Neutral Citation Number [2022] EWHC 2561 (SCCO)

Case No: 018LR155
SCCO reference: SC-2022-APP-000023

IN THE SENIOR COURTS COSTS OFFICE
FROM THE COUNTY COURT AT READING

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

Date: 26/09/2022

Before :

COSTS JUDGE LEONARD

- -

Between :

MR PATRICK MCGREEVY	**Claimant**
- and -	
MR PETER KIRAMBA	**Defendant**

- -
- -

Robin Dunne (instructed by **Boyes Turner**) for the **Claimant**
Andrew Hogan (instructed by **Horwich Farrelly**) for the **Defendant**

Hearing date: 8 July 2022

- -

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.

.....

COSTS JUDGE LEONARD

Costs Judge Leonard:

1. The purpose of this judgment is to determine the basis upon which the Claimant is entitled to recover costs from the Defendant.

2. I should mention that the Defendant was originally the first of two defendants, the second having been removed from the proceedings by a consent order sealed on 17 August 2021. That has no bearing on the decision I have to make, so for simplicity's sake I shall refer in this judgment only to "the Defendant".

3. I am grateful to counsel for both parties for their thorough and cogent submissions.

The Relevant Rules

4. I need to refer to some of the provisions of the Civil Procedure Rules. CPR 36.20(1), (2) and (4):

> "**Costs consequences of acceptance of a Part 36 offer where Section IIIA of Part 45 applies**
>
> **36.20**
>
> (1) This rule applies where—
>
> (a) a claim no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A(1)...
>
> (2) Where a Part 36 offer is accepted within the relevant period, the claimant is entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which notice of acceptance was served on the offeror…
>
> (4) Subject to paragraphs (5), (6) and (7), where a defendant's Part 36 offer is accepted after the relevant period—
>
> (a) the claimant will be entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which the relevant period expired; and
>
> (b) the claimant will be liable for the defendant's costs for the period from the date of expiry of the relevant period to the date of acceptance."

5. CPR 49.25B and 45.29C:

> "**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…."

6. Table 6B provides, where proceedings are issued but the claim settles before allocation, for a party to receive fixed costs in a modest sum, along with a percentage of damages.

7. CPR 49.25J:

> "**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."

The Background

8. On 2 November 2017, the Claimant was injured when the Defendant's car struck the Claimant's stationary vehicle. On 3 November 2017, the Claimant submitted a Claim Notification Form through the mechanism ("the Portal") for resolving claims under the Pre- Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents

("the Protocol"). The value of the claim was put at up to £10,000. On 24 November 2017, the Defendant's insurer confirmed through the Portal that liability was admitted.

9. It is not quite clear to me what happened in the subsequent two years, other than that the Claimant appears to have changed to his current solicitors and taken steps to obtain a series of expert reports from different medical disciplines. The Claimant obtained an orthopaedic consultant surgeon's report on 27 March 2020, a psychiatric consultant's report on 18 April 2020, and a report from a consultant spinal surgeon on 15 June 2020. On 23 June 2020, the Claimant's solicitors confirmed to the Defendant that further medical evidence was awaited and gave notice to Defendant that the case was no longer considered suitable for the Portal. On 6 July 2020, the Claimant's solicitors confirmed that the claim had been removed from the Portal.

10. The Claimant obtained a supplementary report from the spinal surgeon on 20 July 2020, a consultant maxillofacial surgeon's report on 27 August 2020 and a consultant neurologist's report on 20 December 2020.

11. In the meantime, with the limitation date approaching, the Claimant issued Part 7 proceedings on 29 October 2020. The value of the claim at that point was put at up to £50,000 (although it would appear that by the time directions were discussed in May 2021, both parties valued the claim at potentially in excess of that limit). On about 22 February 2021, the Claimant served particulars of claim with reports from each of his five medical experts.

12. The Defendant made an initial Part 36 Offer in the sum of £50,000 on 26 March 2021 and on 7 April 2021, filed and served a Defence in which liability was, again, formally admitted. The Defence however raised significant causation issues, placing some emphasis upon the Claimant's prior involvement in a number of road traffic accidents which had resulted in multiple injuries and his medical history, which included spinal, orthopaedic and neuropathic problems, tinnitus, depression and PTSD.

13. On 16 April 2021, the court gave notice of proposed allocation to the multi- track. The parties filed allocation questionnaires and draft directions in May 2021. It is evident that both considered the case suitable for the multitrack (the Defendant providing for that in his draft directions, and filing a costs budget of just over £50,000 excluding VAT).

14. The parties differed however in relation to the appropriate scope of expert evidence. The Claimant sought permission to rely on expert evidence from the five fields in which he had already instructed experts, as well as upon a care expert. The Defendant characterised this as disproportionate and sought to limit expert evidence to the orthopaedic and psychiatric fields. No doubt in consequence, the Claimant's time estimate for trial was 4 days, whereas that of the Defendant was 1½ days.

The Defendant's Offers

15. On 16 June 2021, the Defendant's solicitors sent two letters to the Claimant's solicitors. The first incorporated a Part 36 Offer in the sum of £75,000. It opened with what would appear to be standard wording, repeated in another Part 36 offer dated 1 in July 2021 (referred to below):

> "Please note that the Defendant offers to settle the claim of Mr Patrick McGreevy. This offer is intended to have the consequences of Section I of Part 36. If this offer is accepted within 21 days of service of this letter, our client will be liable for the Claimant's costs in accordance with Rule 36.13, and where Part 45 applies, in accordance with Rule 36.20 of the Civil Procedure Rules."

16. This was followed by a brief summary of the offer ("The Defendant offers the Claimant the gross sum of £75,000.00 in respect of the whole of the Claimant's claim") and confirmation that, absent deductible benefits and interim payments, the net amount of the offer was also £75,000.

17. The Defendant's second letter of 16 June 2021 incorporated a time-limited Calderbank Offer (headed, in the usual way, "Without Prejudice Save as to Costs") to settle at £100,000, the Claimant's costs to be paid in accordance with CPR45.29C:

> "Please find attached our client's Part 36 offer in respect of this claim.
>
> We are instructed to also make your client a time limited offer to settle the whole of his claim in the gross sum of £100,000.00. This offer will remain open until 4pm on 25th June 2021, after which time it will automatically be withdrawn.
>
> This time limited offer does not affect the Part 36 offer.
>
> As there are no deductible benefits repayable to the CRU and no interim payments have been made, the net sum that your client will receive, should he accept this higher offer, is £100,000.00.
>
> We confirm that if your client accepts this offer within the relevant time period stated, his legal costs will be paid by our client in accordance with CPR 45.29C.
>
> Please note that this offer is made strictly on a commercial basis in a final attempt to bring this matter to an appropriate conclusion before costs escalate.
>
> If the offer is not accepted, we will be commissioning our own medical evidence and request facilities for your client to attend a medico-legal examination, details of which will be provided in due course.
>
> We will also require disclosure of the outstanding documents…"

18. At just before 2 p.m. on 25 June 2021, two hours before the expiry of the offer, the Claimant's solicitors sent to the Defendant's solicitors an email, also headed "Without Prejudice Save as to Costs", accepting the Defendant's Calderbank Offer:

> "I write further to your letter of 16th June 2021 and can confirm that my client accepts the defendant's Calderbank offer of £100,000 in full and final settlement of his claim together with his legal costs.
>
> Please confirm that payment of £100,000 will be made within 14 days.

> I would be grateful if you would please acknowledge receipt of the acceptance."

19. Following this exchange of correspondence one might have expected, in accordance with common practice in such cases, for the parties to move forward by discussing a form of consent order intended to incorporate the terms of settlement. That is not what happened. Instead, on 1 July 2021, the Defendant's solicitors sent another letter to the Claimant's solicitors incorporating a Part 36 offer of £100,000. The letter was worded in identical terms to the Part 36 offer of 16 June, save for the increase in the amount offered. The Claimant responded by email on 2 July:

> "The Claimant will accept the Defendant's P36 offer in the sum of £100,000 in respect of his compensation claim together with his legal costs to be assessed on the standard basis if not agreed.
>
> We do not accept that P45 applies for the following reasons:-
>
> 1. The court considered the matter appropriate for allocation to the Multi-Track (N129C) and directed that the parties should complete box D2 on the Directions Questionnaire if they objected
> 2. The Defendant did not object or complete box D2 but rather filed Multi-Track directions requesting that the matter be allocated to the Multi-Track
> 3. The Claimant also agreed allocation to the Multi-Track
> 4. The Claimant sought to rely on 6 experts and 2 lay witnesses
> 5. The Defendant sought to rely on at least 2 experts
> 6. The trial would have been listed for a minimum of 1.5 days (as per Defendant DQ) and a maximum of 4 days (Claimant DQ)
> 7. The claim was worth £100,000.
>
> We will now draw up our bill of costs and forward that to you shortly for possible agreement."

20. The Defendant responded by email on 2 July:

> "The Defendant's calderbank offer dated 16th June 2021 set out in unequivocal terms the position in relation to the costs payable to the Claimant if the offer was accepted. May we refer you specifically to paragraph 5 of the Defendant's calderbank offer which states, *'We confirm that if your client accepts this offer within the relevant time period stated, his legal costs will be paid by our client in accordance with CPR 45.29C.'*
>
> The Claimant did not seek to vary the terms of the offer, and your email correspondence dated 25th June 2021 confirming acceptance was not conditional upon the Claimant's costs being assessed on the standard basis.
>
> Therefore, the parties have <u>not</u> contracted out of the fixed costs regime, and the Claimant is not entitled to now seek a variation to the terms of the offer which has been accepted."

21. In summary, whilst it never seems to have been in issue, since 25 June 2021, that the parties have reached a comprehensive settlement they differ as to its terms. The Defendant contends, but the Claimant does not accept, that the settlement limits the costs recoverable by the Claimant from the Defendant to the fixed costs prescribed by CPR 45.29C.

22. In response to the Defendant's solicitors' email of 2 July 2021 the Claimant proposed that the court should determine the issue. That was agreed. On 18 August 2021, the court sealed a consent order providing for the Defendant to pay the gross sum of £100,000 in full and final settlement of the Claimant's claim, and "for the court to determine whether the Claimant's costs plus disbursements are payable pursuant to rule 45.29C of the CPR, or on the standard basis, to be assessed if not agreed".

23. The matter was transferred to the SCCO for determination on 4 December 2021. Whilst it has throughout remained the Claimant's position that he is not bound to accept CPR 45.29C fixed costs, he no longer contends that the fixed costs regime does not apply at all. Before me, it was accepted by the Claimant (rightly, in my view) that the regime prescribed by section IIIA of CPR 45 must apply to this case. The Claimant's argument is rather that this is an exceptional claim which under CPR 45.29J(2) merits an order to the effect that the Claimant's costs should be assessed on the standard basis.

The Issues

24. I would summarise the issues I have to determine as follows. First, did the Claimant enter into a concluded and contractually binding settlement agreement with the Defendant on 25 June 2021? If so, do the terms of that agreement limit the costs recoverable by the Claimant from the Defendant to those set out in Table 6B, or is it open to the Claimant to seek, under CPR 45.29J, to recover more?

25. Second, did the Claimant accept the Defendant's Part 36 offer dated 1 July 2021? If so, are the costs recoverable by the Claimant from the Defendant, by virtue of CPR 36.2(2), limited to those set out in Table 6B, or is it open to the Claimant to seek, under CPR 45.29J, to recover more?

26. Third, if it is it open to the Claimant to seek, under CPR 45.29J, to recover more than the fixed costs set out in Table 6B, is this an exceptional case meriting a claim for costs in excess of those fixed costs? If so, is an order for assessment on the standard basis appropriate?

Whether the Claimant Entered into a Binding Settlement Agreement with the Defendant on 25 June 2021

27. I understand the following principles to be accepted by both parties. If the Claimant did enter into a concluded settlement agreement with the Defendant on 25 June 2021, then that agreement will have terminated the Claimant's personal injury claim as effectively as if the court had determined it. The Claimant's cause of action for personal injury will have been superseded by the agreement, which is in itself actionable.

28. The question of whether agreement was reached on 25 June 2021, and any issue as to the terms of the agreement reached, fall to be determined on normal contractual principles. I have been referred to relevant extracts from "Chitty on Contracts" and to

paragraph 26 of the judgment of Newey LJ in *Ho v Adelekun* [2019] EWCA Civ 1988 on the interpretation of contracts:

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

29. The Defendant's primary case is that the parties did reach a binding and concluded settlement agreement on 25 June 2021. Mr Dunne, for the Claimant, submits that the wording of the Defendant's Calderbank letter of 16 June 2021 and the Claimant's response of 25 June 2021 shows that the parties were not, at that point, *ad idem*. The suggestion that they were is he says wholly inconsistent with the fact that the Defendant made a further Part 36 offer within a matter of days.

30. It seems to me that construction on the appropriate principles of the communications exchanged by the parties on 16 June and 25 June 2021, entirely supports the conclusion that the parties reached a concluded settlement agreement on 25 June 2021. There is nothing in the Claimant's response of 25 June 2021 that is inconsistent with the Defendant's Calderbank offer of 16 June 2021. To my mind it reads as a clear and unqualified acceptance of the Defendant's offer. The Claimant could have specified that he would only accept £100,000 in damages if he also received costs on a different basis to that prescribed by CPR 45.29C, but he did not. If he had done so, that would have constituted a rejection of the Defendant's offer, not acceptance. That the Claimant had no intention of rejecting the Calderbank offer is evident not only from the wording of his email but from his request that the £100,000 be paid within 14 days.

31. I cannot attach any significance to the fact that the Claimant's email of 25 June 2021 was headed "Without Prejudice Save as to Costs". That heading represents a (dubious) claim to privilege, and it does not change the substance of the communication. Any suggestion that it might have indicated an intention to reserve the Claimant's position in any way is defeated by the clear wording of the email itself.

32. As for the Defendant's Part 36 offer of 1 July 2021, Mr Hogan for the Defendant has reminded me of the established principle that that one cannot interpret the meaning of words used in a contract by reference to what happened later. It is nonetheless also an established principle that in order to determine whether parties have reached a concluded agreement, it is necessary to have regard to their entire course of dealings (*Global Asset Capital Inc v Aabar Block Sarl* [2017] EWCA Civ 37). For that reason, it seems to me to be appropriate to consider whether the fact that the Defendant made a further Part 36 offer on 1 July 2021 supports the conclusion that the parties had not concluded a binding settlement agreement on 25 June 2021.

33. To my mind, set against the unequivocal terms of the parties' communications on 16 and 25 June, it does not. Mr Hogan says that the Part 36 offer of 1 July 2021 was in effect an alternative to a consent order, intended to formalise the existing settlement for the purposes of the litigation whilst saving the cost attendant on preparing and sealing

a consent order. I have no direct evidence on that, but taken in context the Defendant's 1 July 2021 letter does have the appearance of such a device (albeit not a notably successful one). In any event it cannot change what had happened on 25 June.

Whether the Claimant has Agreed to Accept the Costs Set Out in Table 6B

34. I have found that it was an express condition of the Defendant's Calderbank offer of 16 June 2021 that if the Claimant were to accept the sum of £100,000 in settlement of his claim, the Defendant would pay the Claimant's costs in accordance with CPR 45.29C, and that the Claimant accepted that offer without qualification.

35. Mr Dunne argues that these findings would not exclude the Claimant's right to apply to the court under CPR 45.29J for an order providing for him to recover costs in excess of those set out in Table 6B. That is because CPR 45.29B's provision to the effect that the only costs recoverable will be fixed costs under CPR 45.29C is expressly subject to a number of rules, including CPR 45.29J.

36. I will revisit this argument when I address the arguments raised by the parties on the interpretation of CPR 36.20 and CPR 45.29B, but for the purposes of interpreting the agreement between the parties reached on 25 June 2021, it does not seem to me to assist the Claimant. CPR 45.29C itself provides without qualification for the recovery of the fixed costs at Table 6B, and the Claimant agreed to accept costs limited by that unqualified provision. The Defendant's Calderbank letter did not mention CPR 45.29B or CPR 45.29J, which to my mind can have no bearing on the terms agreed by the parties.

"Factual Matrix" Arguments

37. I need to address some further submissions based upon the proposition that if due consideration is given to the factual matrix at the relevant time, against which the agreement between the parties is to be construed, it can be seen the Claimant did not agree, on 25 June 2021, to accept the costs set out in Table 6B.

38. Mr Dunne submits that the court's indication that the case was to be allocated to the multitrack, and the parties' agreement that that was appropriate, supports the proposition that they should be understood to have agreed that the Claimant's costs would be paid on the standard basis.

39. Even leaving aside my conclusions on the express terms of settlement, I do not think that this argument bears examination. At no point did the Defendant offer to pay the Claimant's costs in the standard basis (my understanding of the costs terms incorporated in the Defendant's Part 36 offers are set out below). On the contrary, given that the case was likely to be allocated to the multitrack there was every incentive for the Defendant to make a pre-allocation offer which might persuade the Claimant to settle on the basis that only fixed costs would be recoverable.

40. The Defendant has raised an argument (again, considered below) to the effect that, on acceptance of a Part 36 offer within the relevant period, a claimant is, by virtue of the wording of CPR 36.20(2), entitled only to fixed costs with no recourse to CPR 45.29J. The Claimant argues that this is inconsistent with the proposition that the Defendant,

on 16 June 2021, offered the Claimant a choice between accepting higher damages with costs limited to those set out at Table 6B, or lower damages without that limitation.

41. I believe that it would be inappropriate, for the purposes of contractual interpretation, to speculate upon what either party might have thought about the potential risks and benefits raised by the Defendant's two offers of 16 June 2021. None of that could have any bearing upon the Claimant's clear acceptance of the Defendant's Calderbank offer of 16 June 2021. I would only observe that, objectively speaking, there was every incentive, in a case in which quantum was clearly going to be a thorny issue, for the Claimant to avoid the risk presented by the Defendant's Part 36 offer of 16 June 2021 by accepting instead the higher, time-limited Calderbank offer of the same date.

Whether the Claimant Accepted the Defendant's Part 36 Offer of 1 July 2021

42. I do entertain some doubts about the validity of a Part 36 offer purporting to compromise a cause of action for personal injury that has already (by virtue of a concluded settlement) ceased to exist. That concern can however be put aside, because in my view the evidence does not support the proposition that the Claimant accepted the Defendant's Part 36 offer of 1 July 2021.

43. Both of the Part 36 offers sent by the Defendant to the Claimant on 16 June and 1 July 2021 provided that if the offer were accepted within 21 days, the Defendant would be liable for the Claimant's costs "in accordance with CPR 36.13, and where CPR 45 applies, in accordance with CPR 36.20…"

44. As I have observed, this appears to be a standard form of wording. It makes appropriate provision for costs in the event that either CPR 36.13 or CPR 36.20 applies. The two are mutually exclusive: where CPR 36.20 applies, CPR 36.13 cannot (*Hislop v Perde* [2018] EWCA Civ 1726, Coulson LJ at paragraph 45).

45. It is, as I have said, now common ground that part IIIA of CPR 45 applies to this case. The position was no different in June and July 2021. The Defendant's Part 36 offers, accordingly, provided that he would be liable for costs in accordance with CPR 36.20 and part IIIA of CPR 45.

46. The Claimant did not purport to accept the Part 36 offer of 16 June. As for the Part 36 offer of 1 July, he responded to the effect that CPR 45 did not apply and that he would "accept the Defendant's P36 offer in the sum of £100,000 in respect of his compensation claim together with his legal costs to be assessed on the standard basis if not agreed".

47. That was not what the Defendant had offered. It seems to me to that the Claimant cannot be said to have accepted the Defendant's Part 36 offer of 1 July, because he rejected the terms of the that offer with regard to costs.

Whether Acceptance of the Defendant's Part 36 Offer Would Have Limited the Claimant's Recoverable Costs to CPR 45.29C Fixed Costs

48. Given the conclusions I have reached it is not strictly necessary for me to decide either this issue or whether, had CPR 45.29J any application to this case, exceptional circumstances could have justified an award to the Claimant of costs in excess of those

set out at Table 6B. In case any of the above conclusions are wrong, however, I should address both points.

49. The Defendant's point is that CPR 36.20(2) states in terms that where section IIIA of CPR 45 applies and a Part 36 offer is accepted within the relevant period, a claimant is entitled only to fixed costs, in this case those provided for in a Table 6B. There is no provision for recovery of any further costs by reference to CPR 45.29J. It follows, says the Defendant, that even if the position were governed by CPR 36.20 rather than by the terms of the Defendant's Calderbank offer, the Claimant would still have no claim under CPR 45.29J.

50. In response the Claimant relies first upon the argument to which I have referred above, to the effect that CPR 45.29B makes CPR 45.29C subject to CPR 45.29J, and second upon Coulson LJ's robust rejection, at paragraph 48 of his judgment in *Hislop v Perde*, of the proposition that CPR 45.29B and CPR 45.29J could not be relevant to the costs consequences of acceptance of a Part 36 offer.

51. I can see that the Defendant's case in this respect might be seen as an unattractive one. Nonetheless, CPR 36.20(2) makes no reference to CPR 45.29B or CPR 45.29J (or even CPR 45.29C). It simply confers upon the Claimant a right to recover the fixed costs in Table 6B. I cannot find any basis for putting a gloss upon the plain wording of CPR 36.20(2) so as to confer upon the Defendant a right to claim costs beyond what is prescribed by the rule itself.

52. I do not find *Hislop v Perde* to be of any assistance in this respect. Mr Hogan points out that *Hislop v Perde* addressed the consequences of the late acceptance by a defendant of a Claimant's part 36 offer. Coulson LJ was not construing CPR 36.20(2), which prescribes the costs consequences (where, as here, section IIIA of CPR 45 applies) of the acceptance of a Part 36 offer by either party within the period specified for acceptance.

53. My conclusion is, accordingly, that even if the Claimant's right to recover costs had derived from acceptance of the Defendant's Part 36 offer of 1 July 2020, he would not now be in a position to seek to recover costs beyond those prescribed by Table 6B.

Exceptional circumstances

54. Mr Dunne says that this was a case involving serious injury. It was valued by the Claimant at a higher sum, but settled for £100,000 due to the significant causation issues involved,

55. CPR 45.29B makes it clear that if the court allocates a claim to the Multitrack, fixed costs no longer apply. In this case, the court and the parties all agreed that allocation to the multitrack was appropriate. It is only by virtue of a settlement having occurred before a Costs and Case Management Conference ("CCMC"), Mr Dunne says, that the Defendant is even able to argue for fixed costs. The Defendant now seeks to restrict the Claimant's costs to fixed costs in a claim which he himself accepts was a Multitrack case and in which he filed a costs budget which made plain that he was running the case as a Multitrack claim.

56. The courts, Mr Dunne submits, should not disincentivise settlements. If the Defendant is right, then the Claimant would have had to await the CCMC and allocation (increasing costs and the utilisation of court resources) before settlement. That would be contrary to the overriding objective.

57. Mr Hogan refers me to *Ferri v Gill* [2019] EWHC 952, which he submits established first that the "exceptional circumstances" test must be applied strictly, and that it is wrong to set a low bar for exceptionality by reference to the proposition that the Portal is intended to deal with simple, low-value cases: and second, that in considering whether a case is exceptional, the Court must compare it to the whole basket of cases covered by section IIIA of CPR 45, which includes cases that have exited the Portal because of value or complexity.

58. It seems to me that Mr Hogan must be correct. The relevant provisions of the Protocol are at paragraphs 4.3 and 7.76:

> "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…
>
> 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…"

59. At paragraph 49 of his judgment in *Ferri v Gill* Stewart J observed:

> "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). 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 paras 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."

60. Stewart J referred in his judgment to similar observations on reasons for exiting the Protocol in the judgment of Briggs LJ in *Qader v Esure Services Ltd* [2016] EWCA Civ 1109, in particular at paragraphs 6 and 16.

61. In *Qader v Esure* the court identified and corrected the omission of the words "and for so long as the claim is not allocated to the multi-track" from CPR 45.29B. In doing so Briggs LJ (at paragraph 55 of his judgment) expressly excluded the disapplication of the fixed costs regime to cases which had settled before allocation, on the basis that this

> "… 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."

62. The omission identified by Briggs LJ in *Qader v Esure* was subsequently remedied by the amendment of CPR 45.29B into its present form. The position is, accordingly, that unless and until a case that has exited the Protocol is allocated to the Multitrack, it will be governed by the fixed costs provisions of section IIIA of CPR 45.

63. It seems to me that the chief difficulty faced by the Claimant is that the only real ground given for exceptionality is that before allocation this case was considered, by all concerned, as suitable for the Multitrack. To treat that in itself as a sufficient reason for a finding of exceptionality would be inconsistent with the express provisions of CPR 45.29B and would fall into the error identified in *Qader v Esure* of disapplying the fixed costs regime before allocation.

64. Given that the case cannot be treated as exceptional simply by virtue of being suitable for the Multitrack, and given that it is not in itself (it seems to me) exceptional by the standards of Multitrack cases, I do not believe that, had it been open to the Claimant to seek an increase in costs under CPR 45.29J, there would have been a sound basis for a finding of exceptionality.

Summary of Conclusions

65. The Claimant, on 25 June 2021, agreed with the Defendant that he would in full and final settlement of his claim recover from the Defendant damages of £100,000 and the fixed costs provided for in CPR 45.29C and Table 6B, at section IIIA of CPR 45. In so doing he contracted out of any right he might have had to claim a larger sum by reference to the provisions of CPR 45.29J.

66. The parties' agreement of 25 June 2021 was not superseded by the Defendant's Part 36 offer of 1 July 2021. Assuming that that was a valid Part 36 offer, the Claimant did not accept it.

67. Even if the Claimant could be said to have accepted the Defendant's Part 36 offer of 1 July 2021, by virtue of CPR 36.20(2) the costs recoverable by him would still be limited to those prescribed by Table 6B at section III of CPR 45. CPR 36.20(2) does not confer upon a claimant the right to seek a larger sum by reference to CPR 45.29J.

68. If the Claimant were able to apply to this court for an increased sum under the provisions of CPR 45.29J, his case would not satisfy the "exceptional circumstances" test that would justify such a recovery.

69. I should add that much of the thrust of the Claimant's case is based upon the proposition that it would be unfair to limit his recovery to the costs prescribed by CPR 45.29C. I do not accept that, in the circumstances of this case, it is unfair. The Claimant's advisers must be taken to have understood the costs implications of settling the case before allocation to the Multitrack. The Defendant, shortly before the case would have been allocated, made two offers which required the Claimant to consider and weigh litigation risk, the timing of the Defendant's offers and their effect on prospective cost recovery. The Claimant, having no doubt taken appropriate advice, accepted one of those offers, and is bound by that acceptance. It is not unreasonable for the Defendant to hold him to that.