CHAPTER 3

Proportionality

Introduction

The terms of reference for the costs review conducted by Jackson LJ[1] were "to make recommendations in order to promote access to justice at proportionate cost". The need for change was acknowledged in the foreword to the final report, which stated: 3–01

> *"In some areas of civil litigation costs are disproportionate and impede access to justice. I therefore propose a coherent package of interlocking reforms, designed to control costs and promote access to justice."*

Inevitably, therefore, proportionality lies at the core of the package of reforms – it permeates into every aspect of the civil litigation process. The overriding objective has been amended to include specific reference to proportionality, costs and case management are determined by it and any assessment of costs is subject to it. Almost four years on from the April 2013 amendments to the Civil Procedure Rules, proportionality still provokes more debate, more controversy and more concern than any other aspect of the reforms. What does it mean, when does it arise, and what impact does it have on litigation?

Proportionality – the concept

Proportionality is not a new concept. Whilst the amended overriding objective[2] refers to "dealing with a case at proportionate cost", the previous version, from introduction in 1999, defined "dealing with a case justly" by reference, amongst other things, to proportionate cost. However, in reality, prior to April 2013, proportionality only had a retrospective role at the conclusion of a case, at the time of the assessment of costs. Where it was suggested that the costs claimed were disproportionate, the Court of Appeal required the assessing judge to determine that issue at the outset of the assessment adopting the *Home Office v Lownds*[3] two-stage approach: 3–02

> *"In other words what is required is a two-stage approach. There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which Pt. 44.5(3) states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the*

[1] *Review of Civil Litigation Costs: Final Report*, December 2009.
[2] CPR r.1.1: "These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.".
[3] *Home Office v Lownds* [2002] EWCA Civ 365.

reduce the costs to the sum it determines is the proportionate figure. Examples of this arise in *BNM v MGN Ltd*[4] and *May v Wavell Group Plc*[5]. In both cases the court reduced the costs assessed as reasonable on the basis that they remained disproportionate. However, in the former the proportionality cross-check was made more by reference to specific items, whereas in the latter, having determined that the reasonable costs were disproportionate and identified the relevant CPR r.44.3(5) factors, the court simply applied CPR r.44.3(2)(a) to reach an overall proportionate figure. It is right to say that the court in *BNM* expressly concluded that it did not have to consider additional liabilities separately, it simply chose so to do. Whilst neither decision is binding and both are subject to appeal, the *May* approach appears to be in line with the comments of Jackson LJ in the final report:

> *"The court should first make an assessment of reasonable costs, having regard to the individual items in the bill. . .The court should then stand back and consider whether the total figure is proportionate. If the total figure is not proportionate, the court should make an appropriate reduction."*[6] para.5.13

Of course, the court can only fulfil the functions set out above by reference to the proportionate costs for a claim. How does it determine that sum? The simple answer is by reference to CPR r.44.3(5), which contains the definition of proportionate costs as follows:

> *"Costs incurred are proportionate if they bear a reasonable relationship to:*
> *(a) the sums in issue in the proceedings;*
> *(b) the value of any non monetary relief in issue in the proceedings;*
> *(c) the complexity of the litigation;*
> *(d) any additional work generated by the conduct of the paying party; and*
> *(e) any wider factors involved in the proceedings, such as reputation or public importance."*

Accordingly, the court must identify which of the factors listed in CPR r.44.3(5) are relevant to any case and, having done so, relate that to a costs figure. It is this step that many critics of the new approach see as unsatisfactory. They view the process as an entirely unscientific one – as the factors do not readily equal a sum in pounds and pence. The simple answer from those proponents of the process is that there is no 'absolute' answer, but, as with many exercises of judicial discretion, there are a range of answers and, provided the discretion has been exercised properly, none within that range are wrong. This is nothing new. Indeed, if different judges were asked to assess the same bill of costs at the conclusion of a claim, the likelihood is that there would be as many different figures as there were judges assessing the bill, but, again on the

[4] *BNM v MGN Ltd* [2016] EWHC B13 (Costs).
[5] *May v Wavell Group Plc* [2016] EWHC B16 (Costs).
[6] *Review of Civil Litigation Costs: Final Report*, December 2009.

cost for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable."

Immediately it is apparent that this approach does not genuinely meet the requirement of dealing with a case at proportionate cost. Even if the first stage of *Lownds* resulted in a finding that the costs were disproportionate, the court could not change the way it had dealt with the case procedurally. Instead all it could do was to reduce the amount of costs recoverable between the parties. Even this retrospective ability to reduce the recoverable costs did not lead to proportionality in its purest sense, as there was no certainty that necessarily incurred costs were proportionate – in essence the imposition of the 'necessarily incurred' test seemed more a sanction for incurring disproportionate costs than any genuine attempt to reduce the costs to a level that was proportionate. Indeed, in giving his judgment in *Lownds*, Lord Woolf had hinted at the purists' position on proportionality when commenting:

"If, because of lack of planning or due to other causes, the global costs are disproportionately high, then the requirement that the costs should be proportionate means that no more should be payable than would have been payable if the litigation had been conducted in a proportionate manner."

Something more was needed to ensure that cases are managed so that no more is spent as the case progresses than is proportionate.

Proportionality – what does it mean and when does it arise?

3–03 The 2013 reforms seek to provide that 'something more' by requiring the court to:

- deal with each case "at proportionate cost" (CPR r.1.1(1)) - which includes allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases (CPR r.1.1(2)(e));
- ensure that every case management decision is made taking account of the costs involved in each procedural step (CPR r.3.17);
- set costs budgets that are proportionate (CPR r.3 PD E 7.3);
- determine whether or not to grant relief from sanction by giving particular weight to the need for litigation to be conducted at proportionate cost (CPR r.3.9); and
- undertake assessments of costs on the basis that only proportionate costs will be awarded, even if that means reasonably or necessarily incurred costs are disallowed. CPR r.44.3(2)(a) signals the demise of the *Lownds* test at assessment, reversing the timetable for consideration of proportionality. The court will assess those costs that are reasonably incurred and reasonable in amount and, having done so, step back and determine if the resultant figure is proportionate. If it is not, then the court will

reduce the costs to the sum it determines is the proportionate figure. Examples of this arise in *BNM v MGN Ltd*[4] and *May v Wavell Group Plc*[5]. In both cases the court reduced the costs assessed as reasonable on the basis that they remained disproportionate. However, in the former the proportionality cross-check was made more by reference to specific items, whereas in the latter, having determined that the reasonable costs were disproportionate and identified the relevant CPR r.44.3(5) factors, the court simply applied CPR r.44.3(2)(a) to reach an overall proportionate figure. It is right to say that the court in *BNM* expressly concluded that it did not have to consider additional liabilities separately, it simply chose so to do. Whilst neither decision is binding and both are subject to appeal, the *May* approach appears to be in line with the comments of Jackson LJ in the final report:

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[4] *BNM v MGN Ltd* [2016] EWHC B13 (Costs).
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proviso that those judges had properly exercised their discretion, none of the assessments would be 'wrong'.

3–04 It is for this reason that in the 15th Implementation Lecture on 29 May 2012 the then Master of the Rolls, Lord Neuberger, stressed the case-sensitive nature of proportionality and anticipated little case law on the topic:

> *"While the change in culture should reduce the scope of costs assessments at the conclusion of proceedings, it will not obviate the need for a robust approach to such assessments. Again the decision as to whether an item was proportionately incurred is case-sensitive, and there may be a period of slight uncertainty as the case law is developed.*
> *`That is why I have not dealt with what precisely constitutes proportionality and how it is to be assessed. It would be positively dangerous for me to seek to give any sort of specific or detailed guidance in a lecture before the new rule has come into force and been applied. Any question relating to proportionality and any question relating to costs is each very case-sensitive, and when the two questions come together, that is all the more true. The law on proportionate costs will have to be developed on a case by case basis. This may mean a degree of satellite litigation while the courts work out the law, but we should be ready for that, and I hope it will involve relatively few cases."*

It is hard to see what further guidance is either necessary or likely other than in extremely general terms. Unnecessary because the very flexibility of the definition makes it hard to think of any case where relevant features impacting on costs do not fall to be taken into account within one of the five factors. Unlikely because each case is fact sensitive, the ambit of judicial discretion is wide and any decision falling outside the parameters would only define proportionality in a very broad sense in that specific case. This view was confirmed by Jackson LJ in his May 2016 lecture 'The Future for Civil Litigation and the Fixed Costs Regime'[7], in which he stated:

> *"There has been much debate about whether a PD should provide supplementary guidance. . .Unfortunately any attempt to draft a PD which supplements those five general rules (44.3(5)) with another set of general rules, albeit more specifically focused, is doomed to fail. If a PD were to give more detailed guidance it would inevitably be lengthy. The PD would be helpful in some cases and confusing in others. There would be arguments about its interrelationship with rule 44.3(5). No legislator can foresee all the vagaries of litigation. Any detailed PD would generate satellite litigation. Then we would have rule 44.3(5) + a lengthy PD + an encrustation of case law, followed up inevitably by much learned commentary by the academic community. Surely we are better off without all that?"* para.2.2

Accordingly, beyond defining proportionality within discretionary parameters in any given case, any comments will be of a general nature, e.g. in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd*[8] where Coulson J commented that:

> *"Costs budgets are generally regarded as a good idea and a useful case management tool. The pilot schemes (including the one here in the TCC) have worked well. They are not automatically required in cases worth over £2 million or £10 million, principally because the higher the value of the claim, the less likely it is that issues of proportionality will be important or even relevant. A claimant's budget of £5 million might well be disproportionate to a claim valued at £9 million, but such a level of costs is probably not disproportionate to a claim worth £50 million."*[9]

and in *Savoye and Savoye Limited v Spicers Limited*[10], a case concerning enforcement of an adjudication, Akenhead J concluded that:

> *". . .for the purposes of costs assessment, the Court should have regard when assessing proportionality and the reasonableness of costs, in the context of the current case or type of case to the following:*
> *(a) The relationship between the amount of costs claimed for and said to have been incurred and the amount in issue. Thus, for example, if the amount in issue in the claim was £100,000 but the costs claimed for are £1 million, absent other explanations the costs may be said to be disproportionate."*

Whilst the court in *Kazakhstan Kagazy Plc v Zhunus*[11] purported to define what is 'reasonable and proportionate' as ". . .the lowest amount (of costs) which it (a party) could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the circumstances", this appears to overlook the provisions of CPR r.44.3(2)(a), which is not considered in the judgment and which could not be clearer, that proportionality trumps reasonableness. Accordingly any attempt to define proportionality by equating it to, or by any measurable reference to, reasonableness appears to overlook this procedural provision. In any event this decision was concerned with payments on account of costs and not the assessment of recoverable costs. (See **Q4** below for more detailed consideration of the link between reasonableness and proportionality and **Q7** below).

Those seeking certainty are, in effect, wishing for something akin to a form of fixed fee regime for all cases. Given the variety of claims it is almost inevitable that any regime of fixed fees would be set with a very broad brush. As stated in previous editions, be careful for what you wish, for it leads in only one direction. Indeed, Jackson LJ concluded his consideration of the concerns expressed about CPR r.44.3(5) in his May 2016 lecture as follows:

[7] Westminster Legal Policy Forum *'The future for civil litigation and the fixed costs regime'* May 2016.

[8] *Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2014] EWHC 3546 (TCC).

[9] The reference to £2 million and £10 million being to the respective versions of CPR r.3.12 in place from 1 April 2013 and 22 April 2014.

[10] *Savoye and Savoye Limited v Spicers Limited* [2015] EWHC 33 (TCC).

[11] *Kazakhstan Kagazy Plc v Zhunus* [2015] EWHC 404 (Comm).

"The best way to satisfy the requests for clarification is to convert the five identified factors into hard figures: In other words a fixed costs regime." para.2.3

It is, perhaps, unsurprising, that this edition will be published whilst Jackson LJ undertakes a review of fixed recoverable costs.

Proportionality—the effect on litigation

3–05 For a more detailed consideration of the effect on litigation see **Chapter 4** – Case and Costs Management. In essence, though, proportionality will arise at all stages of a case, as any case management decision engages the overriding objective, which now includes the obligation to deal with a case at proportionate cost, regardless of any additional burdens imposed by specific provisions. This applies to all claims, regardless of track and regardless of value, where there is no fixed cost regime in place. The court, and the parties, should have proportionality in mind whether they are dealing with the lowest value small claim or the highest value multi-track. It follows that any party seeking any specific case management direction must be prepared to justify it in the context of a consideration of the factors at CPR r.44.3(5).

The discretion offered by the flexible definition of proportionality means that it can be adapted to meet the diverse considerations of all claims, which is just as well as, despite Jackson LJ's recommendation and the current review, fixed fees have yet to be introduced for non personal injury fast track claims and for any multi-track claims. Jackson LJ regards this as a serious omission because CPR r.44.3(5) was not designed as a mechanism to control costs in the fast track. Both he, and Dyson MR returned to this theme, encouraging the implementation of further fixed fee schemes to all fast track claims and some lower value multi-track claims, in their respective *Confronting Costs Management* lectures in May 2015[12] and, as referred to above, Jackson LJ revisited the theme in 2016[13] and is now charged with undertaking a further review *"To develop proposals for extending the present civil fixed recoverable costs regime in England and Wales so as to make the costs of going to court more certain, transparent and proportionate for litigants"*.[14] Without fixed fees and costs management in fast track a significant emphasis in fast track claims remains on proportionality after the costs have been spent under CPR r.44.3(2)(a) at assessment.

This discretion means that provided that the court has considered the factors in CPR r.44.3(5) when reaching any decision on proportionality, it will have made no error of principle and so appealing any decision will be extremely difficult.

[12] Harbour Lecture *'Confronting Costs Management'* May 2015.
[13] IPA Annual Lecture *'Fixed Costs – The time has come'* January 2016 and Westminster Legal Policy Forum *'The future for civil litigation and the fixed costs regime'* May 2016.
[14] Terms of reference for the review of fixed recoverable costs.

Questions and answers

A. The proportionality test

Q1. How do the transitional provisions relate to proportionality at assessment?

3–06 Three possible scenarios arise – two of which are straightforward and the other presents some practical difficulties.

CPR r.44.3(7) makes it clear that the 'new' proportionality provisions – namely the new definition of proportionality at CPR r.44.3(5) and the cross-check at CPR r.44.3(2)(a) do not apply:

- at all to a case which was issued before 1 April 1 2013; and
- to those bits of work done on a case prior to 1 April 2013, where the case was issued after 31 March 2013.

This transitional provision leads to three scenarios as follows:

1. In cases issued before 1 April 2013, *Lownds* still applies and if proportionality is challenged at assessment it must be dealt with at the outset, by reference to what were the 'seven pillars of wisdom' at CPR r.44.5(3) and which are now the first seven of eight 'pillars' at CPR r.44.4(3). The outcome will be that the costs are either assessed against a necessarily or reasonably incurred test.
2. In cases which are issued after 31 March 2013 and no work is done on that case prior to that date, then the new provisions apply to all the costs.
3. In cases where the claim is issued after 31 March 2013 but some work is done before that date, the *Lownds* approach must be adopted in respect of the work done prior to 1 April 2013 and the new test to all the work after 31 March 2013.

It is the last of the three scenarios above that presents challenges. Parties seeking assessment of costs, whether by summary or detailed assessment, will need to ensure that the costs pre and post 1 April 2013 are clearly separated. From 6 April 2016 there is a requirement under CPR r.47 PD 5.8(7) to divide a bill for detailed assessment into parts matching the relevant proportionality test where the transitional arrangements provide that both the 'old' and 'new' provisions apply under 3)) above. However, there is no procedural requirement for separate Forms N260 that would similarly divide between the costs under the 'old' and the 'new' test in a summary assessment. As the court will require this information, it seems sensible that practitioners should produce two Forms N260. Experience to date suggests that this approach has not routinely been adopted. The risks that remain if there are not separate N260s for the relevant periods are that:

- It is not proportionate to adjourn off the summary assessment to another date or for written submissions and the court may be forced to do the best it can on the information available. This may result in the court concluding that if a party has not troubled to separate out the two periods, the sanction (and proportionate way forward) is to assess all the costs under the new test.
- The court does adjourn and demands a re-drawn Form N260, but does not permit any recovery of costs for so doing.

If there are separate Forms N260 or separate parts of the bill, (and, as stated above, under CPR r.47 PD 5.8(7) the bill must be divided into the relevant 'proportionality test' period), the court's function is invidious. It must do one proportionality determination at the beginning (for the pre-1 April 2013 costs) and one at the end (for the post-31 March 2013 costs). However, both exercises are artificial, because the court cannot aggregate the costs of both parts to do the exercise under each discrete test. To do so would be to ignore the clear language of CPR r.44.3(7). Instead the court will have to identify the work undertaken in each period and apply the relevant test to determine the proportionality of that work.

Q2. Does the court look at the sums reasonably claimed or the sums recovered when determining 'the sums in issue in the proceedings' under CPR r.44.3(5)(a)?

3–07 Obviously at the time that proportionality is considered for the purposes of budget setting and case management, the court does not know what sums will ultimately be recovered. At that stage the determination must be based on what is claimed less what is admitted – which emphasises the importance of realistic valuation (how often does the statement of value on a claim form limit to a particular sum, but the subsequent schedule of loss attached to later served Particulars of Claim reveal that the alleged losses are significantly higher than that sum, but there is no application to increase the statement of value?). If there is an argument, namely that the claim is exaggerated, then all that does is confirm that the sums claimed are in issue (and remember the wording of CPR r.44.3(5)(a) is '*the sums in issue in the proceedings*'). It might seem attractive to the court, if it considers a claim to be inflated, to adopt what if considers to be a more realistic value under CPR r.44.3(5)(a) when budgeting. However, unless the court strikes out part of the claim, if it adopts this course, then it ignores the fact that the defendant must still meet the larger claim and its proportionate budget should recognise this. This may explain why the wording of this provision does not refer to sums claimed, but to sums in issue. Of course, if the court thinks that part of the claim will be easily defeated, it can reflect this in its proportionality determination under CPR r.44.3(5)(c) in any event.

At the conclusion of the claim the court will know what sum was recovered. The fact that the sum may be less than was claimed does not, of itself,

necessarily alter the determination of proportionality. The fact that one sum was claimed and one was recovered does not mean that the original sum was not in issue. However, this does assume that it was reasonable to pursue the claim as stated if the claimant's costs are being considered. Again, though, the court must be astute to the position of a defendant who has successfully defeated a claim and has been awarded costs. To approach CPR r.44.3(5)(a) at the assessment stage on any basis other than that the entire sum claimed was in issue would be to approach the question of the defendant's proportionate costs incorrectly. As stated above, the fact that part of the claim was seen off easily can be reflected when the court considers CPR r.44.3(5)(c).

If, for example, it emerges that the claim was exaggerated, but the claimant still obtains an award of some costs, then in cases costs managed, this may well be a 'good reason' to depart from the budget as that will have been set on a basis that the claimant knew was wrong. In non-budgeted cases conduct can be considered when assessing the reasonable costs under CPR r.44.4 and the 'real' value is likely to apply on the proportionality 'cross check'. If, as a result of the exaggeration, the defendant secures some form of costs award, it is right that the defendant's budget reflected the proportionate work that it did as the 'exaggerated' element of the claim was plainly in issue.

In contrast, if the claimant recovers a lower sum than that claimed, but it was reasonable to pursue the higher sum, e.g. if there was a complicated causation argument where the defendant's expert evidence was preferred or where the case turned on a factual dispute and the court preferred the evidence of the defendant's witnesses, then it is likely that will not alter 'the sums in issue' for the purpose of proportionality and so will not represent a 'good reason' to depart from the budget in costs managed cases and will not influence proportionality in non-budgeted cases.

In practice, in these scenarios the limited recovery is likely to sound in the award of costs itself, with something less than a full costs order being made under CPR r.44.2(4)(b) and 44.2(6) or a partial costs award to the defendant. The court must be astute to avoid 'double jeopardy', although as is clear from *Drew v Whitbread*[15] conduct may be considered both on the award and the assessment of costs.

Q3. Why is only the conduct of the paying party included in the definition?

3–08 This question really arises at two stages – at case/costs management and at assessment. It is important, though, when considering the question to remember the full wording of this factor. It is not conduct generally, which falls to be considered, but only conduct of the paying party which generates additional work.

[15] *Drew v Whitbread* [2010] EWCA Civ 53.

B. At the case/costs management stage

3–09 At the costs management stage the rationale is that the past conduct of the parties (for at this stage it is not clear who will be the receiving and who the paying party) is not relevant. This is because the court can only budget the costs "to be incurred". As such, the court can control conduct going forward by proportionate costs and case management. In other words, the court's directions should preclude the possibility of conduct generating additional work. The court sets and manages the progression of the case. If a party persists in conduct that is likely to generate additional work, then the other party may always apply under CPR r.3 PD E 7.6 to vary the budget as a result of that conduct or seek discrete costs sanctions on any applications that arise outside the budget under CPR r.3 PD E 7.9, relying on the stark warnings given by the Court of Appeal about non co-operation in *Denton v T H White*,[16] which resonate beyond the specific scenario which was under consideration:

> *"The court will be more ready in the future to penalise opportunism. The duty of care owed by a legal representative to his client takes account of the fact that litigants are required to help the court to further the overriding objective."*[17]

In any event, CPR r.3 PD E 7.4 requires the court to take incurred costs into account when considering the reasonableness and proportionality of the costs to be budgeted. So, if unreasonable and/or disproportionate costs have been incurred by a party as a result of its conduct up to costs management, it may find its budget going forward suffers as a result. In *Group Seven Ltd v Nasir*[18] the court took this a step further. It concluded that at the costs management stage the court should assume that each party will be the receiving party when its budgeted costs are set. It also found that the conduct of some of the defendants up to the costs case management conference suggested some future procedural difficulties for other parties. As a result of these conclusions the court indicated that it would consider allowing the costs of future applications to ensure compliance by those defendants as contingent budgeted costs of the other parties finding that:

> *"Rule 44.3(5)(d) refers to the relationship of the costs to any additional work generated by the paying party. That rule applies where an order for costs has been made and one knows who the paying party is. At the costs budget stage, there is not yet an order that anyone pay the budgeted costs but I consider that the question of proportionality should be judged on the hypothetical basis that the party who has prepared the budget turns out to be the receiving party. . . as to future costs, I would be prepared to allow Group Seven and ETS sums for contingencies to reflect the possibility that there will be future procedural difficulties which might be attributable to a lack of cooperation from some of the Defendants."*

[16] *Denton v T H White* [2014] EWCA Civ 906.
[17] para.43.
[18] *Group Seven v Nasir* [2016] EWHC 620 (Ch).

C. At the assessment stage

The reason that the conduct of the receiving party does not form part of the definition at assessment seems more complicated. Whilst it is likely that such conduct will already have been taken into account by the court when making the award of costs – see CPR r.44.2(4)(a) – that is by no means certain as it may not always be obvious at that stage whether certain conduct has generated additional costs. However, conduct is also taken into account at the assessment – see CPR r.44.4(3). Both these provisions, though, relate to the conduct of the parties. So if the argument is that conduct has already been considered, then that ought also to apply to the conduct of the paying party. 3–10

The explanation may be that it is difficult to imagine a situation where any additional costs of the receiving party generated by the conduct of that party survive the test of whether they are reasonably incurred or reasonable in amount and, as such, have already been disallowed by the time that the court does the proportionality cross check. In contrast, the receiving party's additional costs caused by the paying party's conduct will survive the test of whether they were reasonably incurred and reasonable. If the court does not remind itself under CPR r.44.4.3(5)(d) when undertaking the CPR r.44.3(2)(a) cross check, that these reasonably incurred and reasonable in amount costs include those extra costs caused by the conduct of the paying party, there is a danger that the overall sum is deemed disproportionate and the paying party escapes the consequences of its actions.

D. The relationship between proportionality, reasonableness and necessity

Q4. Is there any distinction between proportionality and reasonableness in reality?

The answer, as an exercise of semantic interpretation of the CPR, is yes, because throughout the CPR the two are referred to separately – see for example CPR r.3 PD E 7.3 which requires the court to approve budgets for phases that are "reasonable and proportionate" and CPR r.44.3(2)(a) which clearly draws a distinction between the two. Indeed it is the latter provision that makes it clear that some costs may be reasonable, but not proportionate. As the court said in *Group Seven Ltd v Nasir*[19]: 3–11

> *". . .proportionality can result in the non-recovery of costs even where they are otherwise reasonable costs and even where they are necessary costs".*

In practice, there will be cases where the court, having assessed the reasonable costs, then applies the CPR r.44.3(5) factors to the proportionality cross check under CPR r.44.3(2)(a) and determines that those costs are also proportionate

[19] *Group Seven v Nasir* [2016] EWHC 620 (Ch).

– indeed the court's assessment of proportionality might be at a higher figure than the reasonable costs for a variety of reasons (e.g. because of limits imposed by the contractual retainer). There will also be cases where the same cross-check reveals the reasonable costs are still disproportionate. Perhaps the better answer, therefore, is, not necessarily so.

Q5. Is the effect of proportionality to prescribe that in a case about money, the costs cannot exceed the sums in dispute?

3–12 Before 1 April 2013, there was an acceptance within the CPR that there were cases where the proportionate cost would exceed the sum in issue. Section 11 of the then Costs Practice Direction expressed it in these terms:

> *"11.1 In applying the test of proportionality the court will have regard to rule 1.1(2)(c). The relationship between the total of the costs incurred and the financial value of the claim may not be a reliable guide. A fixed percentage cannot be applied in all cases to the value of the claim in order to ascertain whether or not the costs are proportionate.*
>
> *11.2 In any proceedings there will be costs which will inevitably be incurred and which are necessary for the successful conduct of the case. Solicitors are not required to conduct litigation at rates which are uneconomic. Thus in a modest claim the proportion of costs is likely to be higher than in a large claim and may even equal or possibly exceed the amount in dispute."*

What is immediately clear is that 11.2 accords precedence to 'necessary' costs. Work that was necessary informed the assessment of proportionality. This is no longer the situation, for CPR r.44.3(2)(a) expressly gives primacy to proportionality, even if that means that necessary costs (and by implication necessary work) are not recoverable. This does no more than codify the comments at Ch.3 para.5.10 of Jackson LJ's Final Report[20] under the bold heading 'Costs do not become proportionate because they were necessary'.

Does this mean that costs can never exceed the amount in dispute? The answer must surely be no, but not because a certain amount of work is necessary in any given claim, but, instead, because CPR r.44.3(5) does not limit the relationship between proportionality and costs solely to the amount in issue. If there are other relevant factors then those inform the determination of the proportionate sum. This, again, illustrates the flexibility of the definition that enables it to apply to all circumstances. The Final Report concluded, when making the recommendation for the new definition of proportionality, that:

> *"Proportionality of costs is not simply a matter of comparing the sum in issue with the amount of costs incurred, important though that comparison is. It is also necessary to evaluate any non-monetary remedies sought and any rights which are in issue, in order to compare the overall value of what is at stake in the action with the costs of resolution."*[21]

[20] *Review of Civil Litigation Costs: Final Report*, December 2009.
[21] Ch.3 para.5.5.

Notwithstanding this, it is likely to be rare indeed for costs to exceed the sums in dispute. As Stuart-Smith J observed in *GSK Project Management Ltd v QPR Holdings Ltd*[22]:

> *"My starting point is that a case would have to be wholly exceptional to render a costs budget of £824,000 proportionate for the recovery of £805,000 plus interest."*

This confirms that where the only relevant factor under CPR r.44.3(5) is the sum in issue, it is difficult to envisage a court determining that it is proportionate for the parties to spend more than this sum in determining the dispute.

Q6. Is the case of *Kazakhstan Kagazy Plc v Zhunuss*[23] the touchstone regarding proportionality – namely that it defines what is 'reasonable and proportionate' as "...the lowest amount (of costs) which it (a party) could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the circumstances"?

No. See the commentary at para.3–04 above. CPR r.44.3(2)(a) is clear that reasonable costs may be disallowed if they are disproportionate. It matters not that these costs may be at the very bottom of the bracket that the court deems reasonable. What matters is that the costs must bear a reasonable relationship to the factors at CPR r.44.3(5). If they do not then they are disproportionate even if a party could not reasonably have spent less to have a case conducted and presented proficiently. 3–13

It is important to note that this was a short decision in which the court was concerned only with determining the extent of a payment on account of costs. It was not assessing the costs, which would have required detailed consideration of CPR r.44.3(5) and CPR r.44.3(2)(a) (of pertinence is that neither of these provisions is mentioned). Indeed Leggatt J. expressly concluded in general terms that the costs claimed were neither reasonable nor proportionate and that the reasonable and proportionate costs could only properly be determined by a detailed assessment.

Q7. In the case of *Stocker v Stocker*[24] Mr Justice Warby observed: "I readily acknowledge the importance of ensuring that the costs budgeting process does not result in a party being unable to recover the costs necessary to assert their rights." Does this mean that proportionate costs can never be less than those that are necessary?

No. CPR r.44.3(2)(a) makes this quite clear: 3–14

> *"Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred."*

[22] *GSK Project Management Ltd v QPR Holdings Ltd* [2015] EWHC 2274 (TCC).
[23] *Kazakhstan Kagazy Plc v Zhunus* [2015] EWHC 404 (Comm).
[24] *Stocker v Stocker* [2015] EWHC 1634 (QB).

In fact the extract quoted in the question needs to be put in context. It comes at the conclusion of a paragraph considering 'purely financial proportionality'. Of course costs are proportionate if they bear a reasonable relationship to the five factors at CPR r.44.3(5) and not simply the sums in issue in the proceedings. However, Warby J did acknowledge the difficulty 'to cut radically, at a stroke, the costs of this class of litigation' (libel claims), suggesting overtly that this would need to be a gradual process. However, that said, he had no hesitation in concluding that "the Defendant's global costs figure is clearly considerably out of proportion to what is at stake and the nature of the issues, and should be substantially reduced for that reason".

E. The extent of proportionality considerations

Q8. Is proportionality to be applied in all cases, or, as some wish to suggest, is it really for the small to medium value claims, where disproportionate costs are more likely?

3–15 Whilst costs management is limited to those claims specifically referred to in CPR r.3.12, and any other claims where the court orders it, this does not limit the all-encompassing relevance of proportionality. It is part of the overriding objective and, as such, all case management decisions must be made against the obligation on the court to deal with cases at proportionate cost whatever the value of a claim. This is reinforced by CPR r.3.17, which provides that:

> *"When making any case management decision, the court . . . will take into account the costs in each procedural step."*

Chapter 4 considers the effect of proportionality on obvious case management decisions, but the effect is more wide ranging than that. By way of example, in *Agents Mutual Ltd v Gasgoine Halman Ltd*[25] the court considered proportionality in the context of an application for security for costs, describing some of the costs as 'seriously disproportionate'.

Even in those cases where the filing of Precedent H is required and the court chooses not to make a costs management order, the rules on the relevance of that budget at assessment have been strengthened. CPR rules 44 PD 3.6 and 3.7 reiterate and expand previous provisions. They enable the assessing court, where there is a difference of 20% or more between the costs claimed and those shown in a budget, to:

- Restrict the recoverable costs where reliance has been placed on the budget by the paying party to what is reasonable even if that results in a sum less than that which would otherwise be proportionate and reasonable.
- Regard the difference between the costs claimed and those in the budget as evidence that the costs claimed are unreasonable or disproportionate, even where no reliance on the budget is established.

[25] *Agents Mutual Ltd v Gasgoine Halman Ltd* [2016] EWHC 2315 (Ch).

Expect the court to be more robust in applying these provisions, than it was before 1 April, 2013.

Proportionality also has a role to play in non-fixed fee fast track and small claims track cases. Indeed, cases that might previously have been allocated to multi-track (e.g. because the time estimate for trial exceeded one day) may now be allocated to fast-track with directions targeted to reduce the time estimate to one day and cases that are over the small claim track limit may now be allocated to that track as the consent of the parties to this is no longer required. In both these tracks, directions will be targeted to ensure that the cases are dealt with proportionately (and that includes the amount of court time that they occupy).

So far as assessments of costs are concerned, in respect of those that fall under the new proportionality regime (see **Q1** above), then the court must apply the proportionality cross-check under CPR r.44.3(2)(a) as the 'court will only allow costs which are proportionate'. It is no longer a case of proportionality only arising if raised by the paying party.

Q9. What relevance, if any, does proportionality have in cases where an order for costs is made on the indemnity basis?

3–16 Proportionality is still relevant before the costs order is made, as the court will have case managed on a proportionate basis. Where the order for indemnity costs has significance is on the assessment of the amount of recoverable costs. When conducting an assessment on the indemnity basis under CPR r.44.4(1)(b), the court must decide whether costs were unreasonably incurred or unreasonable in amount – it is not required to consider proportionality. Albeit that the rule number may have changed (from CPR r.44.4(3)) this does not alter the provision in place before April 2013. However, where the change in outcome is marked is in cases where a costs management order has been made. This is because CPR r.3.18, which provides that the court will not depart from the last approved or agreed budget at assessment unless there is 'good reason', expressly only applies to cases where the court is assessing costs on the 'standard basis'.

Whilst Coulson J in *Elvanite Full Circle Ltd v AMEC Earth & Environment*[26] suggested that even where there was an order for indemnity costs, the budget should be the starting point, it must be remembered that he was considering a budget prepared under CPR r.51 PD G. The budget form (Form HB) did not require any certification suggesting that the budget was constrained in any way by proportionality – in other words it was probably a fair reflection of all the costs that the client was likely to incur and so represented an approximation of indemnity costs. Now the budget does require a certification linking the sums included to those that are proportionate as is set out in CPR r.22 PD 2.2A:

[26] *Elvanite Full Circle Ltd v AMEC Earth & Environment* [2013] EWHC 1643.

application has been filed under CPR r.3 PD F it seems that these provisions do not apply. It does seem curious that the provisions of CPR r.44 PD 3 have been limited and do not apply to all budgets filed under any rule, practice direction or court order.

The question is limited to CPR 3 Section III. Amendments have been made to CPR r.46 to introduce the discrete costs capping regime in Judicial Review cases at Section VI.

CHAPTER 5

Part 36 and Other Settlement Offers Including ADR and Costs Consequences

Introduction

This chapter deals both with Part 36 offers and with other methods of achieving settlement; and is divided into two sections, the first dealing with Part 36 and the second with methods of settlement other than Part 36. 5–01

Section 1 Part 36

Background to Part 36

Part 36 has undergone significant changes in recent years following two Court of Appeal decisions: *Crouch v Kings Healthcare NHS Trust*[1] and *Trustees of Stokes Pension Fund v Western Power Distribution (South West) Plc*.[2] The Civil Procedure (Amendment No.8) Rules 2014,[3] which came into force on 6 April 2015, contain an entirely new version of Part 36 in Sch.1. There are also consequential amendments to other Parts. The intention of the new Part 36 is to align the rules with the case law developed since the Part was last amended. 5–02

Transitional provisions

The new Part 36 applies in its entirety only in relation to Part 36 offers made on or after 6 April 2015, save that CPR r.36.3 (definitions), CPR r.36.11 (acceptance of a Part 36 offer), CPR r.36.12 (acceptance of a Part 36 offer in a split trial case) and 36.16 (restriction on disclosure of a Part 36 offer) also apply in relation to any Part 36 offer where the offer is made before 6 April 2015, but a trial of any part of the claim or any issue arising in it starts on or after 6 April 2015.[4] 5–03

CPR Part 36 after 5 April 2015

Section I of Part 36 contains a self-contained procedural code about offers to settle made pursuant to the procedure set out in that Part. Section I contains general rules about Part 36 offers. Section II contains rules about offers to settle where the parties have followed the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the RTA Protocol") or the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) claims ("the EL/PL Protocol") and have started proceedings under Part 8 in accordance with Practice Direction 8B.[5] 5–04

[1] *Crouch v Kings Healthcare NHS Trust* [2004] EWCA Civ 1332; [2005] 1 W.L.R. 2015.
[2] *Trustees of Stokes Pension Fund v Western Power Distribution (South West) Plc* [2005] EWCA Civ 854; [2005] 1 W.L.R. 3595.
[3] SI 2014 No.3299.
[4] Civil Procedure (Amendment No.8) Rules 2014, rr.18(1) and (2).
[5] r.36.1.

Under Section I, any party to an action may make an offer to settle in whatever way that party chooses, but if the offer is not made in accordance with CPR r.36.5 (form and content of a Part 36 offer) it will not have the consequences specified in Section I.[6] Where an offer does not comply with the requirements set out in CPR r.36.2, it is not a Part 36 offer.[7]

A Part 36 offer may be made in respect of the whole or part of any issue that arises in a claim, counterclaim or other additional claim, or an appeal or cross-appeal from a decision made at a trial.[8] Counterclaims and other additional claims are treated as claims, and references to a claimant or a defendant include a party bringing or defending an additional claim.[9]

In proceedings following a road traffic accident, the defendant, who alleged contributory negligence, made an offer, under the previous regime, to settle that issue on the basis of a 25% reduction, three weeks before the trial was due to start. The claimant accepted the defendant's offer one week before trial. Neither the offer nor the acceptance made any mention about the costs of the contributory negligence issue. The judge at first instance found that the defendant was in fact the claimant for the purposes of the contributory negligence issue, and ordered the claimant to pay the defendant's costs in relation to it. On the claimant's appeal, it was held that the defendant's offer amounted to an offer solely in relation to liability. It fell within old CPR r.36.2(5) (which provided that "An offeror may make a Part 36 offer solely in relation to liability"—this provision has been omitted from the new rule, presumably because it was superfluous), and the fact that the context was contributory negligence did not affect that. The defendant's offer was, and was intended to be, a Part 36 offer and the claimant's entitlement to costs arose under old CPR r.36.10(1) (now CPR r.36.13). In the light of the settlement at 75% to 25% liability split, it was wholly artificial to describe the claimant as anything other than the winner.[10]

The definition section of Part 36 makes it clear that a trial means any trial in a case whether it is a trial of all the issues or a trial of liability, quantum or some other issue in the case. A trial is in progress from the time when it starts until the time when judgment is given or handed down. A case is decided when all issues in the case have been determined, whether at one or more trials.[11] CPR r.36.3 also defines the relevant period, as to which see paragraph 5–06 below.

Part 36 offers in appeal proceedings

5–05 Except where a Part 36 offer is made in appeal proceedings, it has effect only in relation to the costs of the proceedings in respect of which it is made and

[6] r.36.2.
[7] See *Thewlis v Groupama Insurance Co Ltd* [2012] EWHC 3 (TCC); [2012] BLR 259. Rule 44.2 requires the court to consider an offer to settle which is not an offer to which costs consequences under Part 36 apply.
[8] r.36.2(3).
[9] rr.20.2 and 20.3.
[10] *Onay v Brown* [2009] EWCA Civ 775; [2010] 1 Costs LR 29 CA.
[11] r.36.3.

not in respect of any appeal in those proceedings. Composite first instance and appeal offers to settle are not permissible and separate offers must be made. If a Part 36 offer is made in appeal proceedings the references in the rules to, e.g. claimant/-defendant are replaced by corresponding terms, e.g. appellant/respondent[12].

In personal injury proceedings, the claimant at first instance had been awarded damages which failed to beat two Part 36 offers made by the defendant. The claimant was held liable for the costs incurred from the date of expiry of the first offer. On appeal, the total damages award was increased to an amount in excess of the first Part 36 offer, although less than the second. The Court of Appeal revised the first instance costs decision ordering the claimant to pay the costs from the date of expiry of the second Part 36 offer. With regard to the costs of the appeal, the Court held that the claimant had already been penalised in costs for having failed to accept the defendant's offers and the second offer had not been open for acceptance after May of 2014. It had therefore been necessary for the claimant to pursue the appeal in order to improve his position. The claimant was awarded his costs subject to two exceptions relating to specific categories of costs.[13]

Form and content of a Part 36 offer

5–06 A Part 36 offer must:

(a) be in writing;
(b) make clear that it is made pursuant to Part 36[14];
(c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs, where a Part 36 offer is accepted in accordance with CPR r.36.13 or, where Section IIIA of Part 45 applies, in accordance with CPR r.36.20 if the offer is accepted;
(d) state whether it relates to the whole of the claim or part of it or to an issue that arises in it and if so, to which part or issue; and
(e) state whether it takes into account any counterclaim.[15]

Where a defendant had made what purported to be a claimant's Part 36 offer in respect of the defendant's counterclaim, "the proceedings in respect of which" it was made included the claim and the proposed counterclaim, but were not restricted only to the counterclaim. A Part 36 offer may be made before the commencement of proceedings (under old CPR r.36.3(2), now CPR r.36.7) so the fact that the defendant's counterclaim had not been formulated or pleaded did not of itself matter.[16]

[12] r.36.4(1) and (2).
[13] *Pawar v JSD Haulage Limited* [2016] EWCA Civ. 551.
[14] This is a change from the earlier version of the rule which required the offer to "state on its face if it was intended to have the consequences of Section I of Part 36".
[15] r.36.5(1).
[16] *AF v BG* [2009] EWCA Civ 757. Contrast *Van Oord UK Ltd v Allseas UK* Ltd [2015] EWHC 3385, [2016] 1 Costs L.O. 1, Coulson J, Q13 below.

A Part 36 offer may be made at any time including before the commencement of proceedings. Such an offer is made when it is served on the offeree.[17] The period of 21 days specified in (c) above or such longer period as the parties agree in the case of an offer made not less than 21 days before trial, is known as "the relevant period". Where an offer is made less than 21 days before a trial, the relevant period is the period up to the end of the trial.[18] A Part 36 offer may be made using Form N242A. If the other party is legally represented the notice must be served on the legal representative.[19]

Where a claimant had accepted a Part 36 offer made jointly by all defendants in relation to part of the proceedings and the offer expressly stated that it did not concern the counterclaim, a defendant sought summary judgment on its counterclaim arguing that the offer covered all allegations of wrongdoing on which the claimant's defence to the counterclaim was founded. The court concluded that the acceptance of the defendants' offer did not prevent the claimants from relying in their defence to the counterclaim on facts alleged as part of the settled claim.[20]

Withdrawing or changing the terms of a Part 36 offer generally

5–07 A Part 36 offer may only be withdrawn or its terms changed if the offeree has not previously served notice of acceptance. The offeror may withdraw the offer or change its terms by serving written notice of the withdrawal or change of terms on the offeree.[21] CPR r.36.10 makes provision about when permission is required to withdraw or change the terms of an offer before the expiry of the relevant period. Subject to that, notice of withdrawal or change of terms takes effect when it is served on the offeree.[22]

Provided that the offeree has not previously served notice of acceptance, after expiry of the relevant period the offeror may withdraw the offer or change its terms without the permission of the court, or the offer may be automatically withdrawn in accordance with its terms. Where the offeror changes the terms of the offer to make it more advantageous to the offeree, the improved offer will be treated not as the withdrawal of the original offer, but as the making of a new Part 36 offer on the improved terms, and provided that the new offer is not made less than 21 days before the start of the trial, the relevant period will be 21 days or such longer period (if any) identified in the written notice of change of terms.[23]

CPR r.36.9(4)(b) provides that an offer may be automatically withdrawn after the expiry of the relevant period in accordance with its terms. This is both the effect and apparent intention of the rule – a Part 36 offer can now include within it a provision by which the offer is automatically withdrawn

[17] r.36.7.
[18] rr.36.3(g) and 36.5(2).
[19] r.36.7 and see Practice Direction 36, para.1.1.
[20] *Marathon Asset Management LLP v Seddon* [2016] EWHC 2615 (Comm), Leggatt J.
[21] See r.36.17(7) as to the costs consequences following judgment of an offer which is withdrawn.
[22] r.36.9(1), (2) and (3).
[23] r.36.9(4) and (5).

(and therefore time limited) – though it must still usually be open for a minimum of 21 days and CPR r.36.9(4)(b) cannot be used until that relevant period has passed. This alters the position under the previous version of Part 36, as confirmed in *C v D*.[24]

Where, under the previous version of Part 36, the offer did not specify a period of not less than 21 days, or any period, in compliance with CPR r.36.2(2)(c) (now CPR r.36.5(1)(c)), the offer was not a Part 36 offer. It was not part of the mandatory requirements of the rule, once the period had been specified, to state expressly that that was the period "within which the defendant will be liable for the claimant's costs if the offer is accepted". But the solicitors' letter did not specify any period for the purposes of the rule and that was fatal[25]. The offeror had not sought the more extreme consequences of a successful claimant's offer, namely indemnity costs or interest at an enhanced rate. It was difficult to see how the court could award additional interest unless the offer complied with Part 36 and in the absence of a true Part 36 offer any claim for indemnity costs would have to be justified on the relevant general principles. The impact of the offer on costs was properly to be considered not as if it had complied with Part 36 when it had not, but as part of the court's general discretion as to costs under Part 44[26].

A claimant in libel proceedings made a Part 36 offer which was not accepted and was withdrawn after 21 days. At trial the claimant beat her own Part 36 offer and sought indemnity costs on the grounds of the defendant's failure to beat the Part 36 offer and on the basis of the defendant's unreasonable conduct during the proceedings. The court decided that the procedural matters carried little weight and did not amount to unreasonable conduct sufficient to justify an award of costs on the indemnity basis. In considering that the withdrawn Part 36 offer had not been beaten, the judge decided that to award indemnity costs on that basis would involve the introduction of such an award for behaviour which was not necessarily unreasonable[27].

A building contractor sued a householder for work done. The householder counterclaimed for losses alleging poor workmanship. The defendant made a Part 36 offer, inclusive of interest, and subsequently made increased offers. The claimant made counter-offers, but the parties did not reach agreement. The defendant withdrew all the offers, except the original one. At trial before the District Judge the claimant recovered some £300 more than the defendant's original Part 36 offer. The defendant appealed against the costs order, arguing that the judgment was not materially more advantageous to the claimant than the original Part 36 offer. On appeal the Court of Appeal held that the provisions of Part 36 state clearly how an offer may be made, how it may be varied and how it may be accepted. Unlike ordinary common

[24] *C v D* [2011] EWCA Civ 646; [2012] 1 W.L.R. 1962; [2011] 5 Costs L.R. 773
[25] *Onay v Brown* [2009] EWCA Civ 775and *C v D* [2011] EWCA Civ 646.
[26] *Carillion JM Ltd v PHI Group Ltd, Carillion JM Ltd v Robert West Consulting Ltd,* [2012] EWCA Civ 588; [2012] 4 Costs L.O. 523.
[27] *Gulati v MGN Limited* [2015] EWHC 1805 (Ch.) Mann J. Mann J's judgment on damages was upheld on appeal: [2015] EWCA Civ 1291; [2016] 2 W.L.R. 1217.

law principles they do not provide for an offer to lapse or become incapable of acceptance on being rejected by the other party. Once made, a Part 36 offer remains open for acceptance until the start of the trial or its withdrawal in the manner set out in previous CPR r.36.3(7) (now CPR r.36.9(4)). Where a party makes several offers in different terms, a later offer does not revoke or vary an earlier offer, and all of them may be capable of acceptance at any one time.[28]

Following a collision at sea, the claimant offered to settle liability 60/40 in favour of the claimant. The offer was said to be made in accordance with CPR Part 61.4(10)–(12) and/or Part 36. The offer was subsequently withdrawn two months before trial, when the claimant offered to settle on a two thirds/one third basis. At trial, liability was apportioned 60/40 in favour of the claimant. In relation to costs, the court decided that there was a line of authority starting before the CPR but continuing after it, indicating that where an offer had been withdrawn which should have been accepted, it would not be unjust to award the offeror all of its costs, because, had the offer been accepted, no further costs would have been incurred thereafter (see *Bristol and West Building Society v Evans Bullock & Co*[29]). The mere fact that an offer had been withdrawn did not necessarily deprive the offer of effect on the question of costs. The defendant should have accepted the offer when it was available, or should have appreciated the costs risk and taken protective steps by making a realistic Part 36 offer itself. The fact that the offer was withdrawn two months before trial did not make it unjust to order that the claimant should get all their costs from 21 days after the offer was made. Prior to that the defendant should pay 60% of the claimant's costs, and the claimant should pay 40% of the defendant's costs.[30]

Withdrawing or changing the terms of a Part 36 offer before the expiry of the relevant period

5–08 Where the offeree has not previously served notice of acceptance and the offeror serves notice of withdrawal of the offer or changes in its terms to be less advantageous to the offeree before the expiry of the relevant period, if the offeree has not served notice of acceptance of the original offer by the expiry of the relevant period, the offeror's notice has effect on the expiry of that period; if the offeree serves notice of acceptance of the original offer before the expiry of the relevant period, that acceptance has effect unless the offeror applies to the court for permission to withdraw the offer or to change its terms within seven days of the offeree's notice of acceptance, or, if earlier, before the first day of trial. If such an application is made, the court may give permission for the original offer to be withdrawn or its terms changed if satisfied that

[28] *Gibbon v Manchester City Council LG Blower Specialist Bricklayer Ltd v Reeves* [2010] EWCA Civ 726; [2010] 1 W.L.R. 2081; [2010] 5 Costs L.R. 828.
[29] *Bristol and West Building Society v Evans Bullock & Co* Unreported February 5, 1996 CA.
[30] *Owners and/or Bareboat Charterers and/or Sub Bareboat Charterers of the Ship Samco Europe v Owners of the Ship MSC Prestige* [2011] EWHC 1656 (Admlty) Teare J.

there has been a change of circumstances since the making of the original offer and that it is in the interests of justice to give permission.[31]

Where the offeror seeks permission of the court to withdraw a Part 36 offer or to change its terms to be less advantageous to the offeree before expiry of the relevant period, the permission of the court must, unless the parties agree otherwise, be sought by making a Part 23 application which must be dealt with by a judge other than the trial judge or at a trial or other hearing provided that it is not to the trial judge.[32]

Acceptance of a Part 36 offer

Acceptance of a Part 36 offer is effected by serving written notice of acceptance on the offeror. Except where the permission of the court is required (see below) or in a split trial case, a Part 36 offer may be accepted at any time unless it has already been withdrawn, whether or not the offeree has -subsequently made a different offer.[33] 5–09

A claimant who was already in breach of an unless order requiring him to serve certain documents purported to accept a Part 36 offer. On appeal it was held that a claim that had been struck out (under the unless order) was at an end, therefore the claimant could not have accepted the Part 36 offer once he was in breach of the order, as his claim had, in substance, been brought to an end.[34]

Acceptance of a Part 36 offer made by one or more but not all defendants

The court's permission is required to accept a Part 36 offer where: 5–10

- an offer is made by one or more but not all defendants (subject to the exceptions set out below);
- a defendant in personal injury claims who has made a Part 36 offer has stated that it is intended to include any deductible amounts, the relevant period has expired and further deductible amounts have been paid to the claimant since the date of the offer;
- an apportionment is required under CPR r.41.3A in proceedings under the Fatal Accidents Act 1976 and Law Reform (Miscellaneous Provisions) Act 1934; or
- a trial is in progress.

Where the court gives permission, unless all the parties have agreed the costs, the court must make an order dealing with costs and may order that the costs consequences set out in CPR r.36.13 (costs consequences of acceptance of a Part 36 offer) apply.[35]

[31] r.36.10.
[32] Practice Direction 36, para.2.
[33] r.36.11(1) and (2).
[34] *Joyce v West Bus Coach Services Ltd* [2012] EWHC 404 (QB), [2012] 3 Costs L.R. 540, Kenneth Parker J.
[35] r.36.11(3) and (4).

5–11 In the case of Part 36 offers made by one or more, but not all, of a number of defendants, if they have been sued jointly or in the alternative, the claimant may accept the offer, if the claimant discontinues the claim against those defendants who have not made the offer, and those defendants give written consent to the acceptance of the offer. If the claimant alleges that the defendants have a several liability, the claimant may accept the offer, and continue with the claims against the other defendants if entitled to do so. In any other case the claimant must apply to the court for an order permitting acceptance of the Part 36 offer.[36]

Acceptance of a Part 36 offer in a split-trial case

5–12 Where there has been a trial but not all the issues in the case have been determined,[37] a Part 36 offer, which relates only to parts of the claim or issues that have already been decided, can no longer be accepted. Subject to that proviso, and unless the parties agree, any other Part 36 offer cannot be accepted earlier than seven clear days after judgment is given or handed down in that trial.[38]

Costs consequences of acceptance of a Part 36 offer

5–13 Subject to the exceptions set out below, 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[39].

Where a defendant's Part 36 offer relates to part only of the claim and the claimant abandons the balance of the claim at the time of serving notice of acceptance within the relevant period, the claimant will only be entitled to the costs of that part of the claim unless the court orders otherwise.[40]

Where a Part 36 offer which was made less than 21 days before the start of the trial is accepted; or, which relates to the whole of the claim and is accepted after expiry of the relevant period; or, subject to the previous paragraph, 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.[41] Where the offer has been accepted after expiry of the relevant period but the parties are unable to agree the liability for costs, the court must, unless it considers it unjust to do so, order that the claimant be awarded costs up to the date on which the relevant period expired and that the offeree pay the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance. In considering whether it would be unjust to make the orders specified, the court must take into account all the circumstances of the case including the matters listed in CPR r.36.17(5) (see

[36] r.36.15(1)–(4).
[37] Within the meaning of r.36.3 (e).
[38] r.36.12 and also see r.36.3.
[39] r.36.13(1).
[40] r.36.13(2).
[41] r.36.13(4).

paragraph 5–15 below, costs consequences following judgment). 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.[42]

Despite the variation in wording between old CPR r.36.10(5) and the new CPR r.36.13(5) and in particular the new reference to whether it is "unjust" to disapply the normal costs consequences, the new Rule has not materially changed the proper approach to be taken by the court when deciding how to deal with costs where there has been a late acceptance of a Part 36 offer. The appropriate test is whether, bearing in mind the factors listed under CPR r.36.17(5), the usual costs rules should be departed from because it would be unjust to apply it in the particular circumstances of the case. In the particular case, the claimant was found to have grossly exaggerated her damages claim and the court ordered that the costs payable by the claimant to the defendant should include the defendant's reasonable costs of collecting the surveillance evidence, even though this had not been included in the defendant's approved budget. The court did not agree with the note at paragraph 3.15.3 of the 2015 White Book, which suggested that some allowance should be made in budgets for surveillance (see **Chapter 4 Q32** for further consideration of this topic).[43]

In a claim for disputed commission, the defendants offered the claimants £25,000 plus their reasonable costs. The claimants did not accept the offer. The claimants ultimately made a Part 36 offer to settle for £18,000. The defendants deliberately accepted it one minute after the expiry of the 21 day relevant period. As a result, the claim settled but the automatic costs consequences under CPR r.36.10(1) (now CPR r.36.13(1)) were avoided. The parties could not agree with costs and the defendants argued that the claimants should have accepted their earlier higher offer which had been made 15 months earlier. The judge found that the defendants had elected to accept the offer rather than reminding the claimants of their earlier offer which had never been withdrawn. A decisive factor was that the value of the claim net of the counterclaim was uncertain because of the defendant's unwillingness to disclose the strengths and weaknesses of their case. It was accordingly not unjust to apply the presumption that the defendant should pay the claimant's costs. The first instance decision was upheld on appeal.[44]

In a clinical negligence action, the claimant accepted the defendant's Part 36 offer eight months after it had expired. The defendants argued that an order that the claimant should be awarded costs until the expiry of the offer and to pay the defendant's costs from that date until the date of acceptance

[42] r.36.13(5) to (7). In a County Court decision by a District Judge, the court ordered a claimant who had exaggerated his claim to pay costs on the indemnity basis. The Court found that the claim would have been resolved by the end of June 2012 had the claimant not exaggerated his claim. Accordingly, the usual costs consequences of previous r.36.10(5) (now r.36.13(5)), did not apply. The claimant was awarded costs on the standard basis up to the 30 June 2012 but was ordered to pay the defendant's costs thereafter on the indemnity basis. The claimant was also ordered to meet the entire costs of gathering the surveillance evidence and the costs of the application. *Worthington v 03918424 Limited* [2015] 16 June, unreported.
[43] *Purser v Hibbs* [2015] EWHC 1792 (QB) HHJ Moloney QC.
[44] *Dutton v Minards* [2015] EWCA Civ. 984, [2015] 6 Costs LR 1047.

would be unjust, since the claimant had failed in relation to the vast majority of his pleaded case, namely causation. The court held that there was nothing unjust in making the normal order under Part 36. The difficulty with the defendant's arguments was that it had the means and opportunity to protect itself in respect of the costs that it was going to have to incur in relation to causation, yet it had chosen, when making its offer, to frame it as a settlement of the whole claim. When its offer was not accepted it had not made any revised offer excluding causation. The court found that the claimant had acted unreasonably in rejecting the offer and pursuing the action to within two weeks of trial. Accordingly, for the period when the claimant had to pay the defendant's costs, the costs would be on the indemnity basis.[45]

Unaccepted offers

Restriction on disclosure of a Part 36 offer

5–14 A Part 36 offer is treated as being "*without prejudice except as to costs*". The fact that such an offer has been made must not be communicated to the trial judge until the case has been decided. This restriction does not apply where:

- the defence of tender before claim has been raised;
- the proceedings have been stayed following the acceptance of a Part 36 offer;
- the offeror and offeree agree in writing that it should not apply; or
- although the case has not been decided, any part of it or issue in it has been decided, and the Part 36 offer relates only to parts or issues which have been decided.

Where a part or issue has been decided, the trial judge may be told whether or not there are Part 36 offers other than those relating to the parts or issues which have been decided, but must not be told any of the terms of the other offers unless any of the above exceptions apply to them.[46]

Costs consequences following judgment

5–15 Save where Section IIIA of Part 45 applies,[47] where, upon judgment being entered, (i) a claimant fails to obtain a judgment more advantageous than the defendant's Part 36 offer, or (ii) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in the claimant's Part 36 offer, the court must, unless it consider it unjust to do so, where (i) applies: order that the defendant is entitled to costs (including any recoverable pre-action costs) from the date on which the relevant period expired, and

[45] *ABC (A Protected Party) v Barts Health NHS Trust* [2016] EWHC 500 (QB); [2016] 2 Costs LR 271, HHJ McKenna.
[46] r.36.16(1)–(4). For cases which led to the revision of this Rule, see *Experience Hendrix LLC v Times Newspapers Ltd* [2008] EWHC 458 (Ch) Warren J; *Beasley v Alexander* [2012] EWHC 2715 (QB) Sir Raymond Jack; *Ted Baker Plc v Axa Insurance UK Plc* [2012] EWHC 1779 (Comm) Eder J.
[47] See r.36.21.

interest on those costs.[48] The provision does not apply to a soft tissue injury claim to which CPR r.36.21 applies.

Where (ii) 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 provision, an additional amount, which may not exceed £75,000, calculated by applying the prescribed percentage set out in the rule to an amount which is:
    (i) the sum awarded to the claimant by the court; or
    (ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs.[49]

The prescribed percentage where the amount awarded by the court is up to £500,000 is 10% of the amount awarded. Where the amount awarded by the court is above £500,000, the prescribed percentage is 10% of the first £500,000 and (subject to the limit of £75,000) 5% of any amount above that figure.[50]

Neither of these consequences apply to a Part 36 offer which has been withdrawn, which has been changed so that its terms are less advantageous to the offeree – where the offeree has beaten the less advantageous offer, or made less than 21 days before trial unless the court has abridged the relevant period.[51]

In considering whether it would be unjust to make the orders referred to above, the court must take into account all the circumstances of the case including:

(a) the terms of any Part 36 offer;
(b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
(c) the information available to the parties at the time when the Part 36 offer was made;
(d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
(e) whether the offer was a genuine attempt to settle the proceedings[52].

[48] In relation to any money claim or any money element of a claim, "more advantageous" means better in money terms by any amount however small and "at least as advantageous" is to be construed accordingly – r.36.17(1)–(3).
[49] r.36.17(3) and (4).
[50] r.36.17(4).
[51] r.36.17(7) and (8).
[52] r.36.17(5).

Where the court awards interest under these provisions and also awards interest on the same sum and for the same period under any other power, the total rate of interest must not exceed 10% above base rate[53].

The correct approach in determining whether a judgment award is more advantageous than a Part 36 offer is:

> *"to ensure that the offer or the Judgment sum is adjusted by eliminating from the comparison the effect of interest that accrues after the date when the relevant offer could have been accepted"*[54].

In a construction dispute, the claimant Jockey Club made a Part 36 offer to settle liability on the basis that the defendant should pay 95% of damages to be assessed. The defendant did not respond to this offer and the claimant amended its particulars of claim to set out the quantified costs of the repairs. The court directed a split trial. The defendant subsequently conceded liability and preliminary liability issues were settled by consent in the claimant's favour. The Club, accordingly, claimed its costs on the indemnity basis as it had beaten its own Part 36 offer. The court held that there was no possibility of contributory negligence so that a decision that the defendant should pay 95% of the damages was not one which was open to the court. It was, however, not necessary for a Part 36 offer to reflect an outcome that would be possible at trial. The court accepted that the claimant's offer was a genuine attempt to settle and whilst the 5% discount was very modest it was not derisory. Accordingly, the offer had to be given effect unless it would be unjust. It would be unjust to order indemnity costs from 21 days after the offer given that the defendant has just learned of a major increase in the claim but the claimant was entitled to costs on the indemnity basis from the earliest date after which the defendant should have been equipped to assess the claim on liability. On the facts this was four months after the offer.[55]

In proceedings where the defendant were in breach of their duty, but the claimant failed on primary causation, the defendants claimed costs, approximately one third of which were incurred in expert's fees on technical tax points which were lost. The defendants relied on their Part 36 offer made prior to trial which had not been accepted by the claimants. The court held that the general principles for determining an order for costs were subject to the operation of CPR Part 36, in particular CPR r.36.17. The starting point was that the defendants had been successful and were entitled to their costs. However, those costs did not reflect success on the issues for which they had been incurred. The defendants were awarded 50% of their costs for the period before the Part 36 offer expired and the whole of their costs from the date of the offer expiring. The offer ought to have been accepted and the trial avoided.[56]

[53] r.36.17(6).
[54] *Purrunsing v A'Court & Co. (a firm)* [2016] EWHC 1528 (Ch), HHJ Pelling QC. See also *Blackman v Entrepose UK* [2004] EWCA Civ 1109.
[55] *Jockey Club Racecourse Limited v Willmott Dixon Construction Limited* [2016] EWHC 167 (TCC), Edwards-Stuart J.
[56] *Altus Group (UK) Limited v Baker Tilly Tax and Advisory Services LLP* [2015] EWHC 411 (Ch) 2015 2 Costs LR 267, HHJ Keyser QC.

Solicitors sued under a non-contentious business, contingency fee agreement and the defendants were ordered to pay the full amount of the claim plus contractual interest. They were further required to pay under CPR r.36.17(4)(d) an additional amount of 10% of the judgment. Three issues arose:

(i) whether an additional amount was payable in respect of the contractual interest award;
(ii) the rate of interest payable on costs incurred prior to judgment; and
(iii) the amount to be paid on account of costs.

The parties agreed that the interest rate prior to judgment was 4% above base rate from the date on which the work was done or the liability for the disbursement was incurred or 9 March 2015 whichever was the later. Payment on account of 80% of the approved costs budget was ordered to be paid. With regard to the additional amount, the sum awarded by way of interest was a contractual entitlement. As such it was part of a "*specific sum*" awarded to the claimant as was thus part of the sum in respect of which the additional amount was to be calculated.[57]

Under CPR Part 36, as it was in force prior to 6 April 2015, costs did not fall to be taken into account in determining whether, for the purposes of CPR r.36.14(1)(b), a judgment against a defendant was at least as advantageous to the claimant as proposals contained in its Part 36 offer. If "*Judgment*" in CPR r.36.14(1) were to include a decision on costs, it would be necessary for the court to undertake the exercise of determining what the incidence and basis of costs would be in the absence of a Part 36 offer. It would first have to exercise its discretion under Part 44 on the basis of all the circumstances of the case before considering the effect of Part 36. Such a potentially elaborate and otiose exercise could not have been intended. The justice of the case indicated that the defendant should pay the claimant's costs from a given date but without the other Part 36 consequences. The claimant's Part 36 offer was, in commercial terms and taking into account its costs consequences, too ambitious. Had it been accepted the defendant would have paid more than it would if the court had given judgment on liability and costs at the date of the expiry of the offer. There was also criticism of the claimant's conduct. On the other hand, the defendant could have protected itself by making a counter-offer which protected its costs position.[58]

In a claim for damages for an accident at work, the defendant accepted liability and made a Part 36 offer for "£18,500 net of CRU and inclusive of interim payments in the sum of £18,500". The defendant also stated that the offer was made "without regard to any liability for recoverable benefits". The claimant obtained judgment for £29,550 made up of £4,000 general damages and the balance for loss of earnings. A CRU certificate was issued for £16,262.

[57] *Bolt Burdon Solicitors v Tariq* [2016] EWHC 1507 (QB); [2016] 4WLR 112 Spencer J.
[58] *Transocean Drilling UK Limited v Providence Resources Plc* [2016] EWHC 2611 (Comm), Popplewell J.

CHAPTER 7

Fixed Costs; Indemnity Costs; Litigants in Person

Background

Part 45 of the Civil Procedure Rules deals with fixed costs and is divided into sections. The topics dealt with are as follows: 7–01

Section I	Fixed Costs in the normally accepted sense, i.e. costs which are payable in a given set of circumstances.
Section II	Road Traffic Accidents—fixed recoverable costs.
Section III	Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents and Low Value Personal Injury (Employers' Liability and Public Liability) Claims.
Section IIIA	Claims Which No Longer Continue Under the RTA and EL/PL Pre-Action Protocols-Fixed Recoverable Costs.
Section IV	Scale Costs for Claims in the IPEC.
Section V	Fixed Costs: HM Revenue & Customs.
Section VI	Fast Track Trial Costs.
Section VII	Costs Limits in Aarhus Convention claims.

Section I

Section I of Part 45 sets out the amounts which are to be allowed in respect of solicitors charges in cases to which it applies unless the court otherwise orders.[1] Any appropriate court fee will be allowed in addition to the costs set out in Section I. The fixed costs provisions apply where the only claim is a claim for a specified sum of money exceeding £25 and certain circumstances apply.[2] Section I also applies where (i) the only claim is a claim where the court gave a fixed date for the hearing when it issued the claim and judgment is given for the delivery of goods, and the value of the claim exceeds £25; (ii) the claim is for the recovery of land, including a possession claim under Part 55, whether or not the claim includes a claim for a sum of money and the defendant gives up possession, pays the amount claimed, if any, and the fixed commencement costs stated in the claim form; (iii) the claim is for the recovery of land, including a possession claim under Part 55, where one of the grounds for possession is arrears of rent, for which the court gave a fixed

[1] r.45.1(1) and see PD 45, paras 1.1–1.3.

[2] The provisions apply where: (i) judgment in default is obtained under r.12.4(1); (ii) judgment on admission is obtained under r.14.4(3); (iii) judgment on admission on part of the claim is obtained under r.14.5(6); (iv) summary judgment is given under Ptart 24; (v) the Court has made an order to strike out a defence under r.3.4(2)(a) as disclosing no reasonable grounds for defending the claim; or (vi) r.45.4 applies (defendant only liable for fixed commencement costs plus the relevant amount set out in Table 2).

date for the hearing when it issued the claim and judgment is given for the possession of land (whether or not the order for possession is suspended on terms) and the defendant:

(a) has neither delivered a defence, or counterclaim, nor otherwise denied liability; or
(b) has delivered a defence which is limited to specifying his proposals for the payment of arrears of rent;

(iv) the claim is a possession claim under Section II of Part 55 (accelerated possession claims of land let on an assured shorthold tenancy) and a possession order is made where the defendant has neither delivered a defence, or counterclaim, nor otherwise denied liability; (v) the claim is a demotion claim under Section III of Part 65 or a demotion claim is made in the same claim form in which a claim for possession is made under Part 55 and that demotion claim is successful; or (vi) a judgment creditor has taken steps under Parts 70 to 73 to enforce a judgment or order.

The provisions of CPR r.45.3 operate to apply the costs fixed by Section I of Part 45 when the defendant is liable only for fixed commencement costs, unless the court otherwise orders. The court refused to exercise its discretion to allow more than the fixed costs, on the particular facts of the case, stating, among other reasons:

". . .this Court has recognised the importance of a summary and prompt procedure to secure enforcement of adjudicators' decisions properly reached".
"A party which makes a 'without prejudice save as to costs' offer is not entitled in some way to have it responded to or to assume that threatened proceedings against it will or might be withheld. It would be different if the without prejudice correspondence had revealed some agreement by which the claimant undertook, at least temporarily, not to issue proceedings . . . It would not be fair to limit a successful claimant which complied with the steps called for in the rule and the [TCC] Guide".

The claimant was justified in issuing proceedings and the Part 24, summary judgment, application following a threatened defence and an unqualified admission on the part of the defendant after issue.[3]

Where the claimant has claimed fixed commencement costs under CPR r.45.2; and judgment is entered in a claim (to which CPR r.45.1(2)(a) or (b) applies) in the circumstances specified in Table 2, the amount to be included in the judgment for the claimant's legal representative's charges is the total of the fixed commencement costs; and the relevant amount shown in Table 2 depending on the particular type of judgment.[4]

[3] *Amber Construction Services Ltd v London Interspace HG Ltd* [2007] EWHC 3042 (TCC); [2008] 5 Costs L.R. 715; [2008] B.L.R. 74, Akenhead J.
[4] r.45.4.

The remainder of Part 45 Section I contains rules covering: the amount of fixed commencement costs in a claim for the recovery of land or a demotion; costs on entry of judgment in a claim for the recovery of land or a demotion claim; miscellaneous fixed costs; and fixed enforcement costs[5].

Section II

Section II of Part 45 sets out the costs allowable in proceedings relating to certain road traffic accidents. The provisions apply to road traffic accident disputes,[6] where the accident giving rise to the dispute occurred on or after 6 October 2003. The fixed costs provisions are intended to meet the case where the parties have been able to agree damages within certain limits but have been unable to agree the amount of costs. The agreed damages include damages in respect of personal injury, damage to property or both. The total value of the agreed damages must not exceed £10,000 or be within the small claims limit.[7] The provisions of this section do not apply where the claimant is a litigant in person, or where Sections III or IIIA of Part 45 apply[8]

Except where an application to exceed the fixed recoverable costs is made the only costs which are to be allowed are fixed recoverable costs calculated in accordance with CPR r.45.11; and disbursements allowed in accordance with CPR r.45.12[9]. CPR r.45.11 sets out how the fixed costs are to be calculated.

The court will only entertain a claim for costs greater than the fixed recoverable costs if it considers that there are exceptional circumstances making it appropriate to do so. Failure to achieve an amount 20% greater than the amount of the fixed recoverable costs, will result in an order that the defendant pay to the claimant the lesser of the fixed recoverable costs; and the assessed costs[10].

Section III

Section III: Pre-Action Protocols for Low Value Personal Injury Claims in Road Traffic Accidents and Low Value Personal Injury (Employers' Liability and Public Liability) Claims is in two distinct parts.

The RTA Protocol Scheme

The provisions of the RTA Protocol apply to a claim for damages exceeding £1,000, but not exceeding £10,000, arising from a road traffic accident occurring on or after 30 April, 2010, and before 31 July 2013, or a claim for damages not exceeding £25,000 arising from a road traffic accident occurring on or after 31 July 2013. Claims which fall within the scope of the scheme must follow the process, although a claimant is entitled to settle directly with an insurer/defendant without using the process. The process may be adopted by 7–02

[5] r 45.5–45.8.
[6] "Road traffic accident", "motor vehicle" and "road" are defined in r.45.9(4).
[7] r.45.9(2), r.26.8(2) sets out how the financial value of a claim is assessed for the purposes of allocation to track.
[8] r.45.9(3).
[9] r 45.10.
[10] r.45.13, 45.14.

agreement for claims arising from an accident prior to the implementation date, but the claimant's solicitor will only be allowed the fixed recoverable costs applicable to the new process.

The rules and practice directions are unusual, in that they relate to work done in accordance with the RTA and EL/PL Protocols, rather than (except in relation to Stage 3) to proceedings in court. The case will no longer continue under the Protocol if there is fraud at any stage, and under Stage 1 if there is no admission of liability or there is an allegation of contributory negligence; under Stage 2 if damages cannot be agreed. Stage 3 applies where quantum cannot be agreed; application is then made to the court to determine the quantum.

The pre-action protocol for low value personal injury claims in road traffic accidents has been amended as from 24 March 2016. Paragraph 1.1(A1)(a) and (b) reads as follows:-

> *"(A1)"Accredited medical expert" means a medical expert who*
> *(a) prepares a fixed cost medical report pursuant to paragraph 7.8A(1) before 1st June 2016 and, on the date that they are instructed, the expert is registered with MedCo as a provider of reports for soft tissue injury claims; or*
> *(b) prepares a fixed cost medical report pursuant to paragraph 7.8A(1) on or after 1st June 2016 and, on the date that they are instructed, the expert is accredited by MedCo to provide reports for soft tissue injury claims;"*

Changes have been made to the RTA Protocol, principally for the purpose of introducing a new regime in respect of the costs allowed for medical reports in claims to which the Protocol applies and which fall within the definition of "soft tissue injury claim" in paragraph 1.1(16A) of the Protocol. A "fixed cost medical report" is defined as a report in a soft tissue injury claim which is from a medical expert who, save in exceptional circumstances:

> *"(a) has not provided treatment to the claimant, (b) is not associated with any person who has provided treatment and (c) does not propose or recommend that they or an associate provide treatment"* (Protocol paragraph 1.1(16A)).

A low value RTA claim proceeding within the protocol did not automatically exit the protocol when the personal injury element of the claim was settled. The protocol was carefully designed to whittle down the disputes between the parties as the case passed through the various stages. CPR r.8.1(3) could not be used to subvert the protocol process. Where a district judge, faced with a claim where the only outstanding issue was the claim for car hire charges, decided that the claim was not suitable to continue under the Stage 3 procedure but should continue under CPR Part 7, the Court of Appeal held that the district judge had not been entitled to make that order. The cost which the district judge's order caused the parties to incur were totally disproportionate to the sum at stake (the amount in dispute being £462).[11]

[11] *Phillips v Willis* [2016] EWCA Civ. 401.

The Pre-action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims

7–03

This protocol deals with low value personal injury employers' liability and public liability claims. An employers' liability claim is a claim by an employee against the employer for damages arising from a bodily injury sustained by the employee in the course of employment, or a disease that the claimant is alleged to have contracted as a consequence of the employer's breach of its duty of care in the course of the employee's employment, other than a physical or psychological injury caused by an accident or other single event. A public liability claim is a claim for damages for personal injuries arising out of a breach of duty of care made against a person other than the claimant's employer, or the claimant's employer in respect of matters arising other than in the course of the claimant's employment, but it does not include a claim for damages arising from a disease that the claimant is alleged to have contracted as a consequence of breach of a duty of care, other than a physical or psychological injury caused by an accident or other single event.[12]

The protocol sets out the behaviour which the court expects of the parties prior to the start of proceedings where a claimant claims damages not exceeding £25,000 in an EL or PL claim.[13] The EL/PL Protocol applies where either the claim arises from an accident occurring on or after 31 July 2013, or in a disease claim no letter of claim has been sent to the defendant before that date. The claim must include damages in respect of personal injury and must not exceed the upper limit of £25,000 on a full liability basis, including pecuniary losses but excluding interest. The claim must not be one in which the small claims track would be the normal track (i.e. the claim must be for more than £1,000). The protocol ceases to apply to a claim where at any stage the claimant notifies the defendant that the claim has now been re-valued at more than the upper limit.[14] The protocol does not apply to a claim:

(i) where the claimant or defendant acts as personal representative of a deceased person;
(ii) where the claimant or defendant is a protected party[15];
(iii) in a public liability claim—the defendant is an individual;
(iv) where the claimant is bankrupt;
(v) where the defendant is insolvent and there is no identifiable insurer;
(vi) in the case of a disease claim, where there is more than one employer defendant;
(vii) for personal injury arising from an accident or alleged breach of duty occurring outside England and Wales;

[12] EL/PL Protocol 1.1.
[13] EL/PL Protocol 2.1. The Civil Procedure Rules 1998 enable the court to impose costs sanctions where this Protocol is not followed.
[14] EL/PL Protocol 4.-4.2.
[15] As defined in r.21.1(2).

(viii) for damages in relation to harm, abuse or neglect of or by children or vulnerable adults;
(ix) which includes a claim for clinical negligence;
(x) for mesothelioma; or
(xi) for damages arising out of a road traffic accident.

The fixed costs in CPR r.45.18 apply in relation to a claimant only where a claimant has a legal representative.[16]

The Protocol procedure for both RTA and EL/PL is highly prescriptive and any further commentary would in effect be a mere repetition of the rules.

Section IIIA

7–04 With effect from 31 July 2013, Section IIIA applies where a claim is started under either the RTA or EL/PL Protocol, but no longer continues under the relevant protocol or the stage 3 procedure. This section does not apply to a disease claim which is started under the EL/PL Protocol.[17]

The Court of Appeal has decided the question whether a disposal hearing, listed for the quantification of damages payable after judgment under CPR r.26 PD12.2(1)(a) is or is not a trial within the meaning of CPR r.45.29E(4)(c). The issue turned on the special definition of "*trial*" for the purposes of EL/PL Protocol cases in CPR r.45.29E(4)(c). An identical definition applies in cases started under the RTA Protocol. Many EL/PL Protocol cases are dealt with at disposal hearings and if such a hearing constitutes listing for trial, the fixed costs recoverable are at a higher rate than would otherwise be the case where there is a settlement between the date of listing and the date fixed for the disposal hearing.

Lord Justice Briggs, who gave the leading judgment, stated:

> *"6. The issue with which this appeal is concerned is not fact sensitive. It is common ground that whenever an EL/PL Protocol case is listed for a disposal hearing after Judgment for damages to be assessed, under Part 26 PD12.2(1)(a), and is then settled before the date listed for that disposal hearing, then either the first or the third column in Table 6D Part B must be applicable so as to determine the fixed costs. The second column will not be applicable, since there will not have been a 'date of allocation under Part 26', because listing for disposal is an alternative to allocation to a track. . ."*

In the particular case, a customer visiting a garage was injured when a spanner was dropped on his hand. The claimant's solicitors entered his claim through the portal in September 2013. The defendant garage did not respond and the claim was withdrawn from the portal in October. Liability was, however, admitted in correspondence in November by the defendant's insurers. Although

[16] EL/PL Protocol 4.3, 4.4.
[17] r.45.29A. Nothing in Section IIIA prevents the Court from making an order under r.45.24 (Failure to comply or electing not to continue with the relevant Protocol-costs consequences).

medical evidence and details of special damages were submitted to the insurer, nothing was agreed and proceedings were issued in April 2014. The defendant failed to acknowledge service and default judgment was obtained in May 2014. The case was transferred from the County Court Money Claims Centre to the County Court at Birkenhead for assessment of damages. The matter was listed for a disposal hearing in September 2014.

The case then settled and a Tomlin Order was filed with the Court in July 2014, recording the terms of settlement. There was no agreement as to costs and the claimant's bill was provisionally assessed by the District Judge in December 2014. The defendant requested an oral review confined to the issue of which column, within Table 6D Part B, applied.

Having rehearsed the arguments, Briggs LJ stated:

> *"12. In my judgement, listing a case for a disposal hearing following Judgment pursuant to Part 26 PD12, is listing for trial, for the purposes of triggering column 3 in Table 6D Part B where a case which originated in the EL/PL Protocol settled after listing. My reasons follow.*
> *"13. First listing a case for "disposal" means exactly what it says. The purpose of doing so is, so far as possible, finally to dispose of the case at first instance. A default or other judgment for damages to be assessed leaves that assessment outstanding, as the last stage in the final disposal of the proceedings. For that purpose, it matters not whether the judgment has been obtained by default (as here) or on an application for summary judgment on liability, judgment on admissions, or after a liability only trial: see generally Part 26 PD12(2)."*
> *14. The fact that it may be impossible to tell, prior to the disposal hearing itself, whether it will prove to be final in that sense, or merely the occasion for giving Directions, cannot be conclusive against listing of a disposal hearing triggering column 3 of Table 6D Part B because that table is concerned with settlement prior to trial. If the possibility of a disposal hearing being used for the giving only of Directions were to be admitted, then it is hard to see how listing could ever be a trigger for the application of column 3 following a settlement. Even the hearing date of a full trial may turn into a hearing for Directions if it proves impossible or unjust to do otherwise than permit an adjournment.*
> *15. Secondly, the fact that a disposal hearing might prove to be uncontested is, again, neither here nor there. It is common ground that, even after a Judgment in default, the Defendant may attend and oppose the Claimant's case as to quantification of damages at the disposal hearing. Again, if the possibility that such a hearing might prove to be uncontested were sufficient to prevent its listing being a trigger for the application of column 3, then that possibility exists at all kinds of final hearing, including traditional trials.*
> *16. Thirdly, as DJ Campbell emphasised, listing for a disposal hearing is the trigger for the Claimant (and any other party which wishes to take an active part at that hearing) to prepare and serve the requisite evidence. . .*
> *17. Fourthly, there is a useful pre-history to the formulation 'final contested hearing' in Part 45.29E(4)(c). Part 45.15 deals with the success fee percentages*

applicable in road traffic accident claims. By Part 45.15(6)(b), as it was before April 2013, a reference to 'trial' was a reference to the final contested hearing. This rule was introduced in 2004. Lamont v Burton [2007] 1 WLR 2814 was about a road traffic accident claim which had concluded at a disposal hearing. It was taken for granted in this court (rather than determined after argument) that the disposal hearing had been a trial for the purposes of Part 45.15. I consider it very likely that, when it adopted the same definition of trial in 2013 for the purposes of fixed costs in the EL / PL Protocol cases, the Rule Committee had the analysis in Lamont v Burton well in mind."

The appeal was dismissed[18].

The Court of Appeal has considered, in respect of claims started under the RTA protocol, whether the fixed costs regime continues to apply to a case which no longer continues under the RTA protocol but is allocated to the multi-track after being issued under Part 7. Lord Justice Briggs gave the leading judgment. He pointed out that the court was required not merely to interpret the relevant provisions of Section IIIA of CPR Part 45 together with the relevant provisions of the RTA protocol but also to consider whether they suffer from an obvious drafting mistake which could be put right so as to bring them into compatibility with the intention of the Civil Procedure Rule Committee. The EL/PL protocol has a very similar fixed costs regime and although the appeals before the court concern cases within the RTA protocol, it is expected that their outcome will affect the interpretation and application of the similar and overlapping provisions in Part 45 about the EL/PL protocol. The judge reviewed the provisions of the fixed costs regime including Table 6B. Briggs LJ stated:

> *"14. . . . The formulation of the detailed tabular provisions for the recovery of fixed costs in relation to claims started but no longer continuing under the relevant protocols was developed upon an assumption that, if Part 7 proceedings were issued, they would in due course be allocated to the fast track, if not determined at a disposal hearing following judgment for damages to be assessed . . .*
>
> *15. . . . claims for an amount for more than £25,000, or claims likely to require a trial lasting longer than one day or the deployment of multiple expert witnesses, are normally allocated to the multi-track. Plainly, they involve the expenditure of costs on a scale which will be higher, and often much higher, than the requisite for the determination of claims in the fast track . . ."*

Briggs LJ gave three examples of cases likely to be allocated to the multi-track rather than the fast-track:

(i) Where a claim originally thought to be worth no more than £25,000 is revalued at a substantially higher level;

[18] *Bird v Acorn Group Limited* [2016] EWCA Civ 1096.

(ii) Because of the exclusion of vehicle related damages from the valuation of a claim for the application of the RTA Protocol, where the aggregate of the non-vehicle related damages is below £25,000 but the claim then ceases to continue within the Portal because liability is in issue, the Part 7 claim may then be well in excess of £25,000;

(iii) Where a claim is properly started in the RTA protocol but is met by an allegation that the claim has been dishonestly fabricated. Such proceedings are inherently likely to be pursued and defended on the basis that no stone is left unturned and therefore at very substantial cost.

There is a problem because there is nothing in Part 45.29 which expressly limits the fixed costs regime applicable to cases started but no longer continuing under the relevant protocol to fast track cases, or which excludes the fixed costs regime when a case is allocated to the multi-track. CPR r.45.29J provides for relief in exceptional circumstances, but only by permitting the court to conduct an immediate summary assessment or make an order for detailed assessment neither of which appear apposite at the case management stage when allocation takes place. CPR r.45.29J appears to offer a measure of relief only at the end of a trial or other resolution of the proceedings.

In *Qader*, the judges at first instance and on appeal were persuaded that Part 45.29 clearly provided that fixed costs should apply notwithstanding allocation to the multi-track. In the conjoined appeal of *Khan v McGee*, the District Judge allocated the case to the multi-track but took the view that this disapplied the fixed costs regime and directed filing of costs budgets and adjourned the case to a CCMC. Briggs LJ concluded:

> *"35. After more hesitation than my Lords I have come to the conclusion that section IIIA of Part 45 should be read as if the fixed costs regime which it prescribes for cases which start within the RTA protocol but then no longer continue under it is automatically disapplied in any case allocated to the multi-track, without the requirement for the claimant to have recourse to Part 45.29J, by demonstrating exceptional circumstances. . . .".*

Briggs LJ then set out his reasoning at some length and went into the history of the making of the fixed costs scheme continuing:

> *"54. In the present case the Rule Committee's apparent failure to implement the continuing intention of the Government, in response to stakeholder concerns, to exclude multi-track cases from the fixed costs regime being enacted for cases leaving the RTA and EL/PL protocols seems to me to satisfy all three of Lord Nicholls' preconditions [see Inco Europe Limited v. First Choice Distribution[19]]. The intended purpose of the fixed costs regime in this context was that it should apply as widely as possible (and therefore to cases allocated to the fast track, and to cases sent for quantification of*

[19] [2000] 1 WLR 586 at 592.

damages at disposal hearings), but not to cases where there had been a judicial determination that they should continue in the multi-track. The intended restriction on the ambit of the fixed costs regime is clear, and the only reason for that restriction not being enacted in section 3A of Part 45 appears to be inadvertence, rather than a deliberate decision by the rule committee to take a different course . . .

. . .

56. The best way to give effect to that intention seems to me to add this phrase to Part 45.29B, after the reference to 45.29J:
". . . and for so long as the claim is not allocated to the multi-track . . .""[20]

The wording has been corrected, as recommended by Briggs LJ, by the Civil Procedure (Amendment) Rules 2017 paragraph 8.[21]

In respect of applications for pre-action disclosure (PAD) in claims which started but no longer continue under the EL/PL Protocol the Court of Appeal had to decide whether the fixed costs regime under Section IIIA of Part 45 applied to such application. Part 46, Section 1 makes specific provision (distinct from the general rules about costs) for the costs of PAD applications both in the High Court and the County Court departing from the ordinary general rule under CPR r.44.2, namely: that the unsuccessful party pays. Lord Justice Briggs, who again gave the leading judgment stated:

"30. In my judgment the fixed costs regime plainly applies to the costs of a PAD application made by a claimant who is pursuing a claim for damages for personal injuries which began with the issue of a CNF in the portal pursuant to the EL/PL Protocol but which at the time of the PAD application, is no longer continuing under that protocol . . .
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.
32. That conclusion is, in my view, expressly prescribed by the clear words of Part 45.29A(1) and 45.29D. In particular, paragraph D provides that the fixed costs and disbursements prescribed by the regime (in paragraph 29E and I respectively) are "the only costs allowed". Although this is subject to paragraphs F, H and J they are each part of the fixed costs regime, even though they permit different or enlarged recovery in certain precisely defined circumstances.

[20] *Qader v Esure Services Limited and Khan v. McGee* [2016] EWCA Civ 1109.
[21] SI 2017/95.

. . .

35. For those reasons it seems to me entirely apposite for a PAD application to fall within the description of interim applications in Part 45.29H, as being "an interim application . . . in a case to which this section applies. . . ."

It had become apparent during the submissions that insurance backed defendants were frequently failing in their protocol disclosure obligations, unless a PAD application was made. Counsel for the appellant argued that including the costs of such applications within the fixed costs regime would largely deprive such applications of their value as a spur to proper compliance. In respect of this submission, Briggs LJ stated:

"39. But in my judgment the answer to this submission lies not in subjecting the fixed costs regime to an implied exemption for PAD applications which exposed recalcitrant defendants to an altogether higher but variable level of recoverable costs liability, to be determined by assessment. Rather the answer lies in the availability of an application under Part 45.29J, if exceptional circumstances can be shown or, for the future, in recognition by the Rule Committee that the fixed costs regime needs to be kept under review, and defects in it remedied by adjustment of the fixed allowances where they can be shown to be justified."[22]

The remainder of Part 45 IIIA deals, among other things, with: the application of fixed costs and disbursements – RTA Protocol; the amount of fixed costs – RTA Protocol; the application of fixed costs and disbursements – EL/PL Protocol; and the amount of fixed costs – EL/PL Protocol[23]. The Part also deals with: disbursements; claims for an amount of costs exceeding fixed recoverable costs; and failure to achieve costs greater than fixed recoverable costs. 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. Failure to achieve an amount 20% greater than the amount of the fixed recoverable costs, will result in an order for the party who made the claim to be paid the lesser of the fixed recoverable costs; and the assessed costs[24].

An RTA claim proceeding under CPR Part 45 IIIA was listed for trial and on the day the parties were granted further time for negotiation and the matter settled, the claimant being awarded damages and costs. A recorder refused to award the fixed trial advocacy fee on the basis that the case had settled before the final contested hearing had commenced. On appeal, Coulson J. held that the case had not settled prior to the date of trial and the costs should have been dealt with under Section C of Table 6B. It did not strain the language of the rule to conclude that the case was disposed of at trial albeit by way of settlement rather than judgment. There were sound policy reasons for concluding that

[22] *Sharp v Leeds City Council* [2017] EWCA Civ. 33.
[23] r 45.29–45.29E.
[24] r.45.29I-45.29K.