70. Prima facie the meaning of an enactment which was intended by the legislator is taken to be that which corresponds to its literal meaning. This directs the court to consider the natural and ordinary meaning of the word or phrase in question that is its proper and most known signification. If there is more than one ordinary meaning, the most common and well established is preferred (other things being equal).

71. This in turn poses the interesting question “natural and ordinary” to whom? A set of words may mean one thing to an educated Guardian-reading academic, quite another to a semi-literate manual labourer, and something different again depending on which region of the United Kingdom they come from.

72. Conversely, a strained construction is applied, where it is apparent that something has gone wrong in the drafting. This is where the court plays Humpty Dumpty, in Wonderland, taking the view that words mean what the court says they mean, as a nice knock down point.

73. A “strained” construction will be justified when there is a repugnance between the words of the enactment and some other enactment, or the consequences of a literal construction are so undesirable that Parliament cannot have intended them or there is an error in the text which plainly falsifies Parliament’s intention or the passage of time since the enactment was originally drafted.

74. Technical terms of law or expertise are to be given their technical meaning unless the contrary intention appears. This in turn poses the question of what is a technical term of law or expertise, but usually the context will again provide a steer. The Civil Procedure Rules are littered with technical terms of law, which are so well known to lawyers that they require no deeper definition of their meaning.

75. These days, there is usually a plethora of consultative material, or ministerial statements, which precede significant developments, including in relation to the Civil Procedure Rules, as recent reforms to part 45 demonstrate.

76. But it is far too simplistic, to simply point to this material and suggests that it fills in the gaps in obscure provisions. It is for the courts to interpret legislation not the executive and even precisely framed official statements are of limited assistance at best in interpreting legislation.

77. The court may under proper safeguards have regard to the enacting history of Act as an aid to its construction but must bear in mind that the creation of statute law is subject to a continuous process of development. Measures can go through multiple drafts.

78. Whilst Explanatory Notes are admissible as an aid to construction private notes are not as it is fundamental that all materials relevant to the proper interpretation of an instrument should be available to any person who wishes to inform himself about the meaning of the law.

79. Finally, the courts take as a working assumption, the view that the drafter of legislation is assumed to be competent with a sufficient knowledge of the law, which as a legal fiction is probably a necessary assumption, even if honoured sometimes as much in the breach as the observance.

**MOJ and Portal costs**

80. There is in litigation an established cottage industry in respect of costs arguments which arise from the operation of various Protocols which apply to low value personal injury claims initially submitted via the MOJ Portal, and what costs may be recoverable, should substantive proceedings follow. Very few cases however go to appeal.

81. In the case of **Williams v The Secretary of State for Business Energy and Industrial Strategy [2018] EWCA Civ 852** the court considered the appropriate approach to costs when a claimant unreasonably failed to follow a Pre-action Protocol which allowed for the recovery of fixed costs and disbursements only where the claim was settled before the commencement of proceedings.

82. The case was an NIHL claim. There was an issue as to whether it was properly a case where multiple defendants could be pursued:

 *13. Subsequently, on 19 January 2015, the claimant’s solicitors confirmed to them that a claim was not pursued against British Tissues. Thereafter on 13 February, the defendant’s solicitors took the point that, because there was no reasonable prospect of British Tissues being a defendant and/or that there was no reasonable prospect of the claimant successfully pursuing a claim against British Tissues, the relevant exception to the EL/PL Protocol (that it did not apply to a claim where there was more than one employer defendant) was not triggered and that, in consequence, the defendant was only liable for the fixed costs that would have been payable under the EL/PL Protocol.*

83. The Court of Appeal concluded:

*37. The Part 36 regime is a self-contained procedural code for the making of and acceptance of settlement offers. In the present case, the offer was made in accordance with Part 36. It was accepted in accordance with Part 36, so CPR Part 36.13(1) and 36.13(3) applied. The EL/PL Protocol had not been used at any time, so Part 36.20 did not apply, and would not have applied anyway because r.45.29A(1) (to which it refers) did not apply to disease claims. Therefore, as Judge Godsmark QC found, the starting point under Part 36 was that the claimant was prima facie entitled to its costs assessed in accordance with the usual rules (i.e. not by reference to fixed costs).*

*38. The Judge indicated that, if the defendant had wanted to limit its Part 36 offer to fixed costs, because of the argument about the viability of the claim against British Tissues, then it could have said so expressly in their offer letters. Of course, there may then have been arguments as to whether, in those circumstances, it was a Part 36 offer at all: that qualification may have made it a Calderbank letter instead. It might also have meant that the offer was less likely to be accepted. But certainty is impossible where there are arguments about whether or not the Protocol was not reasonably followed, and such a letter would at least have made the point openly at the relevant time, rather than it arising after the claim had been settled. As the Judge said, it would have provided some costs protection to the defendant.*

*39. Rule 45.24 does cover the position if a claim should have been brought under the EL/PL Protocol but was not. It cannot therefore be said that this was an eventuality that the CPR ignored. On the contrary, r.45.24 is a detailed provision dealing with the costs consequences where the claim was either not made or not continued under the EL/PL Protocol.*

*40. However, as Judge Godsmark QC found, r.45.24 does not apply to the facts of the present case. There have been no Part 7 proceedings. There has been no judgment. Although Mr Hutton QC sought to argue that in some way the requirement for Part 7 proceedings and a final judgment were simply examples of when the court could exercise its discretion under r.45.24, I am unable to accept that submission. It is clear that r.45.24 is dealing with specific circumstances where the court may exercise its discretion to order the payment of no more than fixed costs. Those circumstances (where there are Part 7 proceedings and a judgment) are not examples, but pre-conditions which have to exist before the rule can be applied.*

*41. Moreover, it is unsurprising that r.45.24 assumes the existence of proceedings and a judgment. It is part of a wider scheme. With the exception of r.45.23A (which was itself a later addition to fill a perceived gap in the Rules), all of Section III of Part 45, starting at r.45.16 and including r.45.24, applies where proceedings have been commenced and been pursued to judgment. That in turn is consistent with the principal function of the CPR: to govern the conduct of proceedings once they have commenced.*

*52. These provisions contain numerous ways in which a party whose conduct has been unreasonable can be penalised in costs (what I shall call “the Part 44 conduct provisions”). In my view, the Part 44 conduct provisions provide a complete answer to a case like this. They provide ample scope for a District Judge or a Costs Judge, when assessing the costs in a claim which was unreasonably made outside the EL/PL Protocol, to allow only the fixed costs set out in the EL/PL Protocol.*

*53. Mr Carter sought to argue that it was somehow inherent in r.45.24 that Part 44 would not apply at all in cases like this. He argued that, if the same result could be achieved by way of Part 44, then r.45.24 was otiose.*

*54. I do not accept those submissions. Since r.45.24 does not apply to this case, its existence cannot be relied on as excluding rules which, on their face, do apply. Moreover, r.45.24 would not necessarily be rendered otiose by the provisions of Part 44: it would always depend on the facts. In any event, a situation where, depending on the circumstances, the CPR may provide more than one route to the same result, is hardly uncommon.*

*55. More widely, Part 44 provides important general rules about costs and the sorts of matters which, in the exercise of its discretion, a court may wish to take into account when assessing costs. For Part 44 to be disapplied (in whole or in part), as Mr Carter urges, there would have to be clear words setting out the nature and scope of any such disapplication. There are none here. Accordingly, I consider that Part 44 applies to this case. The unreasonable failure by the claimant to follow the EL/PL Protocol, as found by the DDJ, triggers the Part 44 conduct provisions.*

*56. In my view, it is at this point that paragraphs 2.1, 3.1 and the warning at 7.59 of the EL/PL Protocol, become relevant. Taken together, those paragraphs comprise a clear indication that, if a claim should have been started under the Protocol but was not, and it was unreasonable that the claim was not so started, then by the operation of the Part 44 conduct provisions, the claimant should be limited to the fixed costs that would have been recoverable under the EL/PL Protocol.*

*57. I consider that support for this approach can be found in O’Beirne v Hudson [2010] EWCA Civ 52; [2010] 1 WLR 1717. In that case, there was a claim for general damages just above the small claims track limit of £1,000 and the claim settled for £400. The judge said that there was nothing in the consent order which precluded the costs being assessed by reference to the small claims track. The Court of Appeal agreed, holding that, even where a consent order provided for costs to be assessed on a standard basis, Part 44 meant that the assessment of costs could proceed on the basis that, in respect of each item, the costs judge asked whether it was reasonable for the paying party to pay more than would have been payable had the case been allocated to the small claims track.*

*58. Mr Hutton QC sought to distinguish this case on the basis that there was no unreasonable avoidance of a Protocol. In my view, whilst that might a difference on the facts, it does not affect the applicability of Part 44 to any case where the payee might otherwise recover more than is reasonable in all the circumstances. Indeed, in another case relied on by the defendant (Javed v British Telecommunications PLC [2015] EWHC 90212 (Costs)), where the claimant had failed to follow a Protocol, Master Simons, Costs Judge, again approached the assessment under Part 44 and found at paragraph 42 that “had the claimant acted reasonably then her solicitors would not have been entitled to recover any more than fixed recoverable costs and it seems to me that it would create injustice if they were to profit as a result of their unreasonable conduct”.*

*59. In both O’Beirne and Javed, the assessment was to be undertaken by reference to what is now Part 44.4 (which, at the time of both those cases, was Part 44.5), namely by having regard to all the circumstances of the case, including conduct. It seems to me that, in a case where a claim was not reasonably made under a Protocol, Part 44.11 (Misconduct) is of equal, if not more, importance. It will very often be because of misconduct on the part of the claimant or the claimant’s legal representatives that a claim was made which unreasonably avoided the relevant Protocol altogether. In addition, I note that, whilst O’Beirne favoured an item by item approach to the assessment, Master Simons in Javed said that that was unnecessary in these sorts of circumstances. For my own part, I prefer the approach of Master Simons. If the judge has concluded that, as a result of unreasonable conduct, the relevant fixed costs represent the maximum recovery, then an item by item approach is unnecessary.*

*60. Mr Hutton QC accepted that Part 44 provides a mechanism which achieves the result he seeks. His principal complaint was that it was a less certain remedy than the automatic application of the fixed costs regime. I have already said that that criticism is unrealistic: any dispute about whether or not the EL/PL Protocol should have been used, and whether its non-use was unreasonable, will inevitably introduce a level of uncertainty which cannot be cured by the CPR, at least until that dispute has been resolved.*

*61. For these reasons, I consider that Part 44 provides a complete answer to the issues raised on this appeal. In a case not covered by r.45.24, such as this one, a defendant can rely on the Part 44 conduct provisions to argue that only the EL/PL Protocol fixed costs should apply.*

**Late acceptance of part 36 offers**

84.There are always fashions in litigation: one of them which has occupied roughly two years, have been the arguments about what costs consequences flow, from the late acceptance by a defendant of a part 36 offer made by a claimant, in a personal injury case, often complicated by the presence of the fixed costs provisions.

85. In the case of conjoined appeals **Hislop v Perde and Kaur v Committee (for the time being) of Ramgarhia Board Leicester [2018] EWCA Civ 1726** this issue was ventilated before the Court of Appeal.

86. The issue was described thus:

*1. The issue that arises in these two appeals concerns the correct approach to costs in cases under the fixed costs regime in Section IIIA of Part 45 (low value road traffic accident (“RTA”) and employers’ liability/public liability (“EL/PL”) claims), where the defendant eventually accepts, after they should or could have done, the claimant’s offer under CPR Part 36. We are told that the issue is of some significance and will affect the costs outcome in many other cases. In addition to counsel’s submissions, in completing this Judgment, I have taken into consideration detailed written submission by both the Association of Personal Injury Lawyers, and the Forum of Insurance Lawyers.*

*2. By reference to two earlier decisions of this court, the issue of principle can be delineated in this way. 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: see Solomon v Cromwell Group PLC [2012] 1 WLR 1048. Conversely, where a claim that is subject to the fixed costs regime goes on to trial and, by way of judgment, the claimant recovers more than a Part 36 offer, he or she is entitled to indemnity costs from the date that the offer became effective: see Broadhurst v Tan [2016] EWCA Civ 94; [2016] 1 WLR 1928. That leaves what might be called the cases in the middle, where a defendant accepts the claimant’s Part 36 offer many months after it was made, and the case does not then go on to trial. In those circumstances, does the case remain within the fixed costs regime, or can the claimant escape its confines and recover standard or even indemnity costs from the date that the offer became effective?*

87. The court made some general observations on indemnity costs as follows:

*38. Leaving aside the complexities introduced by the fixed costs regime, the general position is that the late acceptance of a Part 36 offer may warrant an order for indemnity costs. But that will always be a question of fact in each case; there is no presumption to that effect. In Fitzpatrick Contractors Ltd v Tyco Fire and Integrated Solutions (UK) Ltd (3) [2009] EWHC 274 (TCC); [2010] 2 Costs LR 115, I said:*

*“21. Secondly, I consider that the court has to be very careful before inserting into a rule, which is silent on costs, a presumption of this kind, extracted from a different rule altogether. It seems to me that, on this point, Lord Woolf's remarks in Excelsior are of some relevance (although I acknowledge that he was dealing there with a contrast between the old r36.21 and the old r36.20.) He concluded that, in the absence of any reference to the indemnity basis, an order for costs which the court was required to make under the old r36.20 was an order for costs on the standard basis. It seems to me that precisely the same general reasoning would apply here to CPR 36.10(4) and (5).*

*…*

*23. Thirdly, I note that r36.10(3), which deals with the situation where the claimant's offer is accepted within the relevant period, expressly provides that costs will be assessed on the standard basis. If, therefore, there was a presumption that indemnity costs would apply under r36.10(5), when an offer was accepted outside the period, it seems to me that the rule would say so. It does not, and, in my judgment, that is not an oversight or an omission; it is because either standard or indemnity costs may be applicable where an offer is accepted after the relevant period, depending on the analysis under CPR 44.3.*

*24. Finally, I am not persuaded that, as a matter of policy, it would be appropriate to import an indemnity costs presumption into r36.10(4) and (5). A defendant is entitled to accept an offer beyond the period of acceptance. In a complex case such as this, a defendant should be encouraged continuously to evaluate and re-evaluate the claim and its own response to that claim, so that even if the defendant had originally concluded that it was not going to accept the offer, it should always be prepared to change its mind. The CPR should be interpreted in a way that encourages such constant re-evaluation.*

*25. All those of us involved in civil litigation are conscious of the irony that a well-judged Part 36 offer by one party (whether claimant or defendant) at the outset of proceedings can often make a trial and a fight to the finish more, rather than less, likely, because there will often be instances where, by the time the offeree has belatedly realised that the offer was well-judged, he will have incurred considerable cost, and may feel that he has no option but to go on and fight the case through to the finish in the hope of bettering the offer. Such an outcome is not to be encouraged. There is a risk that, if a defendant belatedly changed its mind as to the acceptability of a claimant's Part 36 offer, the defendant would be discouraged from formally accepting that offer if it thought that it would have to pay indemnity costs in consequence. It would not be appropriate to construe the CPR in such a way, because that would, in my view, actively discourage late settlements and instead give rise to another reason for the offeree to push on to a trial.”*

*39. Mr Bacon QC sought to argue, by reference to more recent cases such as OMV Petrom SA v Glencore International AG [2017] 1 WLR 3465 that the ‘carrot and stick’ effect of the new rules, following the Jackson reforms, means that the courts should be much quicker to conclude that a defendant who delays accepting a Part 36 offer should be liable for indemnity costs. In my view, that confuses a presumption in favour of indemnity costs (applicable in every case of late acceptance of a Part 36 offer), and the making of such an order if it is warranted on the facts. All that I was addressing in Fitzpatrick was the absence of any implicit presumption in the CPR in favour of an order for indemnity costs, in every case of late acceptance of a Part 36 offer. That is far from saying that there will not be cases in which, on the facts, late acceptance without proper reason will justify an order for indemnity costs.*

88. The court then went on to consider the position in relation to cases otherwise falling within the fixed costs regime:

*41. Solomon is authority for the proposition that the fixed costs regime made mandatory by r.45.29B and r.45.29D will continue to apply to those cases covered by it, unless there is an express exception. The claimants in Broadhurst moved out of the fixed costs regime (even though they could not put themselves within one of the Part 45 exceptions (rr.45.29F, 45.29G, 45.29H and 45.29J)) because they could demonstrate that what is now 36.21 (then 36.14A) provided an additional exception. It dealt expressly with what should happen when a claimant beat a Part 36 offer after judgment, even in a case to which the fixed costs regime would have otherwise applied. In this way, although the draftsman had not made the point clear in Section IIIA of Part 45, it did not matter, because he had made it clear in Part 36.*

*42. How was the exception made clear? This was achieved by adding particular modifications which were relevant to the fixed costs regime via r.36.21 (old r.36.14A), but at the same time expressly confirming that r.36.17 (old r.36.14) was preserved and continued to apply to fixed costs cases. In other words, the rules expressly provided that, even though the fixed costs regime had brought about a number of specific modifications, the underlying rules in r.36.17 (old r.36.14) also applied to such cases. In this way, the CPR expressly preserved what has been called the ‘enhanced package’ provided for by r.36.17(4), and made that applicable to a claimant within the fixed costs regime, provided that he or she had done better at trial than the Part 36 offer.*

*43. The fundamental difficulty for a claimant in a fixed costs case seeking to say that something very similar should happen where the defendant has delayed before accepting the claimant’s Part 36 offer is that different rules apply. In my view, those different rules demonstrate that the applicable costs regime in fixed costs case where there has been late acceptance is different to that described in Broadhurst v Tan and, on analysis, very similar to that explained in Solomon.*

*44. Whilst the general rule dealing with costs consequences following judgment (r.36.17) is expressly preserved by the particular rule relating to the fixed costs regime (r.36.21), that is not the position in relation to the rules relating to the costs consequences of accepting Part 36 offers before trial. For that situation, the general rule (r.36.13, old rule r.36.10) is not preserved by the rule applicable to fixed costs cases (r.36.20, old rule r.36.10A). Instead, r.36.20 makes plain that it is the only rule which applies to the costs consequences of acceptance of a Part 36 offer in fixed costs cases. It preserves no part of the general rule set out in r.36.13.*

*45. What is more, r.36.13 itself says that it is “subject to” r.36.20 which, because that rule applies to fixed costs cases and r.36.13 does not, also leads to the conclusion that r.36.13 does not apply to fixed costs cases. Where (without more) a general rule is made ‘subject to’ a specific rule that governs a particular class of case then, in that class of case (here, those subject to fixed costs), it will be the specific rule that applies, not the general rule (see Solomon).*

*46. There are other parts of r.36.13 which also demonstrate that it has no application to fixed costs cases. These include the signpost in brackets after r.36.13(1), which makes it clear that it is r.36.20 which “makes provision for” the relevant rules in fixed costs cases, and r.36.13(3), which qualifies the reference to standard costs with the words “except where the reasonable costs are fixed by these Rules”.*

*47. In this way, the interaction between the fixed costs regime and Part 36 is different where the claimant is successful after trial (r.36.17 expressly preserved), as compared to where a Part 36 offer is accepted before trial (r.36.13 not preserved, and excluded by the use of the words ‘subject to’ and the other amendments referred to in paragraph 45 above). In this way, the drafting of the interaction between the two pairs of rules is very different. If the sort of twin-track approach applicable to the position after judgment (as described in Broadhurst v Tan) was intended to apply to late acceptance of a Part 36 offer before trial, the same sort of wording in r.36.21, and in particular the express preservation of the general rule, would have been required in r.36.20. There is no such preservation. On that basis, I consider that the correct interpretation of the rules is to say that, in a fixed costs case, r.36.20 applies where an offer is accepted late, and that r.36.13 does not apply at all.*

*48. Finally on interpretation, both Mr Bacon QC and Mr Benson in their respective cases argued that r.45.29B and r.45.29J could not be relevant to the costs consequences of acceptance of a Part 36 offer, because if they were relevant, there would be no need for r.36.20(2). That is a bad point, for two reasons. First, the draftsman has always striven to make Part 36 self-contained, so it has always contained some provisions which can also be found elsewhere in the CPR. Second and more generally, the fact that there is some duplication within the CPR is, unsatisfactory though it might be, inevitable. Rules should not be construed in reliance on duplication.*

*49. Having set out my interpretation of the relevant rules, I consider that there are four reasons why that interpretation leads to a sensible and coherent result. It is manifestly not a drafting error nor, with respect to District Judge Reed, a lacuna in the CPR.*

*50. First, this interpretation is in accordance with the comprehensive nature of the fixed costs regime in Part 45 and the policy that, subject to limited exceptions, the fixed costs regime is intended to apply to the relevant PAP cases, without further ado or argument. This means that, in relation to offers made under Part 36, the only way out of the regime is triggered where a claimant beats the Part 36 offer at trial (Broadhurst v Tan). Moreover, that particular circumstance has always been a situation where the rules have striven to reward the claimant: hence the enhanced package provided by r.36.17. It therefore makes sense to say that, even in a fixed costs case, that enhanced package should be available to a claimant after trial, just as it is in any other kind of case.*

*51. Secondly, I consider that my interpretation preserves the autonomy of Part 45. If a case begins under the fixed costs regime then it should only be in exceptional circumstances that the parties are able to escape it. 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 will still apply.*

*52. Thirdly, it should not be thought that this interpretation means that the defendant who makes an offer which the claimant accepts late is in a radically different position to a claimant whose own offer has been accepted late. True it is that, in that situation, r.36.20(4)(b) imposes a specific liability on the claimant to pay the defendant’s costs relating to the period between when the offer should have been accepted and when it was accepted. But r.36.20(12) makes it clear that the costs awarded to a defendant in respect of that delay will be assessed by reference to fixed costs only.*

*53. This is important. These rules demonstrate that, in the mirror image of the situation in which these claimants find themselves (namely, where a claimant has accepted a defendant’s offer late) there is no question of either indemnity or standard basis costs being awarded to the defendant. The defendant’s recovery for the period of delay is limited to fixed costs only. There could be no reason to treat the claimant in a radically different way and to go outside the fixed costs regime, and order standard or even indemnity costs, in circumstances where a defendant in a similar position to these claimants is not permitted to recover costs on that basis. In this way, my interpretation of the rules applies the same fixed costs regime to any party whose offer has not been accepted when it should have been.*

*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 draftsman 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 Kaur case was based on a false premise. However, two particular issues were raised as to the scope of r.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 Kaur 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.*

We shall have to see what the scope of fixed costs regimes are in November 2019: the position might be radically different to that which applies today.

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**11th November 2018**