Neutral Citation Number: [2022] EWCA CIV 927

Case No: CA-2021-000557 (formerly A2/2021/0729)

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE COUNTY COURT AT SHEFFIELD**
**(HER HONOUR JUDGE INGRAM)**
**(DY5YJ992)**
**ON APPEAL FROM THE COUNTY COURT AT DONCASTR**
**(DISTRICT JUDGE ROGERS)**
**(DY5YJ992)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 July 2022

**Before:**
**LORD JUSTICE BAKER**
**LORD JUSTICE PHILLIPS**
and
**LORD JUSTICE EDIS**

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**Between:**

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| **ALLAN JOHN DOYLE** | **Claimant/ Respondent** |
| **- and -** | |
| **M&D FOUNDATIONS & BUILDING SERVICES LIMITED** | **Defendant/ Appellant** |

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**Kevin Latham** (instructed by **Atherton Godfrey LLP**) for the **Claimant/Respondent**
**Roger Mallalieu QC** (instructed by **DWF Law LLP**)
for the **Defendant/Appellant**

Hearing date: 22 March 2022
Further written submissions: 24 and 28 March 2022

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# Approved Judgment

This judgment was handed down remotely at 10.30 am on 8 July 2022 by circulation to the parties or their representatives by email and by release to the National Archives.

## Lord Justice Phillips:

1. By a consent order dated 18 July 2018 ("the Order") the appellant was ordered to pay the respondent damages of £5,000 in respect of an injury the respondent had suffered during the course of his employment by the appellant. The Order further provided that the appellant was to pay the respondent's costs, "such costs to be the subject of detailed assessment if not agreed". This appeal concerns the proper interpretation of that provision.

2. The respondent lodged a bill of costs for detailed assessment on the standard basis, citing the terms of the Order. The appellant disputed that approach, contending that, as an ex-protocol low-value personal injury (employers' liability or public liability) claim (an "ex-Protocol claim"), the case fell within the fixed recoverable costs regime set out in section IIIA of CPR Part 45 and that the reference to detailed assessment, interpreted in that context, referred to the process of determining the amount of such fixed costs and disbursements (to the extent there was any disagreement).

3. District Judge Rogers rejected the appellant's contention, upholding (following an oral hearing) his provisional decision on the papers that the fixed costs regime did not apply because the parties had contracted out of it, as reflected in the express terms of the Order. On 13 May 2019 he assessed the bill of costs at £14,467.44, with interest to be agreed. On 10 February 2021 Her Honour Judge Ingram ("the Judge") dismissed the appellant's appeal against that decision.

4. The appellant brings this second appeal with permission granted by Stuart-Smith LJ.

## The facts

5. The respondent was injured on 12 May 2014 whilst working on a construction site in the course of his employment by the appellant. Details of the accident and of the injury suffered are not relevant to this appeal.

6. As the accident occurred after 31 July 2013 and gave rise to a claim for damages for personal injury said to be worth less than £25,000 (but above the small claims track limit), the claim was within the scope of the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ("the Protocol"). The respondent commenced a claim under the Protocol on 25 November 2016 by sending a Claim Notification Form ("CNF") to the appellant. The appellant did not send a CNF response to the respondent (but disputed liability), with the result that the Protocol ceased to apply to the claim.

7. These proceedings were commenced by the appellant on 16 May 2017 and the respondent filed a defence on 6 October 2017. The case was thereafter allocated to the fast track and the matter was listed for trial on 19 July 2018.

8. On 16 July 2018 the parties engaged in without prejudice negotiations to compromise the claim. In that context, the appellant, through its solicitors, made a Part 36 offer of £5,000 (taking into account a 30% deduction for contributory negligence) in full and final settlement of the claim.

9. The respondent's solicitors did not return the Notice of Acceptance of that offer, but instead wrote back the same day, stating as follows:

> "We confirm that the [respondent] is willing to agree quantum, on the basis that this is after and reflects the agreed apportionment on liability, at £5,000 though, for the avoidance of doubt and the reasons which follow, our client is not hereby accepting the [appellant's] Part 36 offer.
>
> The [appellant's] Part 36 offer has been made at a very late stage and well within the 21 day period referred to in Part 36.13(4). In these circumstances we consider an Order is required to finalise matters and enclose an Order, accordingly, for you to endorse with consent…."

10. The draft order contained the provision as to costs referred to in paragraph 1 above. The appellant's solicitors made inconsequential manuscript amendments to the heading of and recital to the draft order and signed the revised version, returning it to the respondent's solicitors on 16 July 2018 "for your consideration".

11. The respondent's solicitors duly signed the draft as revised and filed it at Court, resulting in the production of the Order.

**The relevant rules**

12. It was common ground that the Order (and the agreement it reflected) is to be interpreted in the context of the relevant provision of the Civil Procedure Rules 1998 ("the rules") relating to costs and, in particular, those relating to detailed assessment and to fixed costs in ex-Protocol claim cases. The respondent contends, as explained below, that the rules relating to Part 36 offers to settle are also relevant.

*General rules about costs: CPR Part 44*

13. After setting out the court's discretion as to payment, amount and timing of costs in rule 44.2, the rules make the following provisions as to the assessment of costs so ordered:

    i) Rule 44.3 provides that assessment will be on the standard basis or the indemnity basis. However, rule 44.3(4)(a) provides:

    > "Where:
    >
    > a) the court makes an order about costs without indicating the basis on which the costs are to be assessed; or
    >
    > b) makes an order for assessment on a basis other than the standard basis or the indemnity basis),
    >
    > the costs will be assessed on the standard basis."

    ii) Rule 44.6 provides:

> "(1) Where the court orders a party to pay costs to another party (other than fixed costs), it may either –
>
> a) make a summary assessment of the costs; or
>
> b) order detailed assessment of the cost by a costs officer,
>
> unless any rule practice direction or enactment provides otherwise…
>
> (2) A party may recover the fixed costs specified in Part 45 in accordance with that Part."

14. Rule 44.1 defines "detailed assessment" as the procedure by which the amount of costs is decided by a costs officer in accordance with Part 47.

*Ex-Protocol Fixed Recoverable Costs: Section IIIA of CPR Part 45*

15. Rule 45.29D provides for fixed costs in ex-Protocol cases in the following terms:

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

16. Rule 45.29E sets out the fixed costs recoverable in tabular form, determined by the stage at which the claim is settled or disposed of and the amount of the damages agreed or awarded. Rule 45.29F provides for costs orders in favour of the defendant, rule 45.29H provides for costs of interim applications and rule 45.29I provides that claims for specified disbursements may be allowed.

17. Rule 45.29J deals with claims for costs exceeding the fixed recoverable costs provided for in rule 45.29E as follows:

> "(1) If it considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred to in rules 45.29B to 45.29H.
>
> (2) If the court considers such a claim to be appropriate, it may—
>
> (a) summarily assess the costs; or
>
> (b) make an order for the costs to be subject to detailed assessment.
>
> (3) If the court does not consider the claim to be appropriate, it will make an order—

> (a) if the claim is made by the claimant, for the fixed recoverable costs; or
>
> (b) if the claim is made by the defendant, for a sum which has regard to, but which does not exceed the fixed recoverable costs,
>
> and any permitted disbursements only."

18. Even if the court does decide to assess costs under rule 45.29J(2) rather than simply awarding fixed costs, rule 45.29K provides that costs will still be limited to the amount of fixed costs if the assessed costs do not exceed fixed recoverable costs by 20%.

19. The rules do not make provision for the parties to contract out of the fixed costs regime, but it is recognised that there is no bar on them doing so: see *Solomon v Cromwell Group plc* [2011] EWCA Civ 1584, [2012] 1 WLR 1048 per Moore-Bick LJ at [22], cited in *Adelekun v Ho* [2019] EWCA Civ 1988, [2019] Costs LR 1963 by Newey LJ at [11].

*Detailed assessment: CPR Part 47*

20. Rule 47.6(1) provides that detailed assessment proceedings are commenced by the receiving party serving on the paying party (a) a notice of commencement in the relevant practice form; (b) a copy or copies of the bill of costs, as required by Practice Direction 47; and (c) if required by Practice Direction 47, a breakdown of the costs claimed for each phase of the proceedings.

21. Rule 47.9 provides for the paying party to dispute any time in the bill of costs by serving points of dispute. If the paying party does so, rule 47.14 sets out the procedures for convening a detailed assessment hearing.

*Offers to settle: CPR Part 36*

22. Part 36.13(1) sets out the basic provision in relation to the costs consequence of accepting a Part 36 offer within the relevant period as follows:

> "Subject to …. rule 36.20, where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings (including their recoverable pre-action costs) up to the date on which the notice of acceptance was served on the offeror.
>
> (Rule 36.20 makes provision for the costs consequences of accepting a Part 36 offer in certain personal injury claims where the claim no longer proceeds under the RTA or EL/PL Protocol.)"

23. Rule 36.13(3) provides that, except where the recoverable costs are fixed by the rules (referencing Part 45), such costs are to be assessed on the standard basis.

24. Rule 36.20(2) provides, in relation to specified claims (including Ex-Protocol claims) as follows:

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

## The relevant legal principles

*Interpretation*

25. The approach to interpreting a court order was summarised in *Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd* [2017] EWCA Civ 1525 by Flaux LJ (with whom Gross and Lewison LJJ agreed), drawing in particular on the judgment of Lord Clarke of Stone-cum-Ebony JSC in the Supreme Court in *JSC BTA Bank v Ablyazov (No. 10)* [2015] 1WLR 4754. Whilst Flaux LJ was considering the interpretation of an injunction, the following general approach to court orders was identified at [41(3)]:

> "The words of the Order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context and with regard to the object of the Order."

26. Flaux LJ emphasised at [42] that there was a consistent line of authority to the effect that court orders are to be construed objectively and in the context in which they are made, a point that was made clearly by Lord Sumption giving the judgment of the Privy Council in *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6 at [13] as follows:

> "…the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve."

27. In the present case, where the Order was by consent and so made administratively by the court, there was no judgment to assist in construing it. The immediate context of the Order was that it embodied an agreement between the parties, the terms of which had been finalised via a travelling draft between the respective solicitors. For that reason, and because the central question in construing costs provisions in the Order is whether the parties had contracted out of the fixed costs regime, the real question is the true interpretation of the parties' agreement.

28. In that regard, there was no dispute between the parties that the principles applicable to interpretation of contractual provisions were summarised by Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 as follows:

> "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It

has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning…

11.. Interpretation is…a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause…and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest… Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated…To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose

> of similar provisions in contracts of the same type. The iterative process…assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

29. As the contract in this case was a compromise agreement and the product of negotiation between solicitors as to the terms with a view to being embodied in a court order, it is instructive to recollect the way in which certain of the principles reflected in Lord Hodge's summary above were framed in earlier decisions. First, Lord Hoffman's exposition of the principles applicable in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 at 913B-E included the following:

> "The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax…
>
> …. The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera S.A. v. Salen Rederierna A.B.* 19851 A.C. 191, 201:
>
> ". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."'"

30. Second, both parties identified that certain of the factors emphasised by Lord Neuberger of Abottsbury PSC in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 are particularly pertinent:

> "17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook* [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case,

> the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.
>
> 18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it….
>
> …..
>
> 20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

*The nature of the fixed costs regime*

31. This Court first considered the nature of the fixed costs regime and its interplay with the more general costs provisions in the rules in *Solomon*. That case concerned road traffic accident claims where Part 36 offers of less than £10,000 had been accepted. Although the claims fell within the pre-2013 fixed costs regime set out in (what was then) section II of Part 45, the consequence of the acceptance of a Part 36 offer was, at that time (pursuant to rule 36.10(1)(3)), stated to be that the claimants were entitled to their costs up to the date of acceptance to be assessed on the standard basis. The position has now been corrected by the introduction of rule 36.20, dealing specifically with the costs consequences of acceptance of a Part 36 offer in ex-Protocol cases. But in *Solomon* this Court was confronted by an apparent conflict between the fixed costs regime and the wording of rule 36.10, which did not provide for costs on that fixed basis.

32. Moore-Bick LJ (with whom Aikens and Pill LJJ agreed) explained why the provisions could not be reconciled at [19]:

> "Section II of Part 45 is intended to provide a consistent outcome that is fair across a broad range of cases and obviously does not necessarily lead to an outcome in every individual case equivalent to that which would result from a detailed assessment on the standard basis. I think it is inescapable, therefore, that there is a degree of conflict between rule 36.10(3) and the fixed costs regime for which it provides.

> Although I accept that that regime does involve an assessment of some kind (particularly in relation to disbursement and cases where the court is satisfied that exceptional circumstances exist), I do not think that one can properly regard it as representing an assessment on the standard basis in those case to which it applies)."

33. Moore-Bick LJ concluded at [20] that, despite the wording of rule 36.10(3), Part 45 should govern cases to which it applies, including as to the cost which followed from accepting a Part 36 offer.

34. As referred to above, at [22] Moore-Bick LJ stated that there is nothing in the rules that prevented parties settling a dispute on any terms they please, including as to costs. However, he did not consider that the Part 36 offers in question, even when referring to costs being payable pursuant to rule 36.10, could be read as anything more than an offer to pay costs on the usual basis, namely, fixed costs under Part 45.

35. In *Broadhurst v Tan* [2016] EWCA Civ 94, [2016] 1 WLR 1928 this Court determined that, where a claimant in an ex-Protocol case obtained judgment at least as advantageous as a Part 36 offer they had made, the claimant was entitled to indemnity costs (rather than fixed costs) from the relevant period after the offer expired because rule 36.17(4) (which applies specifically in that situation) trumps the general fixed costs provision in Part 45. Lord Dyson MR rejected an argument that fixed costs are to be equated with indemnity costs as follows at [30]:

> "The starting point is that fixed costs and assessed costs are conceptually different. Fixed costs are awarded whether or not they were incurred, and whether or not they represent reasonable or proportionate compensation for the effort actually expended. On the other hand, assessed costs reflect the work actually done. The court examines whether the costs were incurred, and then asks whether they were incurred reasonably and (on the standard basis) proportionately. This conceptual difference was accepted in the *Solomon* case…"

36. In *Sharp v Leeds City Council* [2017] EWCA Civ 33, [2017] 4 WLR 98 a claimant in an ex-Protocol claim sought standard basis costs of an application for pre-action disclosure, contending that the fixed costs regime did not apply to such an application. Briggs LJ (with whom Irwin and Jackson LJJ agreed) rejected the argument, holding at [14] that section IIIA of Part 45 provides almost as comprehensively for fixed recoverable costs in relation to ex-Protocol claims as section III provides for cases remaining within the Protocol. At [31] Brigg LJ further explained:

> "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."

37. Another issue relating to fixed costs under Part 45 in the context Part 36 offers arose in *Hislop v Perde* [2018] EWCA Civ 1726, [2019] 1 WLR 201, this time in cases where Part 36 offers had been accepted out of time. This Court allowed appeals against decisions to award the costs incurred after the offer should have been accepted on the standard basis. Coulson LJ (with whom King and Longmore LJJ agreed) held at [42] that the situation was different to that described in *Broadhurst v Tan* and very similar to that explained in *Solomon's* case. Rule 36.20 makes it plain that it is the only rule which applies in relation to the acceptance of Part 36 offers in fixed costs cases, preserving no part of rule 36.13. As rule 36.20 provides only for fixed costs, that would apply in cases of late acceptance of an offer, unless the late acceptance amounted to an exceptional circumstance. Coulson LJ considered at [50] that such interpretation preserves the autonomy of Part 45, further stating that:

> "If a case begins under the fixed costs regime then it should only be in exceptional circumstances that the parties are able to escape it. The whole point of the regime is to ensure that both sides begin and end the proceedings with the expectation that fixed costs is all that will be recoverable. The regime provides certainty. It also ensures that in low value claims, the costs which are incurred are proportionate…"

38. Most recently, in *Adelekun*, this Court construed the very same wording as in issue in this case, an accepted Part 36 offer to settle an ex-Protocol case offering to pay costs in accordance with Part 36.13, such costs to be "subject to detailed assessment if not agreed". In holding that the offer was not one to pay costs outside the fixed costs regime and that Part 45 therefore applied, Newey LJ (with whom Sir Geoffrey Vos C and Males LJ agreed) first dismissed certain arguments based on the provisions of Part 36, then continued:

> "30. A third point arises from the fact that it is abundantly clear…that the appellant was intending to make an offer to which CPR Part 36 applied. That is evident both from the reference to CPR 36.13 and from the overall description of "Part 36 Offer Letter". Yet the letter will not, I think, have contained a Part 36 offer if it proposed anything other than the fixed costs regime. The "self-contained procedural code" for which Part 36 provides makes it plain that the fixed costs regime found in Part 45 is to apply "where … a claim no longer continues under the RTA … Protocol pursuant to rule 45.29A(1)": see CPR 36.20 (1) and also the passages from CPR 36.13 quoted in the previous paragraph of this judgment. If, therefore, a party to a claim that no longer continues under the RTA Protocol offers to pay costs on a basis that departs from Part 45, the offer will be incompatible with Part 36 and cannot be an offer under that Part…
>
> 31. Fourthly, while the 19 April letter's reference to "detailed assessment" was far from ideal if the appellant intended the fixed costs regime to apply, it was not wholly inapposite. "Assessed costs" in the sense of costs assessed item by item by reference to work actually done

> are, as Lord Dyson MR said in *Broadhurst v Tan*, conceptually different from fixed costs, and such "assessment" as the fixed costs regime may call for is not to be equated with an assessment on the standard basis (see the quotation from Moore-Bick LJ's judgment in the *Solomon* case set out in paragraph 20 above). As, however, Moore-Bick LJ also noted, the fixed costs regime "does involve an assessment of some kind (particularly in relation to disbursements and cases where the court is satisfied that exceptional circumstances exist)". I do not think, therefore, that reference to "detailed assessment" should be taken to imply an intention to displace the fixed costs regime where there are other indications that that was not intended.
>
> 32. Fifthly, it is inherently improbable, as a reasonable recipient of [the offer letter] should have appreciated, that the appellant intended to offer conventional rather than fixed costs. The fixed costs regime could be expected to be considerably more favourable to the appellant than conventional costs and, on the face of it, the appellant would be vulnerable to the latter as regards costs to date only if a Court were persuaded that there were "exceptional circumstances" warranting an award of extra costs under CPR 45.29J or that there should be a direction disapplying the fixed costs regime retrospectively under CPR 46.13 following re-allocation to the multi-track pursuant to CPR 26.10. None of this was obviously inevitable and it is improbable that the appellant would have been willing to concede the higher costs in her offer."

39. In his concurring judgment, Males LJ made the following observation at [43]:

> "…Mr Mallalieu [in that case arguing for standard basis costs] advanced a powerful argument that assessed costs and fixed costs are "conceptually different" (see *Broadhurst v Tan…*), so that the words "costs to be subject to detailed assessment if not agreed" in the offer letter indicated an intention to depart from the fixed costs regime. In the end I have concluded, in agreement with Newey LJ, that taking the letter as a whole those words are not sufficiently clear to demonstrate such an intention and are outweighed by other considerations. It is unfortunate, however, that it has taken a trip to the Court of Appeal for this to be determined. If parties wish to settle on terms that fixed costs will be payable if an offer is accepted, it is easy enough to say so and thereby to avoid any scope for argument.

## The appellant's contentions

40. The appellant's case rested on two central arguments. The first was that the use of the term "subject to detailed assessment" in the Order did not, or did not necessarily, indicate that the costs were to be assessed on the standard basis, particularly as the Order could have specified standard basis costs but did not do so. The appellant contended that the term "detailed assessment" was also apt to refer to the process of assessing the amount of fixed costs and, in particular, the quantum of disbursements,

there being no other provision in the rules for the determination of the amount payable in the event of disagreement.

41. In that regard, the appellant placed heavy reliance on the fact that this court in *Adelekun* construed the very same phrase, in a Part 36 offer, as "not referring to conventional costs rather than fixed costs", with the result that the parties had not contracted out of the fixed costs regime. The appellant stressed that part of Newey LJ's reasoning was that, as remarked upon by Moore-Bick LJ in *Solomon*, the fixed costs regime "does involve an assessment of some kind".

42. Accordingly Mr Mallalieu QC, for the appellant, disavowed any argument that something had "gone wrong" with the language of the Order (as per Lord Hoffmann in *ICS v West Bromwich*). He accepted that the parties had intended to provide for a detailed assessment (absent agreement), the only question being whether, in the context, such assessment should be read as relating to standard costs or of fixed costs (including disbursements).

43. Building on that, the appellant's second argument was that, in the context of an ex-Protocol claim where there was no realistic prospect of bringing the case within one of the specified exceptions to the costs being fixed, the parties (acting through solicitors with expertise in this type of litigation) must be taken to have intended that the costs to be assessed would be fixed costs (consistently with the clear expectation identified in *Hislop*). In particular (and as recognised in *Adelekun*), it was inherently improbable that the appellant would have agreed to pay standard basis costs when the fixed costs regime was likely to be much more favourable to the paying party. The necessary and inevitable conclusion was, Mr Mallalieu contended, that the Order did not reflect an agreement between the parties to disapply the fixed costs regime, and therefore the detailed assessment they provided for must be read as relating to fixed costs and disbursements.

## The proper interpretation of the Order

*The natural and ordinary meaning of "detailed assessment"*

44. In my judgment, and contrary to the appellant's contention, there is no ambiguity whatsoever as to the natural and ordinary meaning of "subject to detailed assessment" in an agreement or order as to costs. The phrase is a technical term, the meaning and effect of which is expressly and extensively set out in the rules. It plainly denotes that the costs are to be assessed by the procedure in Part 47 on the standard basis (unless the agreement or order goes on to provide for the assessment to be on the indemnity basis). The phrase cannot be read as providing for an "assessment" of fixed costs pursuant to the provisions of Part 45 unless the context leads to the conclusion that the wrong terminology has been used (by the parties or by the Court) so that the phrase should be interpreted otherwise than according to its ordinary meaning.

45. This is abundantly clear from consideration of the rules themselves:

    i) First and foremost, rule 44.3(4)(a) expressly provides that, where an order for costs, or for assessment of costs, does not indicate the basis of assessment, the costs will be assessed on the standard basis. In other words, the effect of an order which provides for costs "subject to detailed assessment" is, by simple and direct application of the rules, an order that costs will be assessed on the standard

basis. An agreement to the same effect, intended to be embodied in an order, must have the same natural and ordinary meaning.

ii) Second, rule 44.6(1), in setting out the court's power to assess costs (either summarily or by way of a detailed assessment), expressly provides that such power does not relate to fixed costs. Fixed costs under Part 45 are dealt with separately in rule 44.6(2) and are stated to be recoverable "in accordance with that Part". It could not be clearer that an agreement or order for the detailed assessment of costs does not (unless something has "gone wrong") relate to fixed costs.

iii) Third, that same clear distinction is apparent from rule 45.29 itself. In circumstances where the court will consider a claim for an amount of costs greater than fixed costs under rule 45.29J, it may do so by assessing the costs (summarily or by way of detailed assessment). Such an assessment must necessarily be on the standard basis unless the court specifically directs that the indemnity basis should be used. Rule 45.29K then draws a distinction between the costs so assessed ("the assessed costs") and the fixed recoverable costs, requiring the court to award the latter unless the assessed costs are 20% greater. Again, it could not be clearer that costs assessed summarily or under Part 47 are not the same as (and cannot include) fixed recoverable costs.

46. The clear distinction between assessed costs and fixed costs to be found in the rules (as set out above) was recognised in *Broadhurst*, Lord Dyson MR describing them at [30] as "conceptually different", a difference also recognised by Moore-Bick LJ in *Solomon* at [19]. Moore-Bick LJ went on, in the same paragraph, to state that the fixed costs regime does involve an assessment of some kind (particularly in relation to disbursements), but not one that is properly regarded as an assessment on the standard basis.

47. In *Adelekun* Newey LJ noted at [19] that Part 45 does not itself explain how the amount recoverable in respect of disbursements under rule 45.29I is to be determined (the assumption being that no determination at all is necessary in relation to fixed costs other than disbursements), but recorded that it was common ground between counsel that the provisions in Part 47 relating to detailed assessment would apply. In my judgment the position agreed by counsel in that case was not correct, for the following reasons:

i) As referred to above, the provisions as to detailed assessment in rule 44.6 make it clear that such assessments do not apply to the fixed costs regime set out in Part 45.

ii) Those provisions were referred to by Master Leonard (sitting in the Senior Courts Costs Office) in striking out a Notice of Commencement of detailed assessment proceedings in *Nema v Kirkland* [2019] 8 WLUL 301 (see [53]). At [54] Master Leonard held that a party seeking determination of the number of disbursements should do so by an interim application under rule 45.29H, which provided for fixed costs of such application, rather than by the more expensive process of detailed assessment.

iii) In so holding, Master Leonard relied on the unreported decision of Master Howarth in *Mughal v Samuel Higgs & EUI Limited* (SCCO unreported, 6

October 2017), also striking out a Notice of Commencement of detailed assessment proceedings. Master Leonard summarised Master Howarth's reasoning as follows:

> "…the whole purpose of the fixed costs regime was to avoid the necessity of either summary or detailed assessment. It was not open to the claimant to draft a bill of costs and use the detailed assessment procedure, so increasing costs in proceedings where fixed costs were meant to apply… the appropriate course, in fixed costs cases, was for an application to be made to the court."

iv) Mr Mallalieu pointed out (in written submissions following the conclusion of the oral hearing) that the parties in *Nema* did not draw Master Leonard's attention to two provisions in Practice Direction 47: (i) paragraph 5.7, which provides that if the only dispute between the parties on detailed assessment concerns disbursements, the bill of costs shall be limited to the title page, background information, a list of disbursements and brief submissions as to those disbursements; and (ii) paragraph 13.5, which provides for such a dispute to be determined on the papers without a hearing. Whilst it is true that those provisions would limit the complexity and cost of disputes as to disbursements on a detailed assessment, those aspects being significant factors in Master Leonard's decision, they do not undermine the sound foundation of both his and Master Howarth's conclusion that Part 45 provides an entirely self-contained regime for fixed recoverable costs (including disbursements specified in rule 45.29I), separate and distinct in all respects from assessments under rule 44.6(1), whether summary or detailed.

v) It therefore appears that specialist judges sitting in the Senior Courts Costs Office do not consider that detailed assessment is a permitted method for determining costs (or disbursements) under the Part 45 regime (although the parties can no doubt use that route by agreement). Mr Mallalieu asserted that that was not the general practice, but produced no authority or example supporting his contention.

48. Notwithstanding the agreement between the parties in *Adelekun* (which I consider to have been mistaken, for the reasons set out above), Newey LJ took the view, in [31], that the reference in the offer letter under consideration in that case to detailed assessment of the costs "was far from ideal if the appellant intended the fixed costs regime to apply", but accepted that the reference was "not wholly inapposite" as an assessment of some kind was necessary. For that reason Newey LJ did not consider that the use of the term detailed assessment "should be taken to imply an intention to displace the fixed costs regime where there are other indications that that was not intended". I read that analysis as recognising that the term "detailed assessment" does not naturally or ordinarily include an assessment of fixed costs (hence the term was "not ideal"), but also recognising that that meaning might permissibly be overridden where it was clear that the fixed cost regime was applicable under the rules and was not intended to be disapplied. The circumstances arising in *Adelekun*, which resulted in such a finding in that case, are discussed in the next section.

*The context of the Order and the agreement it embodied*

49. Notwithstanding that the natural and ordinary meaning of the relevant words is entirely clear (for the reasons set out above), it remains necessary and appropriate to consider the context to determine whether, judged objectively, that meaning was truly intended by the parties in the present case, including whether they had used the wrong words.

50. In this case the terms of the Order were agreed by firms of solicitors acting for the parties, both specialists in this type of litigation. They reached agreement in the course of inter-solicitor correspondence in which a Part 36 offer by the appellant was expressly rejected by the respondent, but a counter-offer (not pursuant to Part 36) in the form of a draft of the order was accepted by the appellant (being returned with minor amendments which were in turn accepted by the respondent).

51. In so doing, the solicitors must, applying an objective test, be taken to have been aware of the relevant rules and principles, in particular, (i) that the fixed costs regime can be disapplied by agreement and (ii) that an order providing for detailed assessment (without more) entails an assessment on the standard basis (rule 44.3(4)(a)). In those circumstances it is difficult to see any basis on which the use of the term "detailed assessment" could bear anything other than its natural and ordinary meaning as discussed above. No matter how strictly enforced the fixed costs regime may be in cases to which it properly applies, and no matter how unlikely it was that the respondent would have been able to escape that regime had the matter proceeded, the parties reached a compromise of the dispute on the basis of a provision as to costs which, on its face, would take the case out of the fixed costs regime and entail assessment on the standard basis. There is no objective reason to believe that the solicitors did not intend the term to bear its natural, ordinary (and in my judgment, obvious) meaning, not least because it would be impermissible (and to no avail) to speculate as to the parties' respective legal or commercial motivations for reaching a settlement on the terms they did. Indeed, the appellant has not suggested that the use of the term "detailed assessment" was a mistake or otherwise did not reflect the parties' agreement.

52. The above reasoning formed the basis of both decisions below:

    i) After referring at [9] to rule 44.3 (assessment being on the standard basis if not otherwise stated) and the explanation in *Broadhurst* that assessed costs and fixed costs are "different", DJ Rodgers held at [11] that "If [the parties] choose to enter into an order, as in this particular case, that allows for costs to be subject to detailed assessment if not agreed, then I find in the circumstances that is outside fixed costs". At [12] DJ Rodgers added that "It is not just a device to assess disbursements".

    ii) At [63] the Judge also referred to rule 44.3, stating that "The default position in relation to costs is always that they are assessed on a standard basis unless stated otherwise". The Judge concluded at [64] as follows: "The [appellant] could not have been any clearer in rejecting the part 36 offer using the clear words with the ordinary objective meaning as stated. Although I accept that the words "assessed costs" can refer to the fixed costs regime, the consent order is clear that it allows for detailed assessment".

53. The Judge did not accept that the reasoning in *Adelekun* (which was reported after DJ Rodgers' judgment) applied in this case. In my judgment she was entirely right in that regard. In that case the document being construed was described as, and intended to be, a Part 36 offer (which was duly accepted) and offered to pay costs in accordance with rule 36.13 (although the applicable provision, referred to in rule 36.13, was in fact rule 36.20). It did, however, go on to provide "such costs to be subject to detailed assessment if not agreed".

54. As Newey LJ pointed out at [30], there was an internal inconsistency in the wording of the letter, in that both rule 36.20 and 36.13 make it plain that the fixed costs regime is to apply where a Part 36 offer is accepted so that, if a party to an ex-Protocol case offers to pay costs on a basis that departs from Part 45, that offer will not be a Part 36 offer. It followed that, if the offer letter in that case was indeed to be construed and given effect as a Part 36 offer, the reference to detailed assessment of the costs could not be read as disapplying the fixed costs regime.

55. It was therefore clear that something had "gone wrong" with the wording used in the offer letter considered in *Adelekun*, justifying reading the term detailed assessment as applying to fixed costs, even though that reading was "not ideal": see [31]. The fact that the parties clearly intended to make and accept a Part 36 offer meant that there were "other indications" that it was not intended to disapply the fixed cost regime by reference to an assessment on the conventional basis. It is apparent, however, that even in that context Males LJ took considerable persuading before concluding in the end that the intention to depart from the fixed costs regime indicated by the term "detailed assessment" was outweighed by other considerations. He pointed out that, if parties wish to settle on terms that fixed costs will be payable, it is easy enough to say so (see [43]).

56. In the present case the agreement reached was not the result of the acceptance of a Part 36 offer: the parties' intentions are not to be understood in that highly restrictive context and there is no inherent ambiguity in the reference to detailed assessment, internal inconsistency within the terms of the Order or other "indication" that detailed assessment did not bear the meaning ascribed to it under the rules. Although *Adelekun* appears, on its face, to be a decision on similar facts to the present case, it was in reality a quite different situation, rooted in the parties' use of the Part 36 offer and acceptance mechanism. No such fetter on the application of the natural and ordinary meaning of the agreed wording as to costs arises in the present case, where the parties reached a free-standing settlement agreement. That agreement included a simple and well-understood provision that the appellant would pay costs subject to detailed assessment, that is to say, on the standard basis.

## Conclusion

57. For the above reasons I would dismiss the appeal.

## Lord Justice Edis

58. I agree.

## Lord Justice Baker

59. I also agree.