Neutral Citation Number: [2018] EWCA Civ 1726

Case No: A2/2017/2458 & A2/2017/2404

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Central London County Court
Her Honour Judge Walden-Smith
A27YP399
&
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Leicester County Court
District Judge Reed
C03YJ945

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/07/2018

Before :

LORD JUSTICE LONGMORE
LADY JUSTICE KING
and
LORD JUSTICE COULSON

- -

Between :

	Miss Mercel Hislop	**Claimant/ Respondent**
A2/2017/2404	**- and -**	
	Miss Laura Perde	**Defendant / Appellant**
	&	
	Mrs Kundan Kaur	**Claimant / Respondent**
A2/2017/2458	**- and -**	
	Committee (for the time being) of Ramgarhia Board Leicester	**Defendant / Appellant**

- -

Matter of Hislop:
Mr Roger Mallalieu (instructed by **Taylor Rose TTKW**) for the **Defendant/Appellant**
Mr Nicholas Bacon QC (instructed by **Winn Solicitors**) for the **Claimant/Respondent**

Matter of Kaur:
Mr Andrew Post QC (instructed by **Weightmans LLP**) for the **Defendant/Appellant**
Mr Imran Benson (instructed by **Affinity Law**) for the **Claimant/Respondent**

Hearing dates: Wednesday 20th & Thursday 21st June 2018

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Approved Judgment

Lord Justice Coulson :

Introduction

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

2. By reference to two earlier decisions of this court, the issue of principle can be delineated in this way. Where a Part 36 offer is accepted within 21 days, in a case governed by the fixed costs regime, neither party can recover more or less by way of costs than is provided for by that fixed costs regime: see *Solomon v Cromwell Group PLC* [2012] 1 WLR 1048. Conversely, where a claim that is subject to the fixed costs regime goes on to trial and, by way of judgment, the claimant recovers more than a Part 36 offer, he or she is entitled to indemnity costs from the date that the offer became effective: see *Broadhurst v Tan* [2016] EWCA Civ 94; [2016] 1 WLR 1928. That leaves what might be called the cases in the middle, where a defendant accepts the claimant's Part 36 offer many months after it was made, and the case does not then go on to trial. In those circumstances, does the case remain within the fixed costs regime, or can the claimant escape its confines and recover standard or even indemnity costs from the date that the offer became effective?

The Facts in Hislop

3. On 17 December 2013, Ms Hislop (the respondent in the first action and the appellant in the first appeal) was injured in a road traffic accident. She blamed Ms Perde (the appellant in the first action and the respondent in the first appeal).

4. On 7 April 2014, Ms Hislop served a Claim Notification Form under the pre-action protocol ("PAP") for low value personal injury claims. Ms Perde did not respond on liability so the claim was removed from the PAP, although it remained subject to the fixed costs regime.

5. On 21 July 2014, Ms Hislop offered to accept £2,100. This was rejected by Ms Perde. On 18 September 2014, the claimant commenced proceedings. On 10 October 2014, Ms Perde offered £1,800, subject to liability. On the same day, Ms Perde offered a 50/50 split on liability. Ms Hislop rejected both offers, because she maintained that she was not responsible for the accident at all.

6. On 11 November 2014 Ms Hislop offered to accept £1,500. That was an offer in accordance with Part 36. There was no response to this offer until 9 January 2015, when Ms Perde rejected it. The proceedings continued: a trial date was fixed for 9 June 2016 and witness statements were exchanged in March 2016. On 20 May, Ms Perde offered £1,000 but this was rejected by Ms Hislop on 31 May.

7. Finally, on 2 June 2016, a week before trial, Ms Perde accepted Ms Hislop's offer of 11 November 2014 at £1,500. The claim was settled on this basis.

8. By then, Ms Hislop's costs were:

   i) £2,372 by way of fixed costs up to 2 December 2014, when the offer should have been accepted;

   ii) £5,534, being the costs actually incurred from 2 December 2014 onwards.

   In the subsequent costs dispute, the claimant sought the sum of £5,534 by way of indemnity costs.

9. On 3 October 2016, at the County Court at Willesden, DDJ Lenon QC rejected the claim for indemnity costs. The approved note of his judgment makes clear that he did not reach this conclusion because of any interaction between the fixed costs regime and Part 36. This was unsurprising because, at that stage, it was accepted by both sides that he had the power to grant an order for indemnity costs pursuant to r.36.13. He refused to do so, saying:

> "5. Notwithstanding the forcible submissions made by Ms Bedford, I am not satisfied that this is an appropriate case for an order for indemnity costs. I am not satisfied that there is anything here which really takes the case out of the norm. It would have clearly been better had the offer been accepted earlier on, but that is not really the point. That is not the criteria that I have to apply. It seems to me, in addition to the policy reasons adverted to by Mr Justice Coulson [in *Fitzpatrick,* referred to below], that it would be unfortunate if it became customary for late acceptances of Part 36 offers to attract applications for indemnity costs, which can themselves be, as in this case, quite complicated and time-consuming and costly.
>
> 6. I agree with Mr Hoe that, really, to make good an application for indemnity costs, there has to be a standout point that can be quickly drawn to the court's attention and which makes it obvious that the case has been conducted abnormally and that, exceptionally, an indemnity costs order is justified. My order, therefore, is that the order for costs should be the fixed costs and not the indemnity costs."

10. Ms Hislop appealed. At the appeal hearing on 19 May 2017, it remained common ground that the judge could make an order under r.36.13. In a careful judgment dated 8 August 2017, Judge Walden-Smith overturned the District Judge's order, on the basis that he had erred in determining that the order for costs ought to have been fixed costs throughout. She did not interfere with his decision not to award costs on an indemnity basis, but ruled that the costs after 2 December 2014 would be assessed on the standard basis.

11. Ms Perde now seeks to appeal against that decision. It was only before this court that the point was taken on her behalf by Mr Mallalieu that the only costs that could be awarded were fixed costs because r.36.13 simply did not apply to fixed costs cases.

12. In addition, there was some debate in the skeleton arguments before us as to whether or not the approach taken by Judge Walden-Smith was open to her. Mr Mallalieu submitted that the argument about the standard basis had not been raised before her. Mr Bacon QC, on behalf of Ms Hislop, disputed that. As we indicated at the outset of the hearing, we thought that the judge was entitled to reach that conclusion on the basis of the argument before her and that, in any event, since both parties had come

prepared to deal with the full range of issues, it would be unsatisfactory if we did not address all the relevant points.

The Facts in Kaur

13. On 25 January 2014, Mrs Kaur was injured at the Board's premises in Leicester. A Claim Notification Form under the PAP was sent on 7 February 2014. On 15 April, liability was denied and so the claim moved outside the PAP, although again the fixed costs regime remained in force.

14. On 8 January 2016, the proceedings were commenced. On 7 September 2016, Mrs Kaur offered to accept £2,000, in accordance with CPR Part 36. That offer was rejected on 15 September 2016.

15. In January 2017 there were further negotiations between the parties. A joint expert's report was produced, parts of which helped Mrs Kaur, and parts of which did not. The Board wanted to settle but was concerned that it might be penalised in costs if it belatedly accepted her offer of 7 September 2016. So, instead, on 6 February 2017, the Board made its own, higher Part 36 offer in the sum of £3,000. That offer was accepted by Mrs. Kaur.

16. Thereafter, the claimant sought indemnity costs from the date that her offer of 7 September 2016 could have been accepted until the date that she accepted the defendant's offer. The defendant said that only fixed costs could apply.

17. On 23 August 2017, District Judge Reed, sitting at the County Court at Leicester, decided that the claimant was entitled to £2,450 by way of fixed costs up to the date of allocation, and costs to be assessed on the standard basis thereafter. He concluded that, if the defendant had simply sought to accept the claimant's earlier Part 36 offer of £2,000 out of time, then the claimant would have been entitled to claim indemnity costs for the period of delay. In those circumstances, he concluded that the claimant should not be worse off simply because the defendant had got round that difficulty by making a higher offer months later. He said that such a result did not sit comfortably with the overriding objective and talked about a lacuna in the CPR. He also indicated (for the same reasons) that this was an exceptional case under r.45.29J, which justified a departure from the fixed costs regime in any event.

18. His reasoning is summarised in the following passages of his judgment:

> "5…It seems to me frankly perverse if the claimant is to be worse off in circumstances where a defendant makes a higher counter Part 36 offer and then where the defendant could have belatedly accepted the claimant's Part 36 offer, and where provision is provided for, for an application for enhanced costs. (sic).
>
> 6. I find it extremely uncomfortable to say that by design or by just unfortunate circumstances that the claimant is adversely affected by the way this case has proceeded. I cannot say that by making a higher Part 36 offer the defendants' approach has been cynical and amounts to almost misconduct, but the consequences are that on the defendant's case the claimant is worse off by their making a higher offer than the claimant had made in the first place, which could have been accepted. It just cannot, in my view, be right the rule will work out in that way.

…

> 9. It has been drawn to my attention that the provisions of Part 44.24 do give me an opportunity to look at the circumstances of this case, as indeed do Part 45.29J, and say the circumstances appear to be exceptional to, as it were, address what seems to be a lacuna in the rules and I think it is appropriate for that to be done."

19. The appeal from District Judge Reed has been 'leap-frogged' to this court to be heard at the same time as the Hislop appeal.

The Relevant Parts of the CPR

20. I set out below the relevant parts of the CPR. CPR Part 36 was revamped and renumbered in 2015. It is convenient to set out the rules in their current form (and using the current numbering) because, although there have been some changes, the current wording applies to the Kaur appeal, and both counsel in the Hislop appeal (to which the pre-2015 rules apply) agreed that the changes make no substantive difference to the argument. However, for completeness, I consider the old rules in Part 36, as they applied to the Hislop case, at paragraphs 59 – 61 below. In addition, I cross-refer to the previous Part 36 numbering at paragraph 25 below, because it facilitates an understanding of the judgments in both *Solomon* and *Broadhurst*, which were cases decided under the old version of Part 36.

21. The general costs consequences of acceptance of a Part 36 offer before trial are set out in CPR 36.13. That provides as follows:

> "**Costs consequences of acceptance of a Part 36 offer**
>
> **36.13**
>
> (1) Subject to paragraphs (2) and (4) and to rule 36.20, where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings (including their recoverable pre-action costs) up to the date on which notice of acceptance was served on the offeror.
>
> (Rule 36.20 makes provision for the costs consequences of accepting a Part 36 offer in certain personal injury claims where the claim no longer proceeds under the RTA or EL/PL Protocol.)
>
> (2) Where—
>
> (a) a defendant's Part 36 offer relates to part only of the claim; and
>
> (b) at the time of serving notice of acceptance within the relevant period the claimant abandons the balance of the claim,
>
> the claimant will only be entitled to the costs of such part of the claim unless the court orders otherwise.
>
> (3) Except where the recoverable costs are fixed by these Rules, costs under paragraphs (1) and (2) are to be assessed on the standard basis if the amount of costs is not agreed.

(Rule 44.3(2) explains the standard basis for the assessment of costs.)

(Rule 44.9 contains provisions about when a costs order is deemed to have been made and applying for an order under section 194(3) of the Legal Services Act 2007.)

(Part 45 provides for fixed costs in certain classes of case.)

(4) Where—

(a) a Part 36 offer which was made less than 21 days before the start of a trial is accepted; or

(b) a Part 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period; or

(c) subject to paragraph (2), a Part 36 offer which does not relate to the whole of the claim is accepted at any time,

the liability for costs must be determined by the court unless the parties have agreed the costs.

(5) Where paragraph (4)(b) applies but the parties cannot agree the liability for costs, the court must, unless it considers it unjust to do so, order that—

(a) the claimant be awarded costs up to the date on which the relevant period expired; and

(b) the offeree do pay the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance.

(6) In considering whether it would be unjust to make the orders specified in paragraph (5), the court must take into account all the circumstances of the case including the matters listed in rule 36.17(5).

(7) The claimant's costs include any costs incurred in dealing with the defendant's counterclaim if the Part 36 offer states that it takes it into account."

22. The general costs consequences following a judgment where a Part 36 offer has not been accepted and is subsequently bettered at trial are set out in CPR 36.17. It is only necessary to set out part of that rule for present purposes:

"**Costs consequences following judgment**

36.17

(1) Subject to rule 36.21, this rule applies where upon judgment being entered—

(a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or

(b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.

(Rule 36.21 makes provision for the costs consequences following judgment in certain personal injury claims where the claim no longer proceeds under the RTA or EL/PL Protocol.)

…

(4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—

(a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

(b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;

(c) interest on those costs at a rate not exceeding 10% above base rate; and

(d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—

(i) the sum awarded to the claimant by the court…"

23. Under the heading 'Personal Injury Claims', CPR 36.20 sets out the particular costs consequences of acceptance of a Part 36 offer before trial, where Section IIIA of Part 45 applies. This provides:

"**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); or

(b)the claim is one to which the Pre-Action Protocol for Resolution of Package Travel Claims applies.

(2) Where a Part 36 offer is accepted within the relevant period, the claimant is entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which notice of acceptance was served on the offeror.

(3) Where—

(a) a defendant's Part 36 offer relates to part only of the claim; and

(b) at the time of serving notice of acceptance within the relevant period the claimant abandons the balance of the claim,

the claimant will be entitled to the fixed costs in paragraph (2).

(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) Subject to paragraphs (6) and (7), where the claimant accepts the defendant's Protocol offer after the date on which the claim leaves the Protocol—

(a) the claimant will be entitled to the applicable Stage 1 and Stage 2 fixed costs in Table 6 or Table 6A in Section III of Part 45; and

(b) the claimant will be liable for the defendant's costs from the date on which the Protocol offer is deemed to have been made to the date of acceptance.

…

(10) Fixed costs shall be calculated by reference to the amount of the offer which is accepted.

(11) Where the parties do not agree the liability for costs, the court must make an order as to costs.

(12) Where the court makes an order for costs in favour of the defendant—

(a) the court must have regard to; and

(b) the amount of costs ordered must not exceed,

the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 applicable at the date of acceptance, less the fixed costs to which the claimant is entitled under paragraph (4) or (5)."

24. Under the same heading, CPR 36.21 sets out the particular costs consequences following judgment where a Part 36 offer has not been accepted and where Section IIIA of Part 45 applies. The relevant parts of this rule provide as follows:

"**Costs consequences following judgment where section IIIA of Part 45 applies**

36.21

> (1) Where—
>
> (a) a claim no longer continues under the RTA or EL/PL protocol pursuant to rule 45.29A(1); or
>
> (b) the claim is one to which the Pre-Action Protocol for Resolution of Package Travel Claims applies,
>
> rule 36.17 applies with the following modifications.
>
> (2) Subject to paragraphs (3), (4) and (5), where an order for costs is made pursuant to rule 36.17(3)—
>
> (a) the claimant will be entitled to the fixed costs in Table 6B, 6C or 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 from the date on which the relevant period expired to the date of judgment…"

25. The cross-referencing of the old and the new rules within Part 36 is as follows:

Current Rule Number	Pre-April 2015 Rule Number
36.13	36.10
36.17	36.14
36.20	36.10A
36.21	36.14A
36.29	36.21

26. It is common ground that the claim in the Hislop action was started under the RTA PAP, and the claim in the Kaur action was started under the EL/PL PAP. Thus, Section IIIA of Part 45 applies to both claims, which fell within the fixed costs regime. In respect of the RTA protocol, Rule 45.29B provides as follows:

> "**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."

In respect of the EL/PL protocol, Rule 45.29D similarly provides as follows:

> "**Application of fixed costs and disbursements – EL/PL Protocol and Pre-Action Protocol for Resolution of Package Travel Claims**
>
> **45.29D** Subject to rules 45.29F, 45.29H and 45.29J, and for as long as the case is not allocated to the multi-track, in a claim started under the EL/PL Protocol or in a claim to which the Pre-Action Protocol for Resolution of Package Travel Claims applies, the only costs allowed are—
>
> (a) fixed costs in rule 45.29E; and
>
> (b) disbursements in accordance with rule 45.29I."

27. The exceptions referred to within r.45.29B and r.45.29D are limited and do not arise here. Rule 45.25F is concerned only with the defendant's costs, although it is perhaps noteworthy that r.45.29F(8) and (9) provide as follows:

> "(8) Where, in a case to which this Section applies, a Part 36 offer is accepted, rule 36.20 will apply instead of this rule.
>
> (9) Where, in a case to which this Section applies, upon judgment being entered, the claimant fails to obtain a judgment more advantageous than the defendant's Part 36 offer, rule 36.21 will apply instead of this rule…."

28. The only other potentially relevant exception can be found at r.45.29J which provides:

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

The Relevant Authorities

(a) The Comprehensive Nature of Part 45 and its Limited Exceptions

29. The comprehensive nature of the fixed costs regime in Part 45, and the limited ways of escaping from it, was the subject of detailed consideration by this court in *Sharp v Leeds City Council* [2017] 4 WLR 3465. Briggs LJ (as he then was) said:

> "14 Section IIIA of Part 45 provides almost as comprehensively for fixed recoverable costs in relation to claims which start within one of those Protocols, but no longer continue under them. I say 'almost as comprehensively' because there are a small number of limited exclusions and exceptions from the applicability of the fixed costs regime, to some of which I will refer in due course. With one exception, those exclusions were all expressly made. The exception consists of the very occasional RTA or EL/PL claim which, having ceased to continue under the relevant Protocol, is allocated to the

> Multi-track. The absence of an express exclusion for such cases was the result of a drafting error which has now been rectified: see Qader v Esure Services Limited [2016] EWCA Civ 1109 at paragraphs 44ff, and the Civil Procedure (Amendment) Rules 2017, paragraph 8.
>
> …
>
> 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. To recognise implied exceptions in relation to such claim-related activity and expenditure would be destructive of the clear purpose of the fixed costs regime, which is to pursue the elusive objective of proportionality in the conduct of the small or relatively modest types of claim to which that regime currently applies.
>
> …
>
> 41 By contrast, to throw open PAD applications generally to the recovery of assessed costs would in my view be to risk giving rise to an undesirable form of satellite litigation in which there would be likely to be incentives for the incurring of disproportionate expense, which is precisely what the fixed costs regime, viewed as a whole, is designed to avoid. 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."

30. Briggs LJ identified the exceptions at r.45.29F, 45.29H and 45.29J, although he omitted to refer to the exception identified by this court in *Broadhurst v Tan*, set out at paragraphs 33 – 34 below. His judgment 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, r.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. It was one of the grounds on which District Judge Reed reached his conclusion in the Kaur case (see paragraph 18 above). It was never in play in the Hislop case because, until the appeal to the Court of Appeal, the appellant in Hislop had always accepted that r.36.13 applied, so it had always been accepted that the judge had the power to award indemnity costs in any event. I return to that topic in paragraphs 51 – 54 below.

(b) The Interaction between Part 36 and Part 45

32. In *Solomon v Cromwell Group PLC*, the claimants had accepted Part 36 offers within the 21 days. The claims were governed by the fixed costs regime in Part 45. The claimants sought to argue that they were entitled to costs to be assessed on the standard basis, relying on what was then CPR 36.10(1)(3) (now 36.13(3)). The Court

of Appeal rejected that submission, saying that Section II of Part 45 took precedence over Part 36. Moore-Bick LJ said:

> "19. Section II of Part 45 is intended to provide a consistent outcome that is fair across a broad range of cases and obviously does not necessarily lead to an outcome in every individual case equivalent to that which would result from a detailed assessment on the standard basis. I think it is inescapable, therefore, that there is a degree of conflict between rule 36.10(3) and the fixed costs regime for which it provides. Although I accept that that regime does involve an assessment of some kind (particularly in relation to disbursements and cases where the court is satisfied that exceptional circumstances exist), I do not think that one can properly regard it as representing an assessment on the standard basis in those cases to which it applies.
>
> 20. Despite the unqualified terms of rule 36.10(3), however, I find it difficult to believe that the Rule Committee can have intended that a claimant in a low-value road traffic accident claim who accepts a Part 36 offer before proceedings have been commenced should be entitled to recover costs assessed on the standard basis, whereas a claimant who accepts an offer to settle made otherwise than under Part 36 should be limited to the costs prescribed by Section II of Part 45, insofar as they might be different. Nor is it easy to see why a claimant who proceeds under the simplified procedure in rule 44.12A should be subject to a more restrictive costs regime than one who starts proceedings to under Part 7 recover his costs. The whole purpose of introducing Section II of Part 45 was to impose a somewhat rough and ready system in a limited class of cases because the commercial interests behind the parties, who bear the burden of large numbers of such cases, considered that, taken overall, it was fair and saved both time and money. If the appellants' argument were correct, the acceptance of a Part 36 offer would always result in an order for costs on the standard basis in low-value road traffic accident cases. That would undermine the fixed costs regime and provide a powerful incentive for defendants not to make Part 36 offers in such cases. Moreover, rules 45.7 and 45.8 make it quite clear that the costs to be allowed in proceedings under rule 44.12A such as the present are those prescribed in Section II of Part 45, so if either party (perhaps the defendant) begins costs-only proceedings, there is no escape from the provisions of that Section. None of these consequences fits well with the broader scheme of the Rules which seeks to encourage settlement by the use of Part 36 and to control the costs of low-value road traffic accident claims in the manner described.
>
> 21. In my view the Rules must be read in accordance with the established principle that where an instrument contains both general and specific provisions, some of which are in conflict, the general are intended to give way to the specific. Rule 36.10 contains rules of general application, whereas Section II of Part 45 contains rules specifically directed to a narrow class of cases. Reading the Rules as a whole, I have no doubt that the intention is that Section II of Part 45 should govern the cases to which it applies to the exclusion of other rules that make different provision for the general run of cases. It is

> true that the procedure in rule 44.12A is not exclusive and that a claimant may start proceedings under Part 7 or Part 8 to recover costs under the terms of a settlement agreement; paragraph 17.11 of the Costs Practice Direction makes that clear. However, it is very doubtful whether he could recover more than the fixed costs for which Section II of Part 45 provides. It is unnecessary to decide that question in the present case, however, because both claimants issued proceedings under rule 44.12A. Accordingly, subject to any agreement between the parties to the contrary, neither can recover more or less by way of costs than is provided for under the fixed costs regime."

33. In *Broadhurst v Tan*, the claimants recovered by way of judgment more than the amount of their own Part 36 offers. They sought indemnity costs for the period between the date on which their offers expired, and the date of judgment. The Court of Appeal upheld that claim noting that, although r.45.29B provided the general rule which applied to all Section IIIA cases, what is now r.36.21 (then 36.14A) set out the costs consequences of Part 36 offers following judgment where Section IIIA of Part 45 applied. That rule specified that r.36.17 (then r.36.14) applied "with the following modifications". There was no modification in r.36.21 dealing with the position whereby a claimant beats its own Part 36 offer at trial. In such a case, therefore, the Court of Appeal held that r.36.17 applied and that, in accordance with 36.17(4) as it now is, the claimant was entitled to indemnity costs.

34. In giving the judgment of the court, Lord Dyson MR said:

> "23. If rule 45.29B stood alone, then subject to various rules in Part 45 which are immaterial, the only costs allowable in a section IIIA case to a claimant who was awarded costs following judgment in his favour would be "(a) the fixed costs in rule 45.29C and (b) disbursements in accordance with rule 45.29I". But rule 45.29B does not stand alone. The need to take account of Part 36 offers in section IIIA cases was recognised by the draftsman of the rules. Indeed, rule 36.14A is headed "costs consequences following judgment where section IIIA of Part 45 applies". Rule 45.29F (8) provides that, where a Part 36 offer is accepted in a section IIIA case, "rule 36.10A will apply instead of this rule". And rule 45.29F(9) provides that, where in such a case upon judgment being entered the claimant *fails* to obtain a judgment more advantageous than the claimant's Part 36 offer, "rule 36.14A will apply instead of this rule". Rule 45.29F does not, however, make provision as to what should happen where the claimant makes a successful Part 36 offer.
>
> 24. Mr Laughland submits that, since rule 45.29F makes no such provision, the basic or general rule in rule 45.29B that the only costs allowable are fixed costs and disbursements carries the day. But that is to ignore rule 36.14A which is headed "Costs consequences following judgment where section IIIA of Part 45 applies". Rule 36.14A(1) provides that in a section IIIA case "rule 36.14 applies with the following modifications". As we have seen, rule 36.14(3) provides that, where a claimant makes a successful Part 36 offer, the court will, unless it considers it unjust to do so, order that the claimant is entitled to four enhanced benefits including "(b) his costs on the indemnity basis from the date on which the relevant period expired.

> 25. The effect of rules 36.14 and 36.14A when read together is that, where a claimant makes a successful Part 36 offer, he is entitled to costs assessed on the indemnity basis. Thus, rule 36.14 is modified only to the extent stated by 36.14A. Since rule 36.14(3) has not been modified by rule 36.14A, it continues to have full force and effect. The tension between rule 45.29B and rule 36.14A must, therefore, be resolved in favour of rule 36.14A. I reach this conclusion as a straightforward matter of interpretation and without recourse to the canon of construction that, where there is a conflict between a specific provision and a general provision, the former takes precedence. As we have seen, there is disagreement as to which is the relevant general provision in the present context. Mr Williams submits that it is rule 36.14; and Mr Laughland submits that it is rule 45.29B. I do not find it necessary to resolve this difference.
>
> 26. Rule 36.14A(8) provides further support for my conclusion. This provision states that in a section IIIA case the parties (i.e. claimant as well as defendant) are entitled to disbursements allowed in accordance with rule 45.29I in any period for which costs are payable to them. This reflects rule 45.29B(b). If, as Mr Laughland contends, rule 45.29B prevailed over rule 36.14A in any event, this provision would have been unnecessary. It is significant that rule 36.14A does not contain a provision which reflects rule 45.29B(a) and 45.29C. In my view, the fact that rule 36.14A contains provision for payment of disbursements in accordance with rule 45.29B(b), but not for payment of fixed costs in accordance with rule 45.29B(a) confirms that the interpretation that I have adopted above is correct."

(c) Indemnity Costs Generally

35. The general principles relating to indemnity costs can be found in the well-known authorities of *Petrotrade v Texaco* [2002] 1 WLR 947; *Reid Minty v Taylor* [2002] 1 WLR 2800; *Kiam v MGM (2)* [2002] 1 WLR 2810 and *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson* [2002] CP Rep 67. More recent authorities on the same issue include *Wates Construction Ltd v HGP Greentree Alchurch Evans Ltd* [2006] BLR 45 and *Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB* [2012] EWHC 749 (Comm).

36. Those general principles can be summarised as follows:

    a) Indemnity costs are appropriate only where the conduct of a paying party is unreasonable 'to a high degree'. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight.

    b) The court must therefore decide whether there is something in the conduct of the action, or the circumstances of the case in general, which takes it out of the norm in a way which justifies an order for indemnity costs.

37. ***(d) General Approach to Late Acceptance of Part 36 Offers***

38. Leaving aside the complexities introduced by the fixed costs regime, the general position is that the late acceptance of a Part 36 offer *may* warrant an order for indemnity costs. But that will always be a question of fact in each case; there is no

presumption to that effect. In *Fitzpatrick Contractors Ltd v Tyco Fire and Integrated Solutions (UK) Ltd (3)* [2009] EWHC 274 (TCC); [2010] 2 Costs LR 115, I said:

> "21. Secondly, I consider that the court has to be very careful before inserting into a rule, which is silent on costs, a presumption of this kind, extracted from a different rule altogether. It seems to me that, on this point, Lord Woolf's remarks in ***Excelsior*** are of some relevance (although I acknowledge that he was dealing there with a contrast between the old r36.21 and the old r36.20.) He concluded that, in the absence of any reference to the indemnity basis, an order for costs which the court was required to make under the old r36.20 was an order for costs on the standard basis. It seems to me that precisely the same general reasoning would apply here to CPR 36.10(4) and (5).
>
> …
>
> 23. Thirdly, I note that r36.10(3), which deals with the situation where the claimant's offer is accepted within the relevant period, expressly provides that costs will be assessed on the standard basis. If, therefore, there was a presumption that indemnity costs would apply under r36.10(5), when an offer was accepted outside the period, it seems to me that the rule would say so. It does not, and, in my judgment, that is not an oversight or an omission; it is because either standard or indemnity costs *may* be applicable where an offer is accepted after the relevant period, depending on the analysis under CPR 44.3.
>
> 24. Finally, I am not persuaded that, as a matter of policy, it would be appropriate to import an indemnity costs presumption into r36.10(4) and (5). A defendant is entitled to accept an offer beyond the period of acceptance. In a complex case such as this, a defendant should be encouraged continuously to evaluate and re-evaluate the claim and its own response to that claim, so that even if the defendant had originally concluded that it was not going to accept the offer, it should always be prepared to change its mind. The CPR should be interpreted in a way that encourages such constant re-evaluation.
>
> 25. All those of us involved in civil litigation are conscious of the irony that a well-judged Part 36 offer by one party (whether claimant or defendant) at the outset of proceedings can often make a trial and a fight to the finish more, rather than less, likely, because there will often be instances where, by the time the offeree has belatedly realised that the offer was well-judged, he will have incurred considerable cost, and may feel that he has no option but to go on and fight the case through to the finish in the hope of bettering the offer. Such an outcome is not to be encouraged. There is a risk that, if a defendant belatedly changed its mind as to the acceptability of a claimant's Part 36 offer, the defendant would be discouraged from formally accepting that offer if it thought that it would have to pay indemnity costs in consequence. It would not be appropriate to construe the CPR in such a way, because that would, in my view, actively discourage late settlements and instead give rise to another reason for the offeree to push on to a trial."

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

40. I now turn to consider the proper interpretation of the CPR in cases covered by the fixed costs regime where a defendant accepts a claimant's Part 36 offer out of time, but before trial.

The Proper Interpretation of the CPR

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

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

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

44. Whilst the general rule dealing with costs consequences following judgment (r.36.17) is expressly preserved by the particular rule relating to the fixed costs regime (r.36.21), that is not the position in relation to the rules relating to the costs consequences of accepting Part 36 offers before trial. For that situation, the general rule (r.36.13, old rule r.36.10) is *not* preserved by the rule applicable to fixed costs cases (r.36.20, old rule r.36.10A). Instead, r.36.20 makes plain that it is the only rule

which applies to the costs consequences of acceptance of a Part 36 offer in fixed costs cases. It preserves no part of the general rule set out in r.36.13.

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

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

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

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

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

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

51. Secondly, I consider that my interpretation preserves the autonomy of Part 45. If a case begins under the fixed costs regime then it should only be in exceptional circumstances that the parties are able to escape it. The whole point of the regime is to ensure that both sides begin and end the proceedings with the expectation that fixed costs is all that will be recoverable. The regime provides certainty. It also ensures that, in low value claims, the costs which are incurred are proportionate. In addition, whatever the perceived injustice in any given case, the 'swings and roundabouts' identified by Briggs LJ in *Sharp* will still apply.

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

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

54. Finally, it remains the position that, in an exceptional case of delay, it may be possible for the claimant to escape the fixed costs regime. That arises under r.45.29J. In this way, my interpretation of the specific rules within Part 36 does not lead to a dogmatic or rigid conclusion, because the draftsman of the Rules already had one eye on ensuring that, in an exceptional case, it might be possible for a claimant to escape, at least in part, the fixed costs regime. In that way, there remains a clear incentive for a defendant not to delay in accepting a claimant's Part 36 offer.

55. I am anxious not to express detailed conclusions about the scope and extent of r.45.29J because, other than acknowledging that it provides a potential escape route in an appropriate case, I do not consider that its general ambit is directly relevant to this appeal: the point did not arise in the Hislop case at all (so was not argued before us) and, for the reasons set out in paragraphs 65-68 below, I consider that the reference to the rule by DJ Reed in the Kaur case was based on a false premise. However, two particular issues were raised as to the scope of r.45.29J, and I address each briefly.

56. First, I do not consider that a defendant's late acceptance of a claimant's Part 36 offer can always be regarded as an "exceptional circumstance". On the contrary, I take the view that my reasoning in *Fitzpatrick* as to why there can be no *presumption* in favour of indemnity costs in these circumstances (see paragraph 37 above) is also applicable, at least in general terms, to the suggestion that there is a *presumption* that a late acceptance of a Part 36 offer is an exceptional circumstance for the purposes of r.45.29J. Again, what matters are the particular facts of each case. A long delay with no explanation may well be sufficient to trigger r.45.29J; a short delay with a reasonable explanation will not.

57. Secondly, I reject the argument advanced by Mr Post QC, in the Kaur appeal, that this provision would only come into play if it could be shown that the exceptional circumstances had caused the litigation to be more expensive for the claimant. In support of this proposition, he relied on r.29J and r.29K which are concerned with the circumstances in which a party seeks to recover more than fixed costs. The rules make that party liable for the costs consequences if the assessment gives rise to a sum which is less than 20% greater than the amount of the fixed recoverable costs.

58. I do not accept Mr Post's gloss on r.45.29J. His suggestion that a claimant must demonstrate a precise causative link between the exceptional circumstances and any increased costs would, in my view, lead to an unnecessarily restrictive view of the rule. It goes without saying that a test requiring "exceptional circumstances" is already a high one. It is not a proper interpretation of the rules to suggest that there should be further obstacles placed in the way of a party who wishes to rely on that provision.

Conclusion in Hislop

59. As a result of my analysis of the existing rules, set out above, I consider that Judge Walden-Smith was wrong to order that the claimant was entitled to anything other than fixed costs. I should say at once that this is no criticism of her, since the argument successfully advanced by Mr Mallalieu on this appeal was simply not raised before her.

60. I said at paragraph 20 above that I would consider whether a different result in the Hislop appeal was suggested by the old Part 36 rules, since they applied to that case. In my view, Mr Bacon QC was right to concede that the old wording cannot lead to a different result.

61. The old rules relating to the costs consequences of a Part 36 after judgment are r.36.14 and r.36.14A. As I have demonstrated, and was confirmed in *Broadhurst v Tan*, r.36.14(3) was expressly preserved by r.36.14A(1), which meant that under the old rules a claimant beating a Part 36 offer after trial was entitled to the enhanced package, including indemnity costs, provided by r.36.14(3).

62. In relation to the costs consequences of the acceptance of a Part 36 offer prior to judgment, the old rules were r.36.10 and r.36.10A. R.36.10A expressly provided that "this rule applies where a claim no longer continues under the RTA or EL/PL Protocol…". Accordingly, that is the rule which applies to the Hislop claim and that rule, like the new r.36.20, does not allow the claimant to make any additional claim in consequence of late acceptance. The old general rule (r.36.10), was not preserved (or indeed referred to) in r.36.10A. And r.36.10 was again made "subject to r.36.10A". Still further, r.36.10 contained rules which Mr Bacon QC had to accept could not apply to a fixed costs case, such as r.36.10(3) (the reference to assessment on the standard basis). Accordingly, although the amendments noted in paragraph 45 above do not appear in the old rules and so are irrelevant for this purpose, the analysis of the existing rules at paragraphs 40 – 44 above is equally applicable to the rules which have now been superseded.

63. 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 r.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 (paragraph 9 above) applies *a*

fortiori to any suggestion that there were exceptional circumstances under r.45.29J. If it is not out of the norm, it certainly cannot be exceptional.

64. That brings me to Mr Bacon QC's final point, which amounted to an attack on that part of Deputy District Judge Lenon QC's reasoning. His short point was that paragraph 6 of the District Judge's reasoning put the test for indemnity costs too high and therefore amounted to an error of principle. Although on my analysis this issue does not strictly arise for decision (because there can be no basis for indemnity costs in any event), I should say that, for the avoidance of doubt, I do not accept that submission. It is not appropriate to subject the District Judge's *extempore* judgment to a close textual analysis. It is quite clear that he applied precisely the right test in paragraph 5 of his short judgment, and his use of the word "exceptionally" was simply to make the point that orders for indemnity costs are not usual. This is a very different case on the facts to *Whaleys (Bradford) Ltd v Bennett and Cubitt* [2017] 6 Costs LR 1241 where the judge manifestly applied the wrong test.

65. For all those reasons, the appeal against the decision of Judge Walden-Smith is allowed, and the order of District Judge Lenon QC is restored.

Conclusion in Kaur

66. As noted in paragraph 18 above, District Judge Reed's conclusion in the Kaur case was based on the assumption that, but for the Board's late Part 36 offer, Mrs Kaur would have been entitled to indemnity costs under the rules, and therefore she should not be deprived of those indemnity costs because of her acceptance of the Board's late offer. For the reasons set out above, that assumption was wrong: there was no such entitlement under the rules.

67. District Judge Reed went on to say this was an exceptional case which triggered r.45.29J. But that was based on the same false assumption that the Board's tactics had deprived Mrs Kaur of her entitlement to indemnity costs. Since there was no such entitlement, there was nothing else which indicated (or could indicate) that this was an exceptional case. Indeed, I note that the District Judge did not criticise the Board's conduct.

68. Of course, the District Judge's decision was an exercise of discretion. This court will always allow a judge a wide latitude on the exercise of discretion: it is necessary to show that the judge erred in principle or left out of account (or took into account) some material feature that he or she should (or should not) have considered: see *Islam v Ali* [2003] EWCA Civ 612. Moreover, in a case where the exercise of discretion concerns the award of costs, the discretion could be regarded as at its widest. As Wilson J (as he then was) said *SCT Finance Limited v Bolton* [2002] EWCA Civ 56; [2003] 3 All ER 434:

> "2. This is an appeal brought…in relation to costs. As such it is overcast, from start to finish, by the heavy burden faced by any appellant in establishing that the judge's decision falls outside the discretion in relation to costs conferred upon him under rule 44.3(1) of the Civil Procedure Rules 1998. For reasons of general policy, namely that it is undesirable for further costs to be incurred in arguing about costs, this court discourages such appeals by interpreting such discretion very widely."

69. However, in this case the Board has been able to demonstrate a material error of principle in the District Judge's reasoning and his conclusion that this was an exceptional case. His approach was based on the erroneous assumption that the Board's offer deprived Mrs Kaur of a right to indemnity costs. She had no such right, so it inevitably follows that the District Judge failed to exercise his discretion properly.

70. Once that point is understood, the rest of the appeal falls into place. Mrs Kaur recovered more by way of damages by taking the £3,000 than she would have received if the Board had accepted her offer of £2,000. The Board may have made their own offer because they (wrongly) thought they were potentially liable for indemnity costs if they instead accepted her offer late, but Mrs Kaur has benefited from that error to the tune of £1,000. Her costs entitlement was always going to be pursuant to the fixed costs regime. The costs consequences of her acceptance of the Board's offer, with the Board paying up to the stage when her acceptance occurred, were largely the same as if the Board had accepted her offer late and paid her fixed costs up to the date when they belatedly accepted that offer. Indeed, as Mr Benson very fairly noted when considering the draft judgment, her costs recovery (being in part a percentage of the sum recovered) will be slightly better because of her acceptance of the £3,000.

71. There is one final point in the Kaur appeal. Although it was not argued in front of District Judge Reed, we allowed Mr Benson to argue it before us, since it was a short point of construction.

72. Mrs Kaur's offer of 7 September 2016 stated that, if the offer was not accepted within time, she would seek indemnity costs. The Board's offer of 6 February 2017 accepted liability for costs if it was accepted within time, but made no mention of the basis on which those costs were to be assessed. When Mrs Kaur's solicitors wrote to accept the offer, also on 6 February, they said:

> "We are pleased to confirm that my client has agreed to accept your Part 36 offer, which is subject to indemnity costs since the expiry of our Part 36 offer on 7th September 2016 in the sum of £2,000."

73. On behalf of Mrs Kaur, Mr Benson argued that this was not an acceptance but a counter-offer, one term of which was the payment of indemnity costs by the Board to Mrs Kaur. He said that this counter-offer was accepted by the Board's solicitors' conduct, when they paid the £3,000 to Mrs Kaur's solicitors.

74. I reject that submission. I consider that the email of 6 February 2017 from Mrs Kaur's solicitors was an acceptance of the Part 36 offer but no more than that. The reference to indemnity costs was a warning that Mrs Kaur was going to pursue the indemnity costs argument, but the language fell far short of making the payment of indemnity costs a condition of their acceptance of the offer. For that construction to work, the email needed to spell out either that an offer was being made on behalf of Mrs Kaur, or that any acceptance was conditional on the Board's consequential acceptance of a liability to pay indemnity costs. It did neither.

75. It would in my view be wrong in principle to construe a letter which confirms "that my client has agreed to accept your Part 36 offer" as anything other than an unqualified acceptance. It would also be wrong, in claims of this sort, to complicate the process of offer and acceptance under Part 36, and to subject that process to convoluted legal arguments as to contract formation and the like.

76. Accordingly, I reject Mr Benson's new argument as to the alleged agreement to pay indemnity costs.

77. For all these reasons, the appeal against the decision of District Judge Reed is allowed. Mrs Kaur is entitled to fixed costs up to the relevant stage when she accepted the Board's offer.

Lady Justice King :

78. I agree.

Lord Justice Longmore :

79. I agree also.