Neutral Citation Number: [2019] EWHC 952 (QB)

Case No: BRO 1800950

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE SENIOR COURTS COSTS OFFICE
MASTER McCLOUD

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2019

Before:

MR JUSTICE STEWART

- -

Between:

MR CARL FERRI	**Claimant/ Respondent**
- and -	
MR IAN GILL	**Defendant/ Appellant**

- -
- -

Mr Benjamin Williams QC (instructed by **Fieldfisher**) for the **Claimant/Respondent**
Mr Roger Mallalieu (instructed by **Horwich Farrelly Solicitors**) for the **Defendant/Appellant**

Hearing dates: Tuesday 9th April 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE STEWART

Mr Justice Stewart:

Introduction

1. This is an appeal against an order of Master McCloud, sitting as a Deputy Costs Judge, dated 25th May 2018. The core provisions of that order are as follows:

> "1. Preliminary points (2) and (3) of the Defendant's Points of Dispute dated 10 April 2018 are dismissed.
>
> 2. Pursuant to CPR 45.29J, the Claimant's costs shall be subject to detailed assessment.
>
> 3. The Claimant's time for applying for a hearing of the detailed assessment is extended until 28 days after (1) the expiry of the time granted to the Defendant for filing an appeal by virtue of this order, or (2) if such an appeal is filed, the final determination of that appeal.
>
> 4. The Defendant has permission to appeal the court's determination of the legal test for making an order under CPR 45.29J, but not the court's application of that legal test as so determined to the facts of this case. The appeal shall lie to a judge of the Queen's Bench Division.
>
> 5 …
>
> 6. The Defendant shall pay 50% of the Claimant's costs of and incidental to the determination of the preliminary issues in any event, to be subject to summary assessment on the standard basis in default of agreement. The balance of the costs of the preliminary issues are reserved to the detailed assessment."

2. Since Master McCloud's order incorporates them by reference, I think it is sensible to set out preliminary points 2 and 3 of the Points of Dispute in full. They read as follows:

> "**Preliminary Point 2**
>
> This case was started under the protocol for low value personal injury claims in road traffic accidents.
>
> The Claimant initially instructed Messrs Leigh Day. At some point in 2015 he transferred instructions to Messrs Field Fisher. At that point, the Claimant appears to have abandoned any attempt to comply with the protocol.
>
> No notification of removal from the protocol, whether in compliance with section 5.1 or 7.76 of the protocol, or at all, appears to have been given.
>
> The matter was settled in the course of a telephone conversation between the parties on 13.02.17.

> At the point at which the claim settled, sections 7.44 of the protocol applied. Any offer automatically included and could not exclude fixed stage 1 and stage 2 costs and disbursements.
>
> There is no "exceptional circumstances" provision in CPR 45, section III.
>
> Costs are fixed by CPR 45.18. Recoverable disbursements are set out in CPR 45.19. The Claimant has no other entitlement to costs.
>
> …
>
> **Preliminary Point 3**
>
> Had this been a case which 'no longer continued' under the Protocol, CPR 45 Section IIIA would apply. All of the requirements of CPR 45.29A would be met.
>
> CPR 45.29B sets out the only costs allowed. The only relevant 'escape' from CPR 45.29B is the exceptional circumstances provision in CPR 45.29J. It is understood that the Claimant contends that CPR 45.29J is engaged in this case, although neither the Part 8 Claim Form, nor the Bill of Costs provide any explanation or justification in that regard.[1]"

Background facts

3. On 26th January 2015 the Claimant was riding his bicycle when the Defendant's opening car door struck him and he suffered injuries to his arm, abdomen, back, neck and left shoulder. He was off work for a week and then had some reduction in his ability to work. He is a self-employed builder and decorator.

4. At about the end of January 2015 the Claimants instructed Leigh Day Solicitors. They obtained a report from a general practitioner, Doctor Uppal. He expected a full recovery from all symptoms over a period of a maximum of four months from the date of his report. His report is dated 2nd March 2015. He said that if the Claimant did not make the expected recovery, he recommended a follow up report from an orthopaedic surgeon/clinical psychologist.

5. On 29th January 2015 Leigh Day completed a Claim Notification Form (CNF) under the pre-action protocol for low value personal injury road traffic accidents from 31st July 2013 (the Protocol). Liability was admitted with no allegation of contributory negligence and the Defendant made a settlement offer of £1500.

6. The Claimant instructed new solicitors, in place of Leigh Day.

7. On 3rd November 2015 Fieldfisher wrote saying they did not consider the case to be a 'fast track portal claim' and would not be running it as such. This was on the basis that the Claimant had suffered a serious shoulder injury, had on-going loss of earnings and

[1] There is then further argument in support of the Preliminary Point 3 in the Points of Dispute.

required private treatment. They obtained a report from an orthopaedic surgeon who diagnosed damage to the acromioclavicular joint and advised that the Claimant be referred for possible corrective surgery.

8. On 20th October 2016 the Claimant underwent arthroscopic examination of his left shoulder with bursoscopy, arthroscopic sub-acromial decompression, arthroplasty and biceps tenodesis.

9. By January 2017 the Claimant had regained full movement with little pain.

10. On 13th February 2017 the claim settled without issue of proceedings in the sum of £42,000.

11. The orthopaedic procedure was performed privately by virtue of an interim payment in the sum of £6000 provided by the Defendant. The Defendant also made two interim payments in the sum of £555.94 for damages to clothing etc and £1000 to allow for the orthopaedic consultation.

12. In short, the Claimant suffered a significant shoulder injury, with two years symptoms, resolved only after a substantial operation. There was also a loss of earnings claim which required some putting together, as the Claimant is self-employed, lost some time totally off work and otherwise had to work reduced hours.

13. The Claimant sought more than fixed recoverable costs under CPR Part 45 and issued Part 8 proceedings under the costs only procedure in CPR 46.14. It is these proceedings which came before the Master on 25th May 2018.

The Protocol

14. The claim was begun under the Protocol. However, the relevant provisions of CPR Part 45 are those contained in section IIIA, entitled "claims which no longer continue under the RTA … pre-action protocol …". This is because the claim exited the Protocol. This was a matter in dispute between the parties before the Master but her decision[2] was to this effect and there is no appeal against this finding.

15. Some provisions of the Protocol are useful as background:

> "…….
>
> **Definitions**
>
> …..
>
> **1.2**
>
> (1) The 'Protocol upper limit' is—
>
> (a) £25,000 where the accident occurred on or after 31 July 2013; or

[2] Paragraphs 1-3.

(b) £10,000 where the accident occurred on or after 30 April 2010 and before 31July 2013, on a full liability basis including pecuniary losses but excluding interest.

(2) Any reference in this Protocol to a claim which is, or damages which are, valued at no more than the Protocol upper limit, or between £1,000 and the Protocol upper limit, is to be read in accordance with subparagraph (1).

Preamble

2.1 This Protocol describes the behaviour the court expects of the parties prior to the start of proceedings where a claimant claims damages valued at no more than the Protocol upper limit as a result of a personal injury sustained by that person in a road traffic accident. The Civil Procedure Rules 1998 enable the court to impose costs sanctions where it is not followed.

Scope

4.1 This Protocol applies where—

(1) a claim for damages arises from a road traffic accident where the CNF is submitted on or after 31st July 2013;

(2) the claim includes damages in respect of personal injury;

(3) the claimant values the claim at no more than the Protocol upper limit; and

(4) if proceedings were started the small claims track would not be the normal track for that claim.

(Paragraphs 1.1(18)[3] and 4.4 state the damages that are excluded for the purposes of valuing the claim under paragraph 4.1.)

…….

4.3 This Protocol ceases to apply to a claim where, at any stage, the claimant notifies the defendant that the claim has now been revalued at more than the Protocol upper limit.

4.4 A claim may include vehicle related damages but these are excluded for the purposes of valuing the claim under paragraph 4.1.

[3] Paragraph 1.1 (18): 'vehicle related damages' means damages for—(a) the pre-accident value of the vehicle;(b) vehicle repair;(c) vehicle insurance excess; and (d) vehicle hire. This, in conjunction with paragraphs 4.1 and 4.4, means that a claim can continue in the Protocol if, by reason of 'vehicle related damages' the value of the claim exceeds £25000.

….

Discontinuing the Protocol process

5.11 Claims which no longer continue under this Protocol cannot subsequently re-enter the process.

…..

General provisions

7.76 Where the claimant gives notice to the defendant that the claim is unsuitable for this Protocol (for example, because there are complex issues of fact or law) then the claim will no longer continue under this Protocol. However, where the court considers that the claimant acted unreasonably in giving such notice it will award no more than the fixed costs in rule 45.18.

16. The Protocol therefore mandates a procedure, enforced by potential costs sanctions[4], for the disposal of claims which are above the Small Claims Track limit and below the Protocol upper limit of £25000[5]. If a claim is within the Protocol then there is provision for fixed costs at all stages. This includes if there is a 'Stage 3 hearing' under CPR Rule 8B to decide quantum.

17. If a claim exits the Protocol, whether under paragraph 4.3 or 7.76 set out above, or for any other permitted reason[6], paragraph 5.11 prohibits its re-admission. For costs purposes it becomes subject to the fixed costs regime in CPR 45 Part IIIA.

CPR 45 Section IIIA

18. The material provisions are:

"SECTION IIIA CLAIMS WHICH NO LONGER CONTINUE UNDER THE RTA OR EL/PL PRE-ACTION PROTOCOLS – FIXED RECOVERABLE COSTS……

Scope and interpretation

45.29A

(1) Subject to paragraph (3), this section applies—
(a) to a claim started under—

[4] Paragraph 2.1
[5] As defined. Vehicle related damages are, by paragraphs 4.1 and 4.4, excluded for the purposes of valuing the Protocol Upper Limit. [Paragraph 1.1 (18) defines vehicle related damages'].

[6] See Paras 6.15 (1) – (4)

(i) the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ('the RTA Protocol'); ……
…….
where such a claim no longer continues under the relevant Protocol or the Stage 3 Procedure in Practice Direction 8B;

Application of fixed costs and disbursements – RTA Protocol

45.29B

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

Amount of fixed costs – RTA Protocol

45.29C

(1) Subject to paragraph (2), the amount of fixed costs is set out in Table 6B…..

TABLE 6B

TABLE 6B

Fixed costs where a claim no longer continues under the RTA Protocol			
A. If Parties reach a settlement prior to the claimant issuing proceedings under Part 7			
Agreed damages	At least £1,000, but not more than £5,000	More than £5,000, but not more than £10,000	More than £10,000
Fixed costs	The greater of— (a) £550; or (b) the total of— (i) £100; and (ii) 20% of the damages	The total of— (a) £1,100; and (b) 15% of damages over £5,000	The total of— (a) £1,930; and (b) 10% of damages over £10,000

…….

Claims for an amount of costs exceeding fixed recoverable costs

45.29J

(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.

Failure to achieve costs greater than fixed recoverable costs

45.29K
(1) This rule applies where—
(a) costs are assessed in accordance with rule 45.29J(2); and
(b) the court assesses the costs (excluding any VAT) as being an amount which is in a sum less than 20% greater than the amount of the fixed recoverable costs.
(2) The court will make an order for the party who made the claim to be paid the lesser of—
(a) the fixed recoverable costs; and
(b) the assessed costs.

Costs of the costs-only proceedings or the detailed assessment

45.29L

(1) Where—

(a) the court makes an order for costs in accordance with rule 45.29J(3); or

(b) rule 45.29K applies, the court may—

(i) decide not to award the party making the claim the costs of the costs only proceedings or detailed assessment; and

(ii) make orders in relation to costs that may include an order that the party making the claim pay the costs of the party defending those proceedings or that assessment."

19. In short, the Claimant in the present case, unless he comes within the exception in Rule 45.29J will receive only fixed costs assessed in accordance with Table 6B. These would be £1930 plus 10% of £32000 (£42000 - £10000), a total of £5130 plus the 12.5% uplift from CPR 45.29C(2), a total of £5771.25.

Master McCloud's decision

20. Since the decision of the Master on the central point is relatively short, it is preferable to set it out in full in this judgment. She said:

> "…
>
> 4. I do not have a great difficulty in forming a view that the value of a case per se is not determinative. Clearly, *Qader* indicates that value is not the mere basis for taking something out of the portal or indeed for treating a case as exceptional. Value might be a factor but it is not going to be determinative per se.
>
> 5. Nor do I think that costs per se are determinative. In my judgment, to say a case is exceptional because the costs are high would be to tend to jump the gun in terms of the 20% criterion under 45.29K and L, which is a protection there for a Defendant. But, nonetheless, costs are, again, a circumstance to be taken into account.
>
> 6. There is a protection for Defendants written into the Rules, and to decide otherwise would encourage a very unfortunate practice of issuing, incurring an issue fee, getting an allocation to track, just so as to escape the provisions of this Rule. If that were to happen, court time would be taken, costs would be incurred unnecessarily. That would not be consistent with the overriding objective or the policy of trying to keep costs within reasonable bounds and would tend to force parties into that approach as a mere way of coming out of the Portal.
>
> 7. So, to say that a case has to be exceptional would, I think, be wrong. I think it is right to say that one must look at this in the context of the sort of cases that are in the Portal and that the correct test would be that there must be some circumstance, or circumstances, which may include value, may include costs but may also include all the circumstances of the case which take it out of the general run of the type of such a case by reason of those circumstances. I do not go as far as saying that that, although circumstances must necessarily be costs drivers, although they will typically (be) costs drivers because otherwise parties would not be arguing over wanting to escape the costs provisions.
>
> 8. So, to the extent that I am influenced, which is to say to a limited degree, by *Costin* v *Merron* because it is not an admissible authority at all, it is a leave to appeal decision, I am adopting the first part of Lord Justice Leveson's wording in his decision of paragraph 6 of that case, which is that there must be exceptionality in the sense that the case is taken out of the general run of this type of case by reason of some circumstance. I do not go as far as saying that circumstance necessarily must be in relation to costs, though in practice it often will be.
>
> 9. Now, in this case, what do we have? Is this a case which is in normal circumstances taken out of the general run of Portal cases? There are a number of things which suggest that it is not, and a number of things

which suggest that it is, and I have to make a decision between the two on the facts of the case.

10. Percentage wise, it is quite considerably outside the range of the value of the sort of cases, that is something to take into account. The costs are somewhat higher than Portal costs, and again, that is something to take into account. They are not strikingly exceptional in themselves or, indeed, really very far outside the general run of these sorts of cases. But, on the facts of the case, I do find circumstances that are out of the general run.

11. We have a situation where a case was initially thought to be suitable for the Portal. It was discovered that the impact of these injuries was greater than had been thought. A different firm of solicitors was then instructed. There was then a somewhat unusually protracted period of pre-action discussion for a case of this sort due to the need for ascertaining a prognosis and the degree of treatment during that period which led to interim payments being made on two occasions. We have a situation where we have a self-employed builder, not unusual, a cyclist, a lot of people cycle, not unusual, but here we have a particularly keen (albeit not professional) amateur cyclist who is also a part time builder. This is somewhat outside the usual run of these sorts of cases.

12. In the round, I think this does satisfy the low bar, and I am setting this as a low bar and not a high bar, the low bar of being simply "outside the general run" of these cases per Leveson LJ, having regard to the facts that there are protections in the Rules for cases where, on scrutiny, it turns out that costs have exceeded the fixed costs by more than 20%. It is a low bar because the Portal is intended to deal with, in my judgment, simple cases which would typically be fast track cases and, for the factual circumstances that I have set out, it is on balance outside the general run of such cases.

13. So, I will make, in principle, a decision under Rule J to allow summary assessment, or to allow costs subject to some form of assessment."

Grounds of Appeal

21. There are four grounds of appeal, namely:

i) the Master made an error of principle in considering the circumstances against which exceptionality should be judged, this being an important point relating to the correct construction of CPR 45.29J;

ii) the Master made a second error of principle in expressly regarding the test of exceptionality as a "low bar" and evaluating accordingly;

iii) that the Master made a third error of principle in leaving out of consideration a material, though not independently determinative, factor namely whether any reportedly exceptional circumstances had caused any significant additional cost;

iv) the Master's decision was wrong and in event outside the ambit of reasonable disagreement.

22. I shall deal with grounds (i) and (ii) first, and take them together. Before that I shall consider some authorities.

Relevant authorities

23. In *Qader v Esure Services Ltd*[7] the Court of Appeal had to consider the provisions of Section IIIA of CPR Pt. 45 in circumstances where a claim had started under the Protocol, but had left it when the Defendant denied liability. Part 7 proceedings had then been commenced, followed by allocation to the multi-track. The judge decided, on the then wording of Rule 49.2B, that the fixed costs regime should apply. The Court held that that rule should be read as if the phrase "and for so long as the claim is not allocated to the multi-track" were inserted[8].

24. In the course of the judgment, the Court made certain important observations on the Protocol and on Section IIIA Pt. 45, namely:

> "3 The RTA Protocol was not designed for the resolution of large claims or complex disputes.
>
> ……
>
> 5 A detailed and comprehensive fixed costs regime has, at least since July 2013, been an essential foundation for the effectiveness of the RTA Protocol, being part of a mechanism which strikes a balance between the need to secure access to justice for the victims of road traffic accidents by providing an economic basis for the provision of legal services to deserving claimants, and the risks of disproportionate costs being incurred in relation to relatively modest claims, with adverse consequences in terms of the cost of motor insurance for the public….[9]
>
> 6 Claims arising from road traffic accidents properly started within the RTA Protocol may leave it without resolution or determination within it for a number of reasons. The most common reason is where liability is not admitted at Stage 1.

[7] [2016] EWCA Civ 1109

[8] The Rule has since been amended to reflect this.. The amendment inserted the words I have put in square brackets and italicised. It now reads: "Subject to rules 45.29F, 45.29G, 45.29H and 45.29J, *[and for as long as the case is not allocated to the multi-track*], if, in a claim started under the RTA Protocol, the Claim Notification Form is submitted on or after 31st July 2013, the only costs allowed are — (a) the fixed costs in rule 45.29C; (b) disbursements in accordance with rule 45.29I." Table 6B has also been amended by deleting the previous upper limit of £25000 from the Agreed Damages in section A.

[9] Reference was made to Paragraph 3.1 of the Protocol, sub-titled "Aims"

Other reasons include a revaluation of the claim so as to take it above the RTA Protocol upper limit: see paragraph 4.3; or a failure by the defendant's insurers or representatives to respond to the claim notification form, also at Stage 1. In such cases the claimant may seek to negotiate an out of court settlement with the defendant or, in default, issue proceedings in the ordinary way under Part 7.

7 Those proceedings will, if liability remains in dispute, typically lead to allocation to the fast track and a trial taking not more than one day. Alternatively liability may be admitted late, or the proceedings may be unopposed, leading to a judgment on admissions or in default for damages to be assessed, at a disposal hearing ordered under paragraph 12 of the practice direction supplementing Part 26. Of course, the case may be settled at any stage during those various procedures. As will appear, the costs regime for cases which started within the RTA Protocol is designed to provide a fixed costs outcome, whether the case fights or settles, thereby removing the all too prevalent risk in the past of expensive satellite litigation about the assessment of costs.

……

16 But there are a number of situations where claims properly started in the RTA Protocol, which no longer continue therein due to a dispute as to liability, but are pursued under Part 7, are likely to have to be allocated to the multi-track rather than the fast track. Three examples were identified during the hearing of these appeals. The first arises where a claim originally thought to be worth no more than £25,000 is re-valued at a substantially higher level. These then cease to continue in the RTA Protocol pursuant to its own paragraph 4.3. It may not automatically follow that such a claim would be allocated to the multi-track, because the £25,000 limit for the fast track is one which only makes it not the "normal" track and the court retains discretion, on grounds set out in detail in rule 26.7 and 8 to allocate otherwise than to the "normal" track. None the less, a large escalation in the amount claimed is inherently likely to lead to intensification of the litigation about its quantification, sufficient to take the case beyond the one day trial estimate which is a key feature for allocation to the fast track.

……

54 ….The intended purpose of the fixed costs regime in this context was that it should apply as widely as possible (and therefore to cases allocated to the fast track, and to cases sent for quantification of damages at disposal hearings), but not to cases where there had been a judicial determination that they should continue in the multi-track. The intended restriction on the ambit of the fixed costs regime is clear……Similarly the substance of the provision which the Rule Committee would have made, if it

> had taken steps to enact that restriction would have been to provide that, from the moment when a case was in fact allocated to the multi-track, the Section IIIA fixed costs regime should cease to apply to that case.
>
> 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. To require the parties to guess, or the court to decide, whether a case which settled prior to allocation (to which therefore part A or the first column of part B of Table 6B would apply) was or was not subject to fixed costs would introduce a damaging and unnecessary degree of uncertainty into a scheme which depends upon its predictability for its contribution towards the proportionate, speedy and effective disposal of civil proceedings." *(my underlining)*…."

25. In *Sharp v Leeds City Council*[10] the Court of Appeal refused to extend the exceptions to the fixed costs regime expressly provided for in the CPR. Briggs LJ said:

> "31 The starting point is that 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.
>
> ……
>
> 41….The fixed costs regime inevitably contains swings and roundabouts, and lawyers who assist claimants by participating in it are accustomed to taking the rough with the smooth, in pursuing legal business which is profitable overall."

26. In *Hislop v Perde*[11] the Court of Appeal refused to depart from the fixed costs regime where (i) a Defendant accepted a Claimant's Part 36 offer out of time and (ii) a Defendant made its own higher Part 36 offer some months later, this offer then being accepted by the Claimant. The Court also made observations on Rule 45.9J. The most relevant sections of the judgment of Coulson LJ are:

[10] [2017] EWCA Civ 33
[11] [2018] EWCA Civ 1726

"30 ….His judgment[12] is an important explanation of the comprehensive nature of the fixed costs regime; the small category of exceptions; and the fact that there will inevitably be swings and roundabouts in any regime designed to deal with high bulk, low value claims. …

…

31 As noted, rule 45.29J allows an escape route from the fixed costs regime in "exceptional circumstances". We were told that there is no authority on the operation of this provision. …..

50 …. 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's case… will still apply.[13]

….

53 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 rule 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…..

54 I am anxious not to express detailed conclusions about the scope and extent of rule 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 directlyrelevant to this appeal….However, two particular issues

---

[12] Briggs LJ in *Qader*

[13] This approach follows what had been said about other fixed costs regimes in *Kilby v Gawith* [2008] EWCA Civ 812 at [27]-[28], in particular: "Costs may be unreasonable in the particular case, but the scheme is intended to iron out fluctuations and, importantly, to cut out argument which is itself potentially very costly.". See also *Nizami v Butt* [2006] EWHC 159 (QB) at [22]-[23] and *Lamont v Burton* [2007] EWCA Civ 49 at [9].

were raised as to the scope of rule 45.29J, and I address each briefly.

55 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's case [2010] 2 Costs LR 115 as to why there can be no presumption in favour of indemnity costs in these circumstances (see para 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 rule 45.29J. Again, what matters are the particular facts of each case. A long delay with no explanation may well be sufficient to trigger rule 45.29J; a short delay with a reasonable explanation will not.

56 Secondly, I reject the argument advanced by Mr Post QC…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 rule 45.29J and rule 45.29K 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.

57 I do not accept Mr Post's gloss on rule 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. <u>It goes without saying that a test requiring "exceptional circumstances" is already a high one</u>[14]. 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.…

……

62 I do not consider that Ms Hislop can now argue that a 19-month delay with no apparent justification triggered the "exceptional circumstances" provision in rule 45.29J. Whilst she did not do so originally because it was wrongly assumed by both parties that the court had the necessary powers under Part 36, the district judge's conclusion that there was nothing out of the norm in this case (para 9 above) applies a fortiori to any suggestion that there were exceptional circumstances under rule 45.29J. <u>If it is not out of the norm, it certainly cannot be exceptional</u>."[15]

[14] My underlining
[15] My underlining

27. Mr Williams QC, for the Respondent, referred to a number of cases which have considered the construction of "exceptional circumstances". Perhaps the most helpful is the statement of Lord Steyn in *R v Soneji*[16], where, absent exceptional circumstances, the court was not allowed to postpone the making of a confiscation order beyond a statutory period of 6 months from the date of conviction. He said:

"…..there were competing arguments about whether the requirement of "exceptional circumstances" in section 72A(3) should be strictly construed. In lower courts a very strict approach has sometimes prevailed. An expression such as "exceptional circumstances" must take its colour from the setting in which it appears. Bearing in mind the context I would not adopt a very strict approach to the meaning of exceptional circumstances."

28. Other examples were

(i) Lord Brown said in *Dymocks v Franchise Systems v Todd*[17] in the context of third party costs orders at [24]-[25]:

> "24. What, then, are the principles by which the discretion to order costs to be paid by a non-party is to be exercised ……
>
> 25. A number of the decided cases have sought to catalogue the main principles governing the proper exercise of this discretion and their Lordships, rather than undertake an exhaustive further survey of the many relevant cases, would seek to summarise the position as follows. (1) Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order….."

(ii) In *R v Kelly*[18] the Court of Appeal considered the statutory requirement to pass a life sentence "unless the court is of the opinion that there are exceptional circumstances relating to either of the offences or to the offender which justify its not doing so". Lord Bingham said:

"…the mandatory duty imposed on the court is not absolute. It is relieved of the duty to impose a life sentence where two conditions are met: first, that the court is of the opinion that there are exceptional circumstances relating to either of the relevant offences or to the offender; and secondly, that the court is of the opinion that those exceptional circumstances justify the court in not imposing a life sentence. We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of

[16] [2005] UKHL 340 at [28]; see also Lord Rodger at [33] and Lord Carswell at [66].
[17] [2004] UKPC 39
[18] [2000] 1 QB 199 at 208

art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered…"

29. As to construction of the CPR Rules, the Master of the Rolls said in *Kilby v Gawith*:

"18 The answer to the question in this appeal is essentially one of construction of CPR Pt 45. Like any provision of the CPR, the relevant rules in Part 45 must be construed by reference to their ordinary meaning when viewed in their context. That is, in the context of section II of Part 45, which must, in its turn, be construed in the context of the CPR as a whole…..this involves a consideration of the statutory purpose of the relevant rules."

30. The Master referred to the decision of Leveson LJ (as he then was) in *Costin v Merron*[19] refusing, after an oral hearing, permission to appeal by way of second appeal to the Court of Appeal under the old Rule 45.12. She said[20] that it was not an admissible authority, being only a leave to appeal decision[21] However, she did adopt the reasoning in paragraph 6. It is therefore necessary for me to consider it. The relevant extract is:

> "2. …… Under CPR 45.12 the court is empowered to entertain a claim for an amount of costs greater than fixed recoverable costs, but "only if it considers that there are exceptional circumstances making it appropriate to do so".
>
> 3. In this case the court was concerned with a comparatively straightforward road traffic accident where the minor claimant suffered comparatively modest physical injuries, but where it was not appreciated that her psychological symptoms were continuing until the matter came before the district judge initially for approval.
>
> 4. The position was as follows. A medical report recorded that the minor claimant had suffered nightmares and the like, but it was only when she gave evidence before the district judge for approval that she complained that she was continuing to suffer adverse symptoms. It was in those circumstances that the district judge declined to approve the settlement then on offer and adjourned the matter for further medical evidence to be obtained,

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[19] [2013] EWCA Civ 380
[20] Judgment at [8]
[21] Practice Direction (Citation of Authorities) [2001] 1 WLR 1001 states:
"6.1 A judgment falling into one of the categories referred to in paragraph 6.2 below may not in future be cited before any court unless it clearly indicates that it purports to establish a new principle or to extend the present law…….
6.2 Paragraph 6.1 applies to the following categories of judgment
Applications attended by one party only
Applications for permission to appeal…"

after which, as I have recorded, an increased offer was forthcoming and the matters ultimately approved.

5. The claimant's solicitors then applied to take the case outside the fixed recoverable costs regime and determined that the circumstances were such that it was exceptional and appropriate to order increased costs. The argument before the district judge and indeed the judge was whether or not the case could be regarded as exceptional and whether the district judge misdirected herself or failed really to apply herself properly to the task in making a finding that it was. Mr Mallalieu, who appeared before the judge and has appeared on this renewal, argues persuasively that there was nothing very unusual about the case and that it is not sufficient merely that the circumstances be exceptional, but they have to be sufficiently exceptional as to make it appropriate to take the costs outside the fixed costs regime. The argument is to the effect that the circumstances of the accident cannot themselves be considered exceptional and that the only feature, namely that this claimant had not identified her continuing psychological symptoms, was not sufficient to justify further costs, not least because her solicitors could have asked the question in advance.

6. I, for my part, have no difficulty in concluding that the exceptional circumstances to which 45.12 refer must be exceptional in the sense that the case is taken out of the general run of this type of case by reason of some circumstance which means that greater costs are in fact incurred than could reasonably be expected to be incurred…….essentially the argument in this case was summarised by HHJ Welchman in these terms:

> "The judge in dealing with this case on these facts, dealing with a young child in an accident who does not disclose the continuing consequence of this accident until questioned by the district judge, thereby giving rise to further enquiries, it seems to me that it falls within the ambit of judicial discretion. This was a decision the district judge was entitled to reach."

7. Mr Mallalieu argues that the district judge failed to give adequate weight to the context that cases of this nature are intended to consist of swings and roundabouts, with some cases costing more than others but not falling outside the fixed costs regime, and the additional costs are not the costs of the psychological report which should have been incurred in any event but merely the additional hearing.

8. All these are valid arguments which were deployed doubtless before the district judge and certainly before the circuit judge.

> 9. When refusing permission to appeal Jackson LJ, whose knowledge of this area of the law is second to none, observed:
>
> > "Both the district judge and the circuit judge were concerned with the application of Rule 45.12 to the particular facts of this case. This proposed appeal does not involve any important point of principle or practice nor is there any other compelling reason for the Court of Appeal to hear the appeal. The wording of Rule 45.12 does not require judicial exegesis."
>
> 10. Mr Mallalieu argues that, because a number of different district judges have reached different views as to the meaning of the words "exceptional circumstance", there is indeed an important point of principle.
>
> 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. In those circumstances it does not appear to be that it can be argued that there is an important point of principle or practice which requires further review by this court….. I do not consider this case merits further attention by the court, on the basis it does not satisfy the second appeals test. The application is therefore refused."

The following points can be noted in respect of *Costin*:

(i) The statements in [6] and [11] that the reason for exceptionality has to be that "because of some circumstance greater costs have been incurred than could reasonably be expected to be incurred" and "exceptionally more money has had to be expended on the case by way of costs than would otherwise have been the case", would not appear to survive *Hislop* at [57]

(ii) despite not having the benefit of the decision in *Hislop* at the time she made her decision, the Master adopted only the first part of *Costin* paragraph 6. That meant she adopted the phrase: "the exceptional circumstances …must be exceptional in the sense that the case is taken out of the general run of this type of case". This will be examined later in this judgment.

(iii) Otherwise, *Costin* was a challenge to the District Judge's application of the exceptionality test to the facts of the case. The problem in the present case did not arise.

Grounds (i) and (ii)

31. Rule 45.29J is part and parcel of Section IIIA and applies only to cases which have exited the Protocol.

32. The Rule must be read in conjunction with Rules 45.29K and 45.29L. So:

- If a litigant satisfies the test in 45.29J(1) and costs are assessed in accordance with 45.29J(2), 45.29K provides that if the assessment yields a sum less than 20% greater than the amount of fixed recoverable costs, the court will order to be paid as costs the lesser of the fixed recoverable costs or the assessed costs
- If a litigant does not satisfy the test in 45.29J(1), the court will order, pursuant to 45.29J(3) recovery of fixed recoverable costs for a Claimant[22] or a sum not exceeding the fixed recoverable costs for a Defendant.
- If either 45.29J(3) or 45.29K applies, 45.29L deals with the costs of the costs-only proceedings or the detailed assessment. It gives the Court the power to decide not to award the party making the claim the costs of the costs proceedings/detailed assessment and to make other costs orders, including payment of the other party's costs defending the proceedings/detailed assessment.

33. Thus 45.29K and 45.29L establish disincentives to parties making a claim of 45.29J exceptionality by way of adverse consequences if they do not (a) cross the exceptionality threshold in 45.29J(1) and, even if they do, (b) requiring them to achieve an award on assessment of no less than 20% greater than the fixed recoverable costs.[23]

34. The central question on Grounds (i) and (ii) is whether, having regard to the policy of the fixed costs regime in general, and the provisions of Section IIIA in particular, the Master was wrong in her decision as to the legal test she applied in respect of Rule 45.29J[24].

35. The policy, which can be summarised as 'swings and roundabouts' is clearly set out in a number of the authorities cited above[25]. Section IIIA expressly provides that ex-Protocol cases are to remain subject to the fixed costs regime. Two of the reasons for exiting the Protocol are that the Claimant notifies the Defendant that the claim has been re-valued at more than the Protocol upper limit or that the claim is unsuitable for the Protocol, e.g because there are complex issues of fact or law. In other words, the Rules mandate fixed recoverable costs in such cases, subject only to subsequent judicial allocation of the claim to the multi-track[26] or Rule 45.29J(1). "Exceptional circumstances" have therefore to be evaluated against those cases which are covered by Part IIIA.

36. The Master's approach to "exceptional circumstances"[27] is to be found primarily in her judgment at [4]-[8] and [12].

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[22] This is what the Appellant submits is the right award in the present case.
[23] Cf the Master's judgment at [5] and [6].
[24] This is the only matter on which there is permission to appeal. See the Master's Order at [4].
[25] Mr Williams suggested that these central policy statements in the recent authorities did not take account of the fact that there was now a greater risk than pre-2013 that a Claimant would make up any shortfall between actual costs and Fixed Recoverable Costs. This was because of the effective abolition of CFA Lite agreements resulting from the abolition of recoverable success fees by the Jackson reforms. However: he accepted (a) that the wording of the Rule has not materially changed since pre-2016; (b) this Court must adopt the Court of Appeal's reasoning as to policy considerations.
[26] See *Qader* at [55]
[27] As opposed to her application of that approach to the facts

37. Having said that the value of a case or the amount of costs are not per se determinative, but are factors to be taken into account, she continued:

i) The matter has to be looked at in the context of the sorts of cases that are in the Portal.

ii) The correct test is that that there must be some circumstance, which may include value, which may include costs, but may also include all the circumstances of the case, which take it out of the general run of the type of such a case by reason of those circumstances.

iii) She set the bar as a low bar, not a high bar, the low bar being simply 'outside the general run' of those cases. She had regard to the protections in the Rules where, on scrutiny, it turned out that the costs exceeded[28] the fixed costs by more than 20%. She said it is a low bar because the Portal is intended to deal with simple cases which would typically be fast track cases.

38. Mr Williams QC submits:

i) Although the Master referred to a 'low bar', she used this term to distinguish between the arguments for the definition of "exceptional", namely to designate either something extremely unusual or out of the general run of the type of case.

ii) The Master was right to use this type of test of "exceptional". He relies on the passages cited above from *Kelly* and *Dymock* and notes the Master's reference to Leveson LJ's words in *Costin*.

iii) In support of the need for the approach to exceptionality not to be unduly constrained, Rules 45.29K and 45.29L are further brakes on a litigant taking advantage of the possibility of being liberated from the fixed costs regime.

iv) An overly strict approach would discourage parties from using the Protocol in cases where there is any prospect of damages exceeding £25000 and would discourage settlement in such cases, as Claimants would have an incentive to await allocation to the multi-track.

v) 45.29J(1) is a gateway Rule allowing a Judge to "consider a claim" for costs greater than fixed costs. A court should have a great flexibility of discretion in reaching that conclusion

39. I will come to the central points in Mr Williams' points (i) and (ii) in a moment. In relation to points (iii) – (v), I would say, following the same numbering:

(iii) Rules 45.29K and 45.29L do not assist. The fact that in order to receive more than fixed costs the circumstances have to be exceptional and the costs on assessment have to be at least 120% of the fixed costs, does not inform the interpretation of "exceptional". To the extent that the Master took this point into account in her judgment at [12], I disagree with her. In effect the exception is for lawyers to contend for a sum more than 20%

[28] This is probably an error of transcription or the Master did not articulate correctly what she meant to say. Clearly she meant to say 'did not exceed'

greater than fixed costs, thus underlining that the fact such increased costs may be justified in an individual case is insufficient of itself to amount to "exceptional circumstances"[29]. Overuse of the exception would carry a risk undermining the fixed costs regime.

(iv) I do not accept that parties may be discouraged from using the Protocol if there was any risk of damages exceeding £25000. There is no evidence about how parties use the Protocol when they believe there is any such risk. It probably depends on the perceived level of risk. It is unlikely that will change because of the construction of Rule 45.29J. In the present case the Protocol was used at a time when the medical evidence indicated that the claim would be well below that limit. Parties have a choice: they either start a Protocol claim early and, in the small percentage of cases where the initial prognosis turns out to be over optimistic, they can exit the Portal and either (a) the claim will become subject to Part IIIA or (b) the case may be judicially allocated to the multi-track after commencement of Part 7 proceedings. If parties wait until later after the accident, so as to see how (and at what treatment costs) injuries resolve, then in the small number of cases where damages are deemed worthy of commencing proceedings worthy of multi-track allocation, they can use the Part 7 procedure. To suggest that there would be any real impact on the use of the Portal depending on how the Court defines "exceptional" in Rule 45.29J is neither evidence-based, nor self-evident.
As to discouraging settlement, the argument is that, to take the present case as an example, the Claimant's solicitors, if faced with a higher exceptionality threshold, might take that into account in deciding whether to settle or to start a Part 7 claim so that it could be assigned to the multi-track so as to avoid fixed costs. I am not persuaded that the construction of "exceptional circumstances" will have any real effect of discouraging settlement.[30]

(v) The fact that Mr Williams describes Rule 45.29J as a gateway rule whereby a Court 'considers' a claim for more costs than are permitted under the fixed recoverable costs regime does not assist in determining whether the Master was right or wrong in her approach to the meaning of "exceptional". Once through the 'gateway' the Claimant is outwith the regime, unless, on assessment, Rule 45.29K applies. None of the general policy reasons for the regime will have any relevance as the circumstances have then been decided to be "exceptional".

40. The two central questions are (i) was the Master was right in her test of "exceptional"; (ii) was she right in deciding against what 'basket' of cases a case needs to be exceptional.

41. As regards the first question, it might be thought that "exceptional" is an ordinary English word which would not benefit from Judicial interpretation. Indeed this is what

[29] As the Master recognized: see judgment at [5]

[30] There was some discussion at the hearing (substantially instigated by me) as to the effect of a Part 36 offer made by a Defendant made before a Part 7 claim had been commenced and then either (a) accepted by the Claimant (perhaps out of time) or (b) which the Claimant did not better. This led to disagreement, which may have to be determined in a future case.

Lord Bingham said in *R v Kelly*. Statements which define it as "out of the general run"[31] add little, if anything. Had the Master said no more, then this part of the challenge would have failed.

42. However, there is no getting away from the fact that the Master herself said she was applying a 'low bar' to exceptionality and that she construed her test of "outside the general run of these cases" through that prism. There is a further indication of this from her application of the test to the circumstances in her judgment at [10][32]. Indeed it might be inferred that she gave permission to appeal on the basis that she was not adopting a high threshold since (a) "outside the general run" says nothing more than exceptional, and (b) there is no suggestion in her judgment that she was aware of the "basket" point which arises from the wording of her judgment.

43. As the House of Lords said in *R v Soneji*, an expression such as "exceptional circumstances" must take its colour from the setting in which it appears. The setting in which it appears informs the Court whether a strict approach to exceptional is or is not warranted. This is apparent from *Soneji* where the House did not accept the lower courts' strict construction and did not itself "adopt a very strict approach" "bearing in mind the context".

44. Was the Master correct in using a "low bar" or not a "strict approach", bearing in mind the context of Rule 45.29J. I do not believe she was. My reasons are as follows:

i) Unavailable to the Master, as it had not by then been decided, was the decision in *Hislop* and the obiter dictum of Coulson LJ that: "It goes without saying that a test requiring "exceptional circumstances" is already a high one".
ii) The setting of the policy reasons reiterated in the Fixed Costs regimes cases cited earlier in this judgment, while allowing for "exceptional circumstances" to depart from that regime, require a more strict, not a "low bar", approach.

45. I turn now to the second question, namely was the Master right in defining the 'basket' of cases compared with which a case needs to have "exceptional circumstances".

46. The Master referred[33] to looking at the case "in the context of the sorts of cases that are in the Portal" and the correct test being whether there were circumstances "which take it out of the general run of the type of such a case". Further that it is a low bar because "the Portal is intended to deal with…simple cases which would typically be fast track cases".

47. It is clear that the basket of cases against which a case must demonstrate "exceptional circumstances" is the type of cases that have exited the Portal and are subject to the Part IIIA regime. The costs in Table 6B for cases that have exited the Protocol are different

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[31] The Master's judgment, following Leveson LJ in *Costin*; cf also *Kelly* as cited above.

[32] "Percentage wise, it is quite considerably outside the range of the value of the sort of cases, that is something to take into account. The costs are somewhat higher than Portal costs, and again, that is something to take into account. They are not strikingly exceptional in themselves or, indeed, really very far outside the general run of these sorts of cases…."

[33] Judgment at [7] and [12]; see also references at [8], [9] and [10]

from those in Table 6 for cases which have not. Also, it must be remembered that Table 6B costs provide for costs in cases where damages exceed £10000, by reference to a Fee of £1930 and 10% of damages over £10000.

48. Mr Williams submitted in his skeleton argument, though he did not press it at the hearing, that the 'basket' point was not taken below. I do not accept that this is a new point. The point at issue below was the construction of Rule 45.29J. This is an argument on that construction, based on an alleged error by the Master. In any event it would be legitimate to allow the point to be taken, given the principles set out in Paragraph 52.17.3 of the 2019 White Book. Otherwise the Court would be giving a ruling on a pure matter of construction while consciously disregarding an argument which has force. Further, looking at the Defendant's skeleton before the Master[34], the point was sufficiently raised.

49. The initial question is whether the Master did use the wrong basket. Mr Williams submitted that it is not clear that she did. He says that she referred to the 'Portal' rather than the Protocol and that certain paragraphs of her judgment only make sense if she was using the correct basket. There is some difficulty in the terminology used in the Master's judgment. However it seems to me that she was probably using the term 'Portal' in the sense of cases within the Protocol and those that had exited the Protocol and were subject to the Section IIIA regime. Then at [12] she says: "It is a low bar because the Portal is intended to deal with, in my judgment, simple cases which would typically be fast track cases and, for the factual circumstances that I have set out, it is on balance outside the general run of such cases." It is correct that cases exit the Portal for a number of reasons, only one of which is that the value is said to be more than the Protocol upper limit; another is that the claimant gives notice to the defendant that the claim is unsuitable for the Protocol (for example, because there are complex issues of fact or law)[35]. Nevertheless, the basket must comprise only the cases covered by the Part IIIA Fixed Costs Regime. Therefore cases which have exited the Protocol under its paragraphs 4.43 and 7.76, (a) form part of the basket against which exceptionality must be construed and (b) do not qualify as engaging exceptionality merely because they are of that type.

50. Mr Williams submitted that there is no qualitative difference between asking whether the case is out of the norm for, on the one hand, cases within the Protocol/cases in a basket which includes those within and those which have exited the Protocol, and, on the other hand, only cases which have exited the Protocol. The response to this is that I am here dealing with the issue of construction, not with the application of that construction to the facts. The Master used the wrong basket for comparison. "Exceptional circumstances" must be construed against the setting (i.e the basket) in which it appears. I have no evidence to support the argument that there is no qualitative difference between a basket comprising (1) cases which remain in the Protocol, or (2) cases which remain in the Protocol and which exit the Protocol or (3) cases which exit the Protocol. If anything, first impressions suggest the contrary to Mr Williams' argument. One would expect that cases covered by Protocol paragraphs 4.3 and 7.76 will be a substantially higher proportion of the cases in basket (3) than those in basket (2), and even more so than those in basket (1).

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[34] at [34] and [36].
[35] The Protocol at [4.3] and [7.76]

51. Finally, Mr Williams says that the defendant repeatedly refers to the 'swings and roundabouts' of fixed costs. But, he argues, this assumes two things, neither of which should be assumed.

> "(a) The first is that any shortfall on costs resulting from fixed costs falls on solicitors who are serial users of the system. This assumption is not (remotely) safe. The shortfall in recovery fact falls on the parties who, in the case of claimants in personal injury proceedings, are very unlikely to be serial users of the system. Section IIIA of CPR 45 has no impact whatsoever on the costs which parties are liable to pay their own lawyers.
>
> (b)The second is that, to the extent that shortfalls fall on solicitors, they will make it back over what the defendant calls their 'macro' experience of the protocol system. This might perhaps be a safe assumption for solicitors carrying out the bulk low-value work at which the protocol is in fact directed. It is not a safe assumption for solicitors like Fieldfisher, conducting higher value work for claimants who cases should never have been started under the protocol in the first place."

52. Nevertheless, how the regime may impact on a particular litigant or lawyer cannot inform the construction of exceptionality. The authorities already cited make clear the policy reasons behind this fixed costs regime in particular, and other similar fixed costs regimes. Exceptionality should not be a low bar and it must be measured against the types of cases that are covered by Section IIIA.

53. For these reasons the Master erred in law on both the central questions raised in this appeal.

54. I should add that I have seen a transcript of the judgment of HH Judge Tindal dated 8th September 2017 from the Birmingham County Court. One of the submissions before him was that the Claimant satisfied Rule 45.29J "exceptional circumstances" where a Defendant accepted a Claimant's Part 36 offer out of time in a fast track case which had exited the Portal. The Judge decided[36] to follow the test in *Costin* at [11], namely whether "exceptionally more money has had to be expended on the case by way of costs than would otherwise have been the case". He did not find exceptionality in that case. He was not referred to *Qader* or *Sharp* and his decision pre-dated *Hislop*.[37]

The Consequences

55. The Appellant's Notice seeks that the issue raised in preliminary point 3 of the Defendant's points of dispute be remitted to the Senior Courts Costs office for reconsideration before a different Master. Master Gordon-Saker kindly acted as assessor in this case, so it would make sense if it was heard by him.

Grounds (iii) and (iv)

[36] Judgment at [28]-[30]

[37] I note that Judge Tindal's case of *Parsa* and the case of *Costin* were referred to in skeleton arguments in *Hislop* but not referred to in the judgment. I was told that Carr J gave an ex tempore judgment on 25 March 2019 dismissing the appeal, but no transcript is as yet available.

56. In these Grounds the Appellant relies on arguments that the Master gave insufficient weight to the quantum of the Claimant's costs and should not, on the facts, have decided that this case came within the exceptionality provision. There is no permission to appeal on these Grounds. No doubt they will be made to the lower court when the case is remitted for a fresh determination