Neutral Citation Number: [2016] EWCA Civ 1109

Case No: A2/2015/3614
& A2/2016/0200

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BIRMINGHAM COUNTY COURT
HIS HONOUR JUDGE GRANT
BM50112A
ON APPEAL FROM BIRMINGHAM CIVIL JUSTICE CENTRE
DISTRICT JUDGE RICH
A62YP323

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/11/2016

Before :

LORD JUSTICE TOMLINSON
LORD JUSTICE GROSS
and
LORD JUSTICE BRIGGS

- -

Between :

QADER & ORS	**Appellant**
- and -	
ESURE SERVICES LIMITED	**Respondent**
-and-	
(1) THE PERSONAL INJURY BAR ASSOCIATION **(2) THE ASSOCIATION OF PERSONAL INJURY LAWYERS**	**Interveners**

AND

KHAN & ANR	**Appellant**
- and -	
MCGEE	**Respondent**
-and-	
(1) THE PERSONAL INJURY BAR ASSOCIATION **(2) THE ASSOCIATION OF PERSONAL INJURY LAWYERS**	**Interveners**

- -

Nicholas Bacon QC (instructed by **Nesbit Law Group**) for the **Appellant Qader & Ors**
Tim Horlock QC and Paul Higgins (instructed by **Horwich Farrelly Solicitors**) for the **Respondents Esure Services Ltd**
Roger Mallalieu (instructed by **DWF LLP**) for the **Appellant Khan & Anr**

Nicholas Bacon QC (instructed by **Nesbitt Law Group**) for the **Respondents Mcgee**
Mr Robert Weir QC and Ms Jasmine Murphy (instructed by **Simpson Millar LLP)** for the **Personal Injuries Bar Association**
The Association of Personal Injury Lawyers for were not represented in court

Hearing dates: 25 October 2016

- -

Approved Judgment

Lord Justice Briggs :

1. These conjoined appeals raise this common question about the fixed costs regime for claims started under the RTA Protocol namely: 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. The issue turns mainly on the interpretation of section IIIA of CPR Part 45, read together with the relevant provisions of the RTA Protocol, and against the background of the process of consultation which preceded the making of that section in 2013, by way of implementation of fixed costs proposals in the reports of Jackson LJ in his Review of Civil Litigation Costs. It requires the court not merely to interpret the relevant provisions, but to consider whether they suffer from an obvious drafting mistake which can be put right so as to bring them into compatibility with the intention of the relevant legislator, namely the Civil Procedure Rule Committee, pursuant to the court's exceptional jurisdiction to do so as explained by Lord Nicholls in *Inco Europe Limited v First Choice Distribution* [2000] 1 WLR 586, at 592.

The RTA Protocol

2. The RTA Protocol provides an efficient modern framework for the resolution of modest personal injury claims arising out of road traffic accidents. It operates through an online portal whereby claimants' lawyers and defendants' insurers are able to exchange details about the claims, consider and (if appropriate) admit liability and then settle or have speedily determined any issues about quantum. Very large numbers of claims are resolved without the need for any court proceedings at all. A further large number are resolved within the confines of the Protocol by a speedy, document-based process of court determination under Part 8 either without any hearing, or with a short hearing before a District Judge at what is called Stage 3 of the Protocol procedure, governed by CPR 8BPD.

3. The RTA Protocol was not designed for the resolution of large claims or complex disputes. It came into operation in 2010, with a "Protocol upper limit" of £10,000. Valuation of a claim for the purpose of establishing whether it fell within the Protocol upper limit required vehicle related damages to be excluded. Those are damages for the pre-accident value of the vehicle, for vehicle repair, for vehicle insurance excess and for vehicle hire: see paragraph 1.1(18). All references to paragraphs in this section of the judgment are to the paragraphs of the RTA Protocol in its form after amendment for accidents occurring after July 2013. That amendment included raising the Protocol upper limit to £25,000.

4. The RTA Protocol procedure has three stages. Stage 1 is designed to lead to an early admission of liability in appropriate cases. Stage 2 is designed to promote early settlement of disputes as to quantum in cases where liability has been admitted. Stage 3, as already described, provides for judicial determination of disputes as to quantum which cannot be resolved by the parties.

5. A detailed and comprehensive fixed costs regime has, at least since July 2013, been an essential foundation for the effectiveness of the RTA Protocol, being part of a mechanism which strikes a balance between the need to secure access to justice for the victims of road traffic accidents by providing an economic basis for the provision of legal services to deserving claimants, and the risks of disproportionate costs being

incurred in relation to relatively modest claims, with adverse consequences in terms of the cost of motor insurance for the public. That fixed costs play this important part is apparent from the statement of the aim of the RTA Protocol in paragraph 3:

> "Aims
>
> 3.1 The aim of this Protocol is to ensure that –
>
> (1) The defendant pays damages and costs using the process set out in the Protocol without the need for the claimant to start proceedings;
>
> (2) damages are paid within a reasonable time; and
>
> (3) the claimant's legal representative receives the fixed costs at each appropriate stage."

6. Claims arising from road traffic accidents properly started within the RTA Protocol may leave it without resolution or determination within it for a number of reasons. The most common reason is where liability is not admitted at Stage 1. Other reasons include a revaluation of the claim so as to take it above the Protocol upper limit: see paragraph 4.3; or a failure by the defendant's insurers or representatives to respond to the Claim Notification Form, also at Stage 1. In such cases the claimant may seek to negotiate an out of court settlement with the defendant or, in default, issue proceedings in the ordinary way under Part 7.

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

8. There is now established a very similar protocol for dealing in substantially the same way with personal injury cases in the context of employers' liability and public liability, called "the EL/PL Protocol", for which a very similar fixed costs regime was also established, with effect from July 2013. Although these appeals concern cases started within the RTA Protocol, it is likely that their outcome will affect the interpretation and application of the similar and indeed overlapping provisions in Part 45 about the EL/PL Protocol.

The Fixed Costs Regime

9. Part 45, headed "Fixed Costs" makes detailed provision for fixed costs in a variety of different types of proceedings. It is divided into six largely self-contained sections. For present purposes, the court is concerned only with sections III and IIIA. Section III deals with cases started (or which ought to have been started) within the RTA and

EL/PL Protocols, and which remain within those Protocols, (unless settled earlier) through to a Stage 3 Part 8 determination. Section IIIA is headed:

> "Claims Which No Longer Continue Under the RTA or EL/PL Pre-Action Protocols – Fixed Recoverable Costs"

Viewed as a whole, at first sight section IIIA appears to make comprehensive provision for the recovery only of fixed costs in all cases which start but no longer continue under either of the relevant Protocols, subject only to expressly stated exceptions.

10. Thus, Part 45.29A, headed "Scope and Interpretation" provides as follows:

> "(1) Subject to paragraph (3), this section applies where a claim is started under—
>
> (a) the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ('the RTA Protocol'); or
>
> (b) the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ('the EL/PL Protocol'), but no longer continues under the relevant Protocol or the Stage 3 Procedure in Practice Direction 8B.
>
> (2) This section does not apply to a disease claim which is started under the EL/PL Protocol.
>
> (3) Nothing in this section shall prevent the court making an order under rule 45.24."

Sub rule (2) expressly excludes disease claims. Sub rule (3), by its reference to Part 45.24, makes special provision where a claimant fails to comply with the relevant Protocol or unreasonably elects not to continue with that process.

11. Part 45.29B and C make detailed provision for fixed costs in cases which no longer continue under the RTA Protocol. So far as is relevant, they provide as follows:

> "**Application of fixed costs and disbursements – RTA Protocol**
>
> 45.29B
>
> Subject to rules 45.29F, 45.29G, 45.29H and 45.29J, if, in a claim started under the RTA Protocol, the Claim Notification Form is submitted on or after 31st July 2013, the only costs allowed are -
>
> (a) the fixed costs in rule 45.29C;
>
> (b) disbursements in accordance with rule 45.29I.

Amount of fixed costs – RTA Protocol

45.29C

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

(2) …

(3) …

(4) In Table 6B—

(a) in Part B, 'on or after' means the period beginning on the date on which the court respectively—

(i) issues the claim;

(ii) allocates the claim under Part 26; or

(iii) lists the claim for trial; and

(b) unless stated otherwise, a reference to 'damages' means agreed damages; and

(c) a reference to 'trial' is a reference to the final contested hearing.

Table 6B

Fixed costs where a claim no longer continues under the RTA Protocol				
A. If Parties reach a settlement prior to the claimant issuing proceedings under Part 7				
Agreed damages	At least £1,000, but not more that £5,000	More than £5,000, but not more that £10,000	More than £10,000, but not more that £25,000	
Fixed costs	The greater of (a) £550; or (b) the total of (i) £100; and (ii) 20% of the damages	The total of - (a) £1,100 ; and (b) 10% of damages over £10,000	The total of - (a) £1,930; and (b) 10% of damages over £10,000	
B. If proceedings are issued under Part 7, but the case settles before trial				
Stage at which case is settled	On or after the date of issue, but prior to the date of allocation under Part 26	On or after the date of allocation under Part 26, but prior to the date of listing	On or after the date of listing but prior the date of trial	
Fixed costs	The total of (a) £1,160; and (b) 20% of the damages	The total of (a) £1,880; and (b) 20% of the damages	The total of (a) £2,655; and (b) 20% of the damages	
C. If the claim is disposed of at trial				
Fixed costs	The total of— (a) £2,655; and (b) 20% of the damages agreed or awarded; and (c) the relevant trial advocacy fee			
D. Trial advocacy fees				
Damages agreed or awarded	Not more than £3,000	More than £3,000, but not more than £10,000	More than £10,000, but not more than £15,000	More than £15,000
Trial advocacy fee	£500	£710	£1,070	£1,705

These are the provisions of central relevance to these appeals. Nonetheless, in order to set them in context, I shall summarise the remaining provisions of Part 45 section IIIA.

12. Part 45.29D and E make very similar fixed costs provision for cases started but no longer continuing within the EL/PL Protocol, including similar tables, separately for employers' liability and public liability claims. The structure of those tables follows the format used for the RTA Protocol in Table 6B, but the amounts recoverable are different.

13. Part 45.29F, G, H and I make detailed provision for fixed costs in relation to defendants' costs, counterclaims, interim applications and provision for disbursements. Nothing turns on their detail, nor on Part 45.29K or L. Nonetheless Part 45.29J, headed "Claims for an amount of costs exceeding fixed recoverable costs" is important. It provides as follows:

> "45.29J
>
> (1) If it considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred to in rules 45.29B to 45.29H.
>
> (2) If the court considers such a claim to be appropriate, it may -
>
> (a) summarily assess the costs; or
>
> (b) make an order for the costs to be subject to detailed assessment.
>
> (3) If the court does not consider the claim to be appropriate, it will make an order—
>
> (a) if the claim is made by the claimant, for the fixed recoverable costs; or
>
> (b) if the claim is made by the defendant, for a sum which has regard to, but which does not exceed the fixed recoverable costs, and any permitted disbursements only."

The Problem

14. As will shortly appear, 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. As is apparent from this court's decision in *Bird v Acorn* [2016] EWCA Civ … the post-judgment disposal procedure is an alternative to allocation to a track, to which the fixed costs regime is fully applicable.

15. As is apparent from Part 26.6, the fast track is the normal track for proceedings (in the personal injuries context) where the claim lies between £1,000 and (after April 2009) £25,000, but only where the trial is likely to last for no longer than one day, and expert evidence is limited to one expert per party. Claims for personal injuries below £1,000 are not properly brought within the Protocol and are allocated to the small claims track, where there is only a vestigial provision for costs shifting. But claims for an amount of 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 always be higher, and often much higher, than that requisite for the determination of claims in the fast track. Just as personal injury claims for less than £1,000 are inappropriate for the Protocols, so are claims for more than £25,000, so that there is

an initial apparent symmetry between the scope of the Protocols and the fast track, in terms of the amount claimed.

16. But there are a number of situations where claims properly started in the RTA Protocol, which no longer continue therein due to a dispute as to liability, but are pursued under Part 7, are likely to have to be allocated to the multi-track rather than the fast track. Three examples were identified during the hearing of these appeals. The first arises where a claim originally thought to be worth no more than £25,000 is re-valued at a substantially higher level. These then cease to continue in the RTA Protocol pursuant to its own paragraph 4.3. It may not automatically follow that such a claim would be allocated to the multi-track, because the £25,000 limit for the fast track is one which only makes it not the "normal" track and the court retains discretion, on grounds set out in detail in Part 26.7 and 8 to allocate otherwise than to the "normal" track. Nonetheless, a large escalation in the amount claimed is inherently likely to lead to intensification of the litigation about its quantification, sufficient to take the case beyond the one day trial estimate which is a key feature for allocation to the fast track.

17. The second example arises 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 a little below £25,000, so that the claim is properly started in the RTA Protocol, then if it ceases to continue therein because liability is in issue, the ensuing Part 7 claim may include a claim for vehicle related damages as well. As is notorious, these damages, including in particular credit hire damages, may be substantial, where the relevant vehicle is a luxury car. Again, this may take the claim well above the £25,000 damages ceiling for a "normal" fast track claim. This may not automatically lead to its allocation to the multi-track, for example because, regardless of the amount of vehicle related damages claimed, there may be no real issue about quantification. If the real issue is about liability, and suitable for determination at a one day trial, the case may nonetheless proceed in the fast track, but the risk of an allocation to the multi-track remains real.

18. The third example, and the one which led to these appeals, arises where a claim is properly started in the RTA Protocol but is met by an allegation in the defence that the claim has been dishonestly fabricated. Sometimes the allegation is simply that the claimant slammed on the brakes to cause the accident, and the issue simply requires the cross-examination of the drivers of the two cars, easily achievable within a one day fast track trial. But some cases involve the allegation of a sophisticated conspiracy to engineer a multi-car incident, the cross examination of numerous witnesses and the deployment of sophisticated engineering expert evidence about the collision. Furthermore, the consequences for a claimant of being found to have been party to the fraudulent contriving of a road traffic accident may well include the inability to obtain vehicle insurance in the future, criminal proceedings or punishment for contempt of court. Such proceedings are therefore inherently likely to be pursued and defended on the basis that no stone is left unturned, and therefore at very substantial cost.

19. In both the present cases, allegations of the dishonest contrivance of the relevant accident led to the allocation of the claims to the multi-track, and the exercise of that discretion by the case management judges in each case is not challenged on appeal. The result is that, subject only to the prospect of obtaining a greater amount than the

fixed costs pursuant to an application under Part 45.29J, the claimants in each case, and their solicitors, face the unattractive prospect of pursuing their claims and resisting serious allegations of dishonesty, at trials likely to last well over one day but upon the basis of a fixed costs regime which, as will appear, was plainly designed to be suitable only for fast track cases. That was, indeed, the conclusion reached by the judges from whose decisions these appeals proceed, although one of them concluded that Part 45.29J could be used to avoid subjecting the claimant to that predicament by being applied at the allocation stage.

20. This problem arises 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. On the contrary, the language of Part 45.29A and B, taken together, appears unambiguously to apply the fixed costs regime to all cases which start within the relevant Protocols but no longer continue under them. Table 6B part B refers in general terms to the date of allocation as the trigger for an increased scale of recoverable fixed costs but makes no mention of allocation to the fast track, or exclusion of allocation to the multi-track. Part 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. Rather, as a matter of language, Part 45.29J appears to offer a measure of relief only at the end of a trial or other resolution of the proceedings.

21. The problem is exacerbated by the fact that, as will shortly appear, the extensive process of design, consultation about and determination by the Rule Committee of the detail of the fixed costs regime now compressed into Table 6B for RTA Protocol cases (and Table 6C and 6D for EL/PL Protocol cases respectively) was focussed upon the creation of a fixed costs regime for fast track, but not multi-track, cases.

These Appeals

Qader v Esure Services Limited (Case No: A14YP549)

22. Mr Qader and his two passengers (respectively the first, second and third claimants) claimed to be injured in a collision between his car, a Peugeot 307 and a Ford Focus driven by a Mrs Matthews, insured by the defendant, on 25 October 2013. The claimants submitted their claim into the RTA part of the Protocol Portal on 5 November 2013. The case left the Protocol due to the defendant's denial of liability and the claimants issued Part 7 proceedings on 2 September 2014, valuing their claim at between £5,000 and £15,000, well within the RTA Protocol upper limit and the normal confines of the fast track.

23. The defence, served on 31 October 2014, asserted that Mr Qader had deliberately induced the collision by sharply applying his brakes so that, without negligence on her part, Mrs Matthews could not avoid colliding with it, so that all claims arising from the collision were fraudulent. The defendant did not even admit that all the claimants were in the vehicle when the collision occurred. By their reply, served on 13 November 2014, the claimants asserted that Mr Qader had slowed down in order to avoid colliding with a vehicle in front of him, which had braked and turned without signalling.

24. On 30 January 2015 the case was allocated to the multi-track by District Judge Nadarajah. He must have thought that this allocation decision automatically dis-applied the Part 45 fixed costs regime, because he directed a one and a half hour Costs and Case Management Conference with the usual provision for filing of costs budgets in advance.

25. The CCMC was duly heard by District Judge Salmon on 3 June 2015. In an admirable *extempore* judgment he concluded that, although not without considerable sympathy for the claimant's predicament, Part 45.29A unmistakeably provided for the fixed costs regime to apply, notwithstanding allocation of the case to the multi-track, although he acknowledged that the Rule Committee might not have intended that consequence. He considered that the claimant might ultimately obtain relief under Part 45.29J, but only at the end of the proceedings, and he declined to make a costs management order at the CCMC which anticipated that outcome because, in his view, Part 45.29J was plainly intended only to be invoked at the end of the case.

26. The claimants' appeal was dismissed on 9 September by HHJ Grant. In his careful reserved judgment following a much more detailed consideration of the relevant rules than had been possible at the hearing before District Judge Salmon, he also concluded that Part 45.29 clearly provided that fixed costs should apply notwithstanding allocation to the multi-track, that to conclude otherwise would go beyond a purposive interpretation of the rules in accordance with the overriding objective and amount to re-casting them. He also doubted whether the particular allegation of fraud in Mr Qader's case really took the litigation out of that for which the RTA Protocol and the fixed costs regime were intended to apply. He also rejected a submission that this would lead to a contravention of Article 6 of the Human Rights Convention.

27. On 8 February 2016 Lewison LJ granted permission to appeal Judge Grant's order.

Khan v McGee (Claim No: A62YP323)

28. The collision in this case took place on 3 April 2014. The claimants Mr and Mrs Khan were respectively the driver and owner/passenger of a Volkswagen Golf. They allege that the defendant negligently drove his Vauxhall Corsa into the rear of their vehicle. They submitted their claims in accordance with the RTA Protocol. The defendant's denial of liability led to the claims leaving the Protocol and the claimants issued Part 7 proceedings on 22 October 2014.

29. In his defence, dated 25 November 2014, the defendant alleged that the driver of a third vehicle swerved in front of the claimant's vehicle in a deliberate attempt to cause the collision. He alleged that the claimants and the driver of the third vehicle had colluded so as to contrive the collision, and he also put the claimants to proof that they were in the Volkswagen at the time. In their reply, the claimants denied that the third vehicle had anything to do with the accident and denied collusion and fraud. The particulars of the fraud allegation extend over three closely reasoned pages of the defence, including particulars of a similar fact type of incident also involving the first claimant.

30. On 28 March 2015 District Judge Ingram allocated the case to the multi-track. He also appears to have thought that this dis-applied the fixed costs regime because he directed filing of costs budgets and adjourned the case to a CCMC, which was heard

by District Judge Rich in the County Court at Birmingham on 3 July 2015. His review of the pleadings led him to conclude that this was far removed from an ordinary modest value RTA case, and therefore unfit for the application of the fixed costs regime. Having (wrongly) been referred to Part 45.13 (which, under section 2 of Part 45 makes very similar provision for additional costs claims in exceptional cases as does Part 45.29J) he concluded that he could properly exercise a discretion under that rule at the CCMC stage, and directed that the case should proceed on the ordinary multi-track basis of assessed costs from then on.

31. On 19 November, on the defendant's application for permission to appeal, HHJ McKenna granted permission and directed that the appeal be transferred to this court. Thus, whereas the claimant is the appellant in Mr Qader's case, the defendant is the appellant in Mr Khan's case. Nonetheless, both cases raises substantially the same questions. The only significant difference may be that Mr Khan's case more obviously involves detailed, lengthy and expensive examination of a fraud allegation than does Mr Qader's case. Nonetheless the allocation of both cases to the multi-track is not challenged on appeal.

Case Management of the Conjoined Appeals

32. On 8 February 2016 Lewison LJ directed that both appeals should be heard together, and he gave permission for both the Personal Injuries Bar Association ("PIBA") and the Association of Personal Injury Lawyers ("APIL") to intervene by way of written and oral submissions.

33. In the event, APIL intervened by way of written submissions, with substantial supporting authorities and other documents. PIBA appeared by Mr Robert Weir QC and Ms Jasmine Murphy. The court was considerably assisted at the hearing by Mr Weir's concise and well-focussed submissions, and wishes to express its appreciation for both the form and content of the submissions of both intervening associations.

34. For their part, the claimants in both appeals appeared by Mr Nicholas Bacon QC. Mr Tim Horlock QC and Mr Paul Higgins appeared for the defendant insurers in Mr Qader's case. Mr Roger Mallalieu appeared for Mr McGee, the appellant defendant in Mr Khan's case.

Analysis

35. After more hesitation than my Lords I have come to the conclusion that section III A 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 dis-applied 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. My reasoning proceeds, in outline, in the following way:

    a) District Judge Salmon and Judge Grant were right to conclude that no ordinary process of construction or interpretation of the wording of the relevant rules could lead to that result. On the contrary, the application of the detailed provisions of Part 45.29A and B, read together with other relevant provisions in the CPR, lead clearly to the conclusion that fixed costs apply to all cases properly started within the RTA Protocol but then continuing outside it,

regardless whether allocated to the fast track, to the multi-track or, indeed, not allocated at all but dealt with at a disposal hearing.

b) This is, in particular, not a case where the court has to resolve an apparent conflict between differing provisions in different parts of the CPR concerning the same subject matter. Nothing in the rules conflicts with the outcome which I have just described.

c) Nor is that outcome irrational or, on its face, one which could not possibly have been intended, so as to compel the court to some other conclusion, even though it would, subject to relief under Part 45.29J, lead potentially, albeit only until the end of the trial, to rough justice for some claimants.

d) But careful analysis of the historic origins of the scheme now enshrined in section III A of Part 45, and in particular the process of consultation which preceded it, demonstrate that it was not in fact the intention of those legislating for this regime in 2013 that it should ever apply to a case allocated to the multi-track. A conclusion that it should so apply is a result which can only have arisen from a drafting mistake, which the court has power to put right by way of interpretation even if, as here, it requires the addition of words, rather than giving the words actually used a meaning different from their natural and ordinary meaning. It should normally be possible to understand procedure rules just by reading them in their context, but this is a rare case where something has gone wrong, and where the court's interpretative powers must be used, as far as possible, to bring the language into accord with what it is confident was the underlying intention.

Ordinary Construction Points to Fixed Costs Applying Notwithstanding Allocation to Multi-track

36. Part 45.29A and B are, in my view, perfectly clear. The fixed costs regime in section IIIA of Part 45.29 applies to all cases started under the RTA Protocol but which no longer continue thereunder. The exception for disease claims only applies to cases started under the EL/PL Protocol, and the provisions in Part 45.29F, G, H, and J are part of that fixed costs regime although, where applicable, they adjust what would otherwise be the specific fixed costs provided for in Table 6B. In particular, Part 45.29J provides a safety valve which enables the court to do justice by making a more generous award of costs in exceptional cases.

37. Nothing in Part 45.29C (of which Table 6B forms part) is on its face intended to define or derogate from the scope of the application of this fixed costs regime to all cases started under the RTA Protocol which no longer continue thereunder. Furthermore, Table 6B provides for scales of costs which are adjusted (where cases settle before trial) on or after the date of allocation under Part 26, but nothing purports to dis-apply this fixed costs regime altogether if the allocation decision is that the case continues in the multi-track.

38. Both Mr Bacon and Mr Weir made much of the fact that in part A of Table 6B, which provides fixed costs where parties reach a settlement prior to the claimant pursuing proceedings under Part 7, no provision is made for a settlement for more than £25,000. In a case where the damages were revalued after entry into the RTA

Protocol so as to exceed £25,000, or where the aggregate arrived at by adding the vehicle related damages had the same result, a settlement for more than £25,000 of a case originally properly brought in the RTA Protocol might be at least a theoretical possibility, for which the fixed costs regime in section III A of Part 45 made no provision. But no similar restriction appears in parts B, C and D of Table 6B. The only other part of Table 6B where trial advocacy fees are fixed by reference to specific amounts of damages (rather than as a percentage of damages) is part D, where the upper scale applies where the damages are, simply, "more than £15,000".

39. Mr Horlock and Mr Mallalieu were both constrained to accept that the reference in part A of Table 8B to an upper limit for damages of not more than £25,000 was, on their construction of section IIIA of Part 45 as a whole, clearly a drafting error. But they submitted that this anomaly could not, on its own, come anywhere near to undermining the otherwise uniform and consistent message to be derived from reading Part 49.29A, B and C as a whole, namely that this fixed costs regime applied to all cases properly started in the RTA Protocol which no longer continue thereunder. I agree. Furthermore, the anomaly would only have any consequence in the very small number of cases properly started under the RTA Protocol which settled for more than £25,000 damages before proceedings were even issued under Part 7. It would have no direct effect on claims settled, regardless of the level of damages, after the issue Part 7 proceedings, or upon claims disposed of at trial, again regardless of the amount of damages awarded. Furthermore, that particular anomaly could arise even in a case fit for a fast track trial, either because only liability rather than quantum was in issue, or because the addition of vehicle related damages so as to take the case above £25,000 did not in any event give rise to issues requiring the court's determination. As I have said, the court has a discretion to allocate a case to the fast track even if the amount claimed exceeds £25,000, for example where the case is in all other respects suitable for fast track case management and trial.

No Other Part of the CPR Conflicts with the Applicability of Fixed Costs under Part 45.29, where applicable

40. Fixed costs are, generally, incompatible with costs management (including costs budgeting) which is a process characteristic of Part 7 cases allocated to the multi-track: see generally section II of CPR Part 3, and Part 3.12(1) in particular. But that provision, which only applies to multi-track cases, expressly excludes costs management where the proceedings are the subject of fixed costs or scale costs: see Part 3.12(1)(d). This exception appears expressly to acknowledge that Part 45 may impose a fixed costs regime upon some multi-track cases. Mr Bacon and Mr Weir were in some difficulty in identifying any provision for fixed costs which could apply to the multi-track other than those in section IIIA of Part 45. Mr Bacon suggested that fixed costs applicable in the Intellectual Property Enterprise Court or costs recoverable in an Aarhus Convention claim might be candidates, but it seems to me that the former are scale costs and the latter are capped costs, rather than fixed costs.

41. This is not, therefore, a case like *Broadhurst v Tan* [2016] 1 WLR 1928 where this court had to resolve an apparent conflict between the applicability of Part 45 fixed costs and the availability of indemnity costs under Part 36. There is simply no tension in the present context between Part 45 and Part 3 in relation to multi-track cases.

No Irrationality in the Application of section IIIA of Part 45 to multi track cases

42. Sometimes a contractual or statutory provision is so irrational in its effect that the court can say, with confidence, that its literal or ordinary meaning cannot have been intended, without needing to conduct any examination of the process by which it was agreed or made. In such a case the court may be compelled to find some other meaning. But it is, as Mr Horlock submitted, both rational and reasonable to provide a complete fixed costs code for cases properly started in the RTA or EL/PL Protocols, so that those involved on both sides in such cases know where they stand and can settle them knowing what the costs consequences will be, rather than having to engage in disproportionate costs-only litigation, as used to be the case. Further, he submitted that an element of rough justice or "swings and roundabouts" was inherent in any fixed costs regime. There would be bound to be a small number of cases where the expenditure required was greatly in excess of the fixed costs recoverable on a successful outcome, but solicitors conducting large numbers of such cases on CFAs or DBAs would be prepared to take the rough with the smooth, suffering losses on the occasional case but making a satisfactory professional living on the caseload, taken as a whole. Further, he submitted that Part 45.29J provided a perfectly adequate safety valve for those exceptional cases. While acknowledging that its language made it inapposite for use before the end of the proceedings, he submitted that claimants seeking to protect themselves from the risk of recovering only fixed costs after successfully resisting an allegation that their claims were fraudulently contrived could obtain the requisite protection by making a liability-only Part 36 offer at an early stage in the proceedings, relying on the *Broadhurst* case as showing that indemnity costs under Part 36 would prevail over fixed costs under Part 45 in the event of a successful outcome. By contrast, he submitted that if allocation to the multi-track was to displace the Part 45 fixed costs regime in relation to cases coming out of the Protocols, then this would generate disproportionate satellite litigation at the allocation stage, in which parties seeking to escape the fixed costs regime moved heaven and earth in seeking to persuade the case management judge to allocate the case to the multi-track.

43. I broadly accept those submissions. But for what I am about to describe about the background to the making section IIIA of Part 45, it could not be said that it would have been irrational for the Rule Committee to have gone down the more rigorous route of making fixed costs applicable to all cases coming out of the relevant Protocols, leaving the combination of Part 45.29J and Part 36 to make appropriate provision, where necessary, for cases allocated to the multi-track. Looking simply and objectively at the CPR, that would appear to have been what the Rules Committee intended.

The history of the making of this fixed costs scheme

44. It is however clear that this rigorous approach is not what the Rule Committee actually intended. The original impetus for what became the fixed costs scheme for RTA and EL/PL Protocol cases came from Jackson LJ's reports. At appendix 5 to his December 2009 Final Report is to be found a composite table ("table B") of fixed costs for RTA, EL and PL cases which, although the amounts recoverable are different, has a structure which was eventually adopted almost precisely in Tables 6B, 6C and 6D in section IIIA of Part 45. His appendix is entitled "Fixed costs matrix for fast track personal injury claims".

45. In March 2011 the Ministry of Justice published a consultation paper headed "Solving disputes in the County Courts: creating a simpler, quicker and more proportionate system". At paragraphs 57 to 59 it noted Jackson LJ's proposals for a regime of fixed recoverable costs for personal injury cases in the fast track. At paragraph 83 it noted that Jackson LJ's fast track proposals could be used for cases which left the RTA Protocol process, for example where liability was not admitted. Paragraph 60 made express reference to the fixed costs table B in appendix 5 to Jackson LJ's final report.

46. In February 2012 the Ministry of Justice published the Government's response to that consultation. At paragraph 15 it announced its intention to increase the financial limit of the RTA Protocol to £25,000. At paragraph 20 it announced the Government's intention to extend the system of fixed recoverable costs, subject to further discussions with stakeholders, in a way similar to that proposed by Jackson LJ in his review.

47. In a consultation letter dated 19 November 2012 Helen Grant MP, the Parliamentary Under-Secretary of State for Justice, notified stakeholders of the Government's intention to introduce a matrix of fixed recoverable costs which would apply to RTA, EL and PL claims which "exit the Protocol process" based on Jackson LJ's table B (in appendix 5 to his Final Report), but amended to take account of inflation since the table was produced in 2009, and reduced throughout by an amount intended to reflect the forthcoming ban on referral fees. She attached as Annexe B to her letter a tabular form of her proposals, modelled on Jackson LJ's template and containing, for the most part, precisely the amounts now set out in Table 6B for RTA Protocol cases. She sought further views and evidence on (among other things):

> "The interface between proposed FRC arrangements within and outside the Protocols, particularly with regard to incentives for either side to exit."

48. In a further response to consultation dated 27 February 2013 the Ministry of Justice stated, at paragraph 6, that it was the Government's intention to ask the Rule Committee to make rules which would fix recoverable costs in low-value personal injury cases at the level set in Annexe A. Annexe A continued to adopt the structure of Jackson LJ's table B, with amounts which in all respects, save for slightly different trial advocacy fees, were later included in Table 6B for RTA Protocol cases.

49. Paragraph 87 of that response stated as follows:

> "Respondents were unclear as to whether the proposals are intended to apply to multi-track, as well as fast track, cases between £10,001 and £25,000. There was a clear view (whilst still arguing the proposed levels of FRCSs were too low in any event) that any proposals should only apply to fast track cases. It has always been the Government's intention that these proposals apply only to cases in the fast track and if a case falling out of the protocols is judicially determined to be suitable for multi-track, normal multi-track costs rules will apply".

50. The CPR are made and amended by the Rule Committee, subject to being allowed, disallowed or altered by the Lord Chancellor: see generally s.3 of the Civil Procedure Act 1997. Section 3A provides that the Lord Chancellor may also by notice to the Rule Committee require rules to be made for achieving a purpose specified in the notice, within a reasonable time thereafter. Rules are then contained in statutory instruments, subject to negative resolution in Parliament.

51. Part IIIA of CPR 45 was made pursuant to a notice from the Lord Chancellor under s.3A. There is no evidence that the Government altered its policy in relation to multi-track cases falling outside the fixed costs regime as set out in paragraph 87 of its 27 February 2013 response to consultation, nor that the Rule Committee consciously decided to adopt the opposite approach, by including multi-track cases within the fixed costs regime, subject only to the exceptional circumstances discretion conferred by Part 45.29J. Furthermore it is plain that the fixed amounts recoverable were all based upon a table originally proposed by Jackson LJ and then amended after consultation, specifically chosen for fast track cases. Finally, the tell-tale inclusion of £25,000 as the upper limit for damages in a settlement before issue of a Part 7 claim in part A of Table 6B strongly suggests that the Rule Committee were under the illusion that no claim above that limit could continue outside the Protocols after being started within them, so that allocation to the multi-track was not a realistic possibility calling for express provision.

52. In the *Inco Europe* case to which I referred at the beginning of this judgment, Lord Nicholls described the court's jurisdiction to put right drafting errors in statutory provisions in the following terms, at [2000] 1 WLR 586, at 592C-H:

> "It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opuscule, *Statutory Interpretation* , 3rd ed. (1995), pp. 93–105. He comments, at p. 103:
>
> "In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role."
>
> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2)

> that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see *per* Lord Diplock in *Jones v. Wrotham Park Settled Estates [1980] A.C. 74* , 105–106. In the present case these three conditions are fulfilled. "

53. It may be said that the interpretative jurisdiction to put right obvious drafting errors in a statute is fortified by the difficulties which typically face Parliament in doing so, in relation to primary legislation, in the light of its heavy workload. The same difficulties do not affect the Rule Committee to any similar effect. It can, and regularly does, re-consider rules when invited to do so by the court, either to correct drafting errors or other infelicities which have been proved to cause procedural difficulty. Nonetheless it is almost invariably the case that corrections cannot be made with retrospective effect, so that parties in ongoing litigation who are adversely affected by the relevant error do not thereby obtain relief from their predicament.

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. The intended purpose of the fixed costs regime in this context was that it should apply as widely as possible (and therefore to cases allocated to the fast track, and to cases sent for quantification of damages at disposal hearings), but not to cases where there had been a judicial determination that they should continue in the multi-track. The intended restriction on the ambit of the fixed costs regime is clear, and the only reason for that restriction not being enacted in section IIIA of Part 45 appears to be inadvertence, rather than a deliberate decision by the Rule Committee to take a different course. Similarly the substance of the provision which the Rule Committee would have made, if it had taken steps to enact that restriction would have been to provide that, from the moment when a case was in fact allocated to the multi-track, the section IIIA fixed costs regime should cease to apply to that case.

55. By contrast, I do not consider that the Rule Committee would have carried back to a pre-allocation stage a policy to dis-apply fixed costs, merely because a claim properly started in the Protocols had grown in value beyond £25,000, or had become the subject of a pleaded defence of fraud or dishonesty. As I have said, it by no means follows that every such case would be inappropriate for management and determination in the fast track. To require the parties to guess, or the court to decide, whether a case which settled prior to allocation (to which therefore part A or the first column of part B of Table 6B would apply) was or was not subject to fixed costs would introduce a damaging and unnecessary degree of uncertainty into a scheme which depends upon its predictability for its contribution towards the proportionate, speedy and effective disposal of civil proceedings.

56. The best way to give effect to that intention seems to me to be 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…"

57. I recognise the force of Mr Horlock's submission that this process of interpretation by the addition of words risks giving rise to satellite litigation at the allocation stage by claimants seeking to dis-apply the fixed costs regime in relation to their claims. I consider that this is a risk best addressed by relying upon the good sense and vigour of case management judges in furthering the overriding objective, and in penalising those who seek to abuse the opportunity to which the allocation stage in such a claim gives rise.

58. I recognise also that my proposed insertion of words to Part 45.29B does nothing about the anomaly represented by the £25,000 apparent damages ceiling in part A of Table 6B. It is unnecessary in the context of these appeals to do so, both because neither of them reached settlement prior to the issuing of Part 7 proceedings, and because the damages claimed are well below £25,000. It is a continuing anomaly which, in my view, the Rule Committee should be invited to consider at the earliest available opportunity. It may also be minded to devise an amendment to section IIIA of Part 45 which fully reflects the concerns which underlie this judgment, not merely in relation to the RTA Protocol, but to the EL/PL Protocol as well.

59. I would therefore allow the appeal in Mr Qader's case. I would dismiss the defendant's appeal in Mr Khan's case. If allocation of a case to the multi-track automatically dis-applies the part IIIA fixed costs regime, then there is no need to consider, at that stage, relief under Part 45.29J. That safety valve is one which ought to be applied, if at all, only at the end of proceedings, as I consider that its language makes plain. Although the District Judge's use of an equivalently worded provision to Part 45.29J was therefore in my view inappropriate, his decision that costs budgeting, costs management and the other ordinary costs provisions relating to the multi-track should apply to Mr Kahn's case was, for the different reasons which I have set out, correct.

Lord Justice Gross:

60. I agree.

Lord Justice Tomlinson:

61. I also agree.