Case No: C38YJ961

IN THE COUNTY COURT
AT OXFORD

St. Aldates
Oxford

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Before:

HER HONOUR JUDGE CLARKE

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Between:

ROBERT JOHN ANSELL	**1st Claimant**
GARETH EVANS	**2nd Claimant**
- and -	
A.T. & T. (GB) HOLDINGS LTD.	**Defendant**

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Mr. K. Latham for the **Claimants**
Mr. T. Asquith for the **Defendant**

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APPROVED JUDGMENT

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JUDGE CLARKE:

1. This is an *ex tempore* Judgment in this matter which is an appeal by Robert John Ansell and Gareth Evans who were Claimants in a claim arising from a road traffic accident when the car in which they were passengers, driven by Mr. Ansell, was in a collision with a car driven by an employee or servant of the Defendant/Respondent, namely A.T. & T. (GB) Holdings Limited.

2. In order to avoid confusion -- and it may cause more but let us see how we go -- I will continue to refer to the Appellants as the Claimants and the Respondent as the Defendant when setting out the history and the background which leads us to this court.

3. The Claimants after the accident each filed a claim notification form in relation to personal injury each say they had suffered. Those were filed in accordance with the pre-action protocol for low value personal injury claims in road traffic accidents and I will refer to that as 'the RTA protocol'. The Defendant admitted liability within the time period permitted under the protocol. The Claimants then gave notice that their claims were not suitable for the portal and exited. The Claimants issued Part 7 Claims. The Defendant made early Part 36 offers and the Claimants each accepted an offer within 21 days of the offers being made.

4. A dispute then arose. The Claimants contended that, pursuant to the operation of CPR 36.20, the fixed costs set out in Table B of Part 45 Section IIIA applied. The Claimants' case is that the court had no discretion under CPR 36.20 to award any different amount. The Defendants wished to argue that the Claimants had unreasonably exited the portal and so, pursuant to CPR 45.24 and also paragraph 7.76 of the RTA protocol, the Claimants were entitled to no more than the fixed costs set out in Rule 45.18 together with disbursements allowed in accordance with Rule 45.19. The Defendants' position was that: (i) the court had the power to make such a determination under CPR 45.24; and (ii) CPR 36.20 does not and should not be taken to oust the provisions of CPR 45.24. So the Claimants made an application on 5th October 2016 for the court to resolve that dispute. I assume that application may have been made under CPR 36.20(11) but it does not really matter, no procedural issue is taken by the Defendant. That application was heard by Deputy District Judge Lynch on 12th June 2017 and it is the decision of Deputy District Judge Lynch that is the subject of the appeal before me today.

5. I have before me, first of all, Mr. Latham for the Claimants/Appellants. Mr. Latham has filed a comprehensive and very helpful skeleton for which I thank him. I should say that Mr. Latham also appeared, I understand, in the court below at first instance. I also have Mr. Asquith for the Respondent. Mr. Asquith did not appear before Deputy District Judge Lynch. I think the Respondent was represented by Mrs. Robson who, I believe, is a solicitor; it does not matter. Mr. Asquith relies also on a clear and well structured skeleton argument which was produced by Mr. Hoe, his instructing solicitor, and my thanks go to Mr. Hoe for that; and both Mr. Latham and Mr. Asquith are to be congratulated for the clarity of their submissions in taking me on a tour of some relatively complex and perhaps less than clear provisions of the Civil Procedure Rules; I thank them for those submissions.

6. I also have before me: copies of the skeleton arguments which were before the Deputy District Judge in the court below; a copy of the written evidence and exhibits, which are minimal, which were before her; a copy of the transcript of both the hearing before the Deputy District Judge and of her Judgment, which was an *ex tempore* Judgment. The submissions were extensive and of some complexity, and that can be seen in the transcript of the hearing. They are, understandably, similar to the submissions I have heard today which have also been extensive. The Judgment, as I say, was *ex tempore* and it is brief. The Deputy District Judge dismissed the Claimants' arguments and found that the Claimants were restricted to the portal costs because she found that the court did consider that the Claimants acted unreasonably by discontinuing the process set out in the relevant protocol. I do not know that I need to read the Judgment; it is only four paragraphs long and can be read by anyone interested. I will say that in paragraph 1 she deals first with an issue which was raised about a letter, whether it was sent by e-mail or by post; I can come back to that. In paragraph 2 she makes a clear finding of unreasonableness and I will just read some of that:

> "I do think the Claimants jumped the gun. Their letter of the 28th, by the time that letter is received by the Defendants they had already exited the portal. It even says that, 'Please note this matter has exited the portal' and it is clear that they are exiting because they say there are complex issues of law."

I am just going to skip a little bit:

> "It could equally be argued and, I think, more forcefully, that the Claimants should have waited and allowed the inspection before anything further was done and if that inspection proved that there was not any damage to the vehicle, as was said, then it would have come out at that point and then they would not be spending this time arguing about why they came out; but it is clear that at 28th August or at some time between 4th and 28th August it was taken out of the portal and, therefore, the Defendant did not have any choice but to proceed from that basis outside because it was taken out."

Both counsel before me accept that the decision made by the judge was that there was a premature ejection from the portal by the Claimants/Appellants.

7. Paragraph 3 does not add very much – I mean there no disrespect at all – to the matters before me. Paragraph 4 is what appears to be the Judgment in relation to the meat of the issue before the Deputy District Judge, which was whether CPR 36.20 had the effect of ousting a determination under CPR 45.24 or not, and I am going to read this paragraph in full. It says:

> "So I say that it was unreasonable to remove in the way that they did and, because it was unreasonable, I think that they are stuck with the portal costs because there really was, once they pulled it off thereafter, once they were told there was nothing further, nothing happened after that. There were no complex issues to deal with. There was nothing more to deal with for them at all because they were told, presumably, as soon as the inspection was done, that it could simply continue, and

> then there was the Part 36 offer and I accept the argument that the Part 36 offer did allow some discretion, but portal costs, because I think it was argued as well that by making a Part 36 offer as well, that it was accepted that it was off the portal and I do not accept that argument either. I think they were entitled to make a Part 36 offer in the way that they did and I accept the Defendant's argument in respect of that and, therefore, I think they are restricted to the portal costs."

8. So that was the decision the subject of the Claimants' appeal.

9. There are three grounds of appeal before me. Ground 1 is that the Deputy District Judge failed to give reasons for dismissing the Claimants' argument that by operation of CPR 36.20 costs payable by the Defendant to the Claimants were fixed at those sums set out in table 6B Part 45 section IIIA. For that ground Mr. Latham relies on the well-known leading cases of *Flannery & Another v. Halifax Estate Agencies Limited* [2000] 1 All E.R. 373, and *English v. Emery Reinbold & Strick Limited* [2002] EWCA 605 (Civ). He submits that the failure to give reasons is a serious procedural irregularity such that the appeal should be allowed, and Mr. Latham asks in that case for me to determine the Claimants' application afresh.

10. Ground 2 is that the Deputy District Judge was wrong in law to reject the Claimants' case that CPR 36.20 meant that costs payable by the Respondent were fixed at those sums in table B of Section IIIA. If I am not with the Claimants on ground 2, the final ground 3 is that the Deputy District Judge was wrong in law to conclude that the Claimants acted unreasonably in exiting the portal. Mr Latham submits that she should have found that the Claimants' actions were not unreasonable and so the Respondent was obliged to pay fixed costs pursuant to CPR 36.20 and not pursuant to CPR 45.24. Of course the burden is on the Claimants as Appellants.

11. I agreed with counsel at the start of this appeal hearing to focus attention on ground 2 and ground 3, so I will deal with those first. Before I move on to ground 2 I think I need to give further detail about the chronology and the relevant correspondence.

12. As I say, there was a road traffic accident. That was on 10th July 2015. The claims were made under the protocol. Each filed a claim notification form on 20th July 2015 for personal injury only. The First Claimant had a claim for damage to his vehicle, which was dealt with in separate proceedings with separate legal representation. The Defendant admitted liability under stage 1. It is the Defendant's case that the Defendant's driver told his insurers that: (i) there was no damage to his vehicle, and (ii) there was no apparent injury to the Claimants at the scene – and so the Defendant's insurer notified the Claimants' solicitors of potential low velocity impact concerns, and made a request to inspect the Claimants' vehicle. That notification letter is at 141 of my bundle. Specifically, it says:

> "We have been advised by our insured of potential LVI concerns. We, therefore, request access to your client's vehicle to arrange a without prejudice inspection of the same in line with *Kearsley v. Klarfeld*. We trust your client will have no issue with this request… We also advise you that pending the above investigations we may wish to raise *Casey v. Cartwright* so we look forward to hearing from you in due course."

The Claimants' solicitors replied on 28th August 2015 and that letter is before me. It says:

> "We refer further to your recent correspondence raising LVI concerns. Please note that this matter has now exited the MoJ portal. In accordance with protocol 7.76 the claim is unsuitable for the protocol as there are complex issues of fact and law in relation to the vehicle related damages. This is clearly going to be unsuitable for the portal".

Then it goes on to ask for information.

13. The Defendant's solicitors replied on 23rd October 2015. They wrote a letter saying, "Please note that LVI is no longer an issue" and they confirmed that on 9th December 2015 with another letter. In the meantime the Defendant had paid, in full, the vehicle damage the subject of another claim. The Claimants issued Part 7 proceedings and, as I have said, two Part 36 offers were made on 24th February 2016 to the First and Second Claimant of £3,100 and £3,400 respectively, which they accepted on 10th March 2016.

14. Turning to the law, CPR 36.20 is headed "Cost consequences of acceptance of a Part 36 offer where section IIIA of Part 45 applies" and provides, so far as is relevant:

> 36.20 - (1) This rule applies where a claim no longer continues under the RTA…. Protocol pursuant to rule 45.29A(1).
>
> (2) Where a Part 36 offer is accepted within the relevant period, the claimant is entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which notice of acceptance was served on the offeror.
>
> …
>
> (13) The parties are entitled to disbursements allowed in accordance with rule 45.29I incurred in any period for which costs are payable to them."

15. Section IIIA of Part 45 applies to claims which no longer continue under the RTA protocol and deals with fixed recoverable costs.

16. CPR 45.29A(1) provides as follows:

> "(1) Subject to paragraph 3 this section applies where a claim is started under –
>
> (a) the [RTA protocol]...
>
> but no longer continues under the relevant Protocol or the Stage 3 Procedure in Practice Direction 8B.
>
> …
>
> (3) Nothing in this section shall prevent the court making an order under rule 45.24."

17. If we go back to CPR 45.24 that is found in Section III rather than Section IIIA of Part 45. It is headed, "Failure to comply or electing not to continue with the relevant protocol costs consequences". It provides so far as is relevant:

> (1) "This rule applies where the claimant –
>
> (a) does not comply with the process set out in the relevant Protocol; or
>
> (b) elects not to continue with that process,
>
> and starts proceedings under Part 7.
>
> (2) Subject to paragraph (2A), where a judgment is given in favour of the claimant but…
>
> (b) the court considers that the claimant acted unreasonably –
>
> (i) by discontinuing the process set out in the relevant Protocol and starting proceedings under Part 7;…
>
> the court may order the defendant to pay no more than the fixed costs in rule 45.18 together with the disbursements allowed in accordance with rule 45.19."

18. That order for fixed costs is different to the order for fixed costs which would apply under CPR 45.29A if CPR 45.24 did not apply. Those are found: (i) in 45.29B which sets out the fixed costs and disbursements which are allowed; and (ii) in 45.29C which specifically provides in paragraph 1 that, subject to paragraph 2, the amount of fixed costs are set out in table 6B. Paragraph 2 provides for an additional amount equal to 12.5 per cent of the costs allowable under paragraph 1, where the claimant (a) lives or works in an area set out in Practice Direction 45 and (b) instructs a legal representative who practises in that area. This is basically London weighting, we are all agreed. Paragraph 3 of CPR 45.29C makes clear that VAT may also be recovered on the fixed costs, which are net of VAT.

19. Mr. Latham submits that the wording in CPR 36.20(2): *"the Claimant* ***is entitled to*** *the fixed costs in table B, table 6C and table 6D…"* gives no discretion to the court to allow a higher or a lower sum in respect of costs. In support of this basic contention he makes the following submissions. First, he submits that it is trite law that the general provisions of the Civil Procedure Rules yield to specific provisions. He relies on the case of *Solomon v. Cromwell Group PLC* [2012] 1 W.L.R. 1048 as authority for this, in particular paragraph 21 of the judgment of Moore-Bick LJ, who said:

> "In my view the rules must be read in accordance with the established principle that where an instrument contains both general and specific provisions, some of which are in conflict, the general are intended to give way to the specific. Rule 36.10 contains rules of general application. Where section II of Part 45 contains rules specifically directed to a narrow class of cases, reading the rules as a whole I have no doubt that the intention is that section II of Part 45 should govern

> the cases to which it applies to the exclusion of other rules that make different provision for the general run of cases."

This was a case which also considered potential conflict of rules relating to acceptance of a Part 36 offer on the one hand and fixed costs under Part 45 on the other. However, it pre-dated significant changes to the Civil Procedure Rules which are those with which we are concerned, particularly the introduction of CPR 36.20 which I believe I am correct in saying was introduced partly as a response to the issues highlighted in *Solomon v. Cromwell*.

20. To apply that guidance to this case, Mr. Latham submits that the general rule is CPR 45.29B which applies to all Section IIIA cases, and the specific rule which modifies it is that upon which the Claimants rely, namely CPR 36.20. He submits that prescribes the costs consequences following the acceptance of a Part 36 offer in circumstances where CPR 45.29B would otherwise apply. This is the opposite approach to that of Moore-Bick LJ, but Mr. Latham distinguishes the circumstances in which this case has been decided from the situation at the time that *Solomon v. Cromwell* was determined, because of that introduction of CPR 36.20 I have referred to.

21. Mr. Latham submits that the correct course for the court is to look at where the entitlement to costs arises. He argues that at the time of Moore-Bick LJ's decision in *Solomon v. Cromwell*, Part 36 applied in every case where a Part 36 offer was accepted, whether in time or out of time, without a specific fixed costs regime attached to it. Accordingly, he submits, that was the general entitlement to costs which was amended by the specific rule in Part 45 at that time. However, now that CPR 36.20 has been introduced, the entitlement to costs can be found within Part 45 and specifically Part 45.29B. So that now becomes the general provision which is subject to the specific provision found at Part 36.20 which, therefore -- I am trying to avoid the use of the word 'trump' but l think I am just going to allow myself to do so -- effectively trumps it. I should say that neither counsel succumbed to the use of the word trump so I paraphrase. That is Mr. Latham's position.

22. Mr. Asquith in his skeleton argument relies on *Solomon v. Cromwell* to submit that the position is as Moore-Bick LJ found, that the general rules in Part 36 give way to the specific rules of Part 45, but it perhaps became apparent as Mr. Asquith's oral arguments were made that he was open to accepting the idea that which was the general rule and which was the specific had really been reversed by the introduction of CPR 36.20.

23. I think there is force in Mr. Latham's submission that the circumstances which now pertain by the introduction of CPR 36.20 mean that the general rule is to be found in CPR 45.29B but that there is a specific rule which modifies it which is to be found in CPR 36.20. I accept that. However, Mr. Latham went a bit further to submit that CPR 45.29B is itself explicitly modified by and subject to CPR 45.29A(3) which brings in CPR 45.24 from Part 45 section III, which otherwise would not apply. I accept that it is so modified. However, Mr. Latham's argument, as I understand it, appears to be that the *whole* of Rule 45.29B is the general rule even though it may be subject to the provision in CPR 45.24 in a specific case, i.e. where the court considers that a claimant had acted unreasonably in discontinuing the process and starting proceedings under Part 7.

24. In my judgment, it seems to me that, for the purposes of interpreting these provisions, if CPR. 45.29B is the general rule and CPR 36.20 is a specific rule which pertains in specific circumstances in which a Part 36 offer is accepted within time, et cetera, as I have found, then CPR. 45.24 equally can be seen to be a specific rule pertaining in specific circumstances, namely where a court has made a finding of unreasonable actions by the Claimants. For that reason I do not consider that Mr. Latham's first point is a full answer. He submits that it precludes the Respondents from making the argument they seek to make to me. I do not reach the conclusion that he does. I do not consider that it precludes the Respondents from making that argument because, in my judgment, there is a clear tension between two specific rules, namely CPR 36.20, and CPR 45.24 and how they both affect the general rule in CPR 45.29B. Applying *Salomon v Cromwell*, I can be satisfied that these specific rules govern the cases to which they apply to the exclusion of the general rule in CPR 45.29B, but this does not, in my view, lead me to the answer that Mr. Latham seeks because it does not tell me how to resolve that conflict or tension between those two specific rules.

25. The next point raised by Mr. Latham for his clients, the Appellants, is that Part 36 is a self-contained procedural code -- I do not believe that Mr. Asquith disagrees with that; neither do I (that can be found in CPR 36.1) -- and that the court should be slow to incorporate into it other parts of the Civil Procedure Rules unless specifically provided by the draftsman within Part 36 itself. Mr. Latham analyses the wording in CPR 36.20 which refers to Section IIIA of Part 45, specifically in the heading and in both CPR 36.20(1) and (2). He submits that the reference to Section IIIA in the heading is not intended to incorporate *all* of Section IIIA into CPR 36.20, but merely to highlight what *type* of claims CPR 36.20 is intended to refer to. He submits that the scope of CPR 36.20 is set out in CPR 36.20(1) which makes clear that the rule applies where a claim *"no longer continues under the RTA… Protocol pursuant to rule 45.29A(1)"*. He submits that is a specific reference to a specific subsection and that, therefore, *only* 45.29A(1) is incorporated into CPR 36.20 by that reference and not either CPR 45.29A(2) or, crucially, CPR 45.29A(3). The latter, as I have set out, is the section which provides that *"nothing in CPR 45.29A prevents the court making an order under rule 45.24"*. Mr. Latham further submits that this contention (that the relevant draftsman of CPR 30.20 has chosen specific parts of Section IIIA only to incorporate into that rule) can also be seen to operate: (i) in CPR 36.20(2) where the draftsman specifically provides that *"where a Part 36 offer is accepted within the period the claimant is entitled to the fixed costs in Tables 6(b), 6(c) or 6(d) of Section IIIA of Part 45"*; and (ii) in CPR 36.20(13) which provides that parties are entitled to disbursements allowed in accordance with CPR 45.29I and no more. He asks me to accept that those are careful references incorporating certain provisions of Part 45 into CPR 36.20, which is consistent with Part 36 being a self-contained code.

26. Finally on this point, Mr. Latham submits that, if the Defendant wished to argue for a costs order under CPR 45.24 in circumstances where it also wished to argue that the Claimants had acted unreasonably by discontinuing the process in the way that they did and seeking costs in respect of that, it could, instead of making Part 36 offers to the Claimants, have chosen not to do so, and instead have made an open offers or *Calderbank* offers.

27. Mr. Asquith for the Respondent responds with the following key submissions. (I am not going to deal with all the submissions of both parties; those have been extensive

and I am picking out for the purposes of this already lengthy *ex tempore* judgment the submissions that I think are particularly relevant. I have considered all of the submissions, however.). Firstly, CPR 36.20(1) states that it applies when a claim no longer continues under the RTA protocol pursuant to CPR 45.29A(1). Mr. Asquith submits that since CPR 45.29A(1) specifically expresses itself to be subject to CPR 45.29(3), CPR 36.20(1) also effectively incorporates consideration of CPR 45.29(3) into its scope. In addition, since CPR 45.29A(3) itself provides that *"nothing in this section shall prevent the court from making an order under rule 45.24"*, making clear that CPR 45.29A(1), which is subject to this provision, does not prevent such an order being made, to the extent that Mr. Latham argues that there is a 'missing link' between CPR 36.20 and CPR 45.24, Mr. Asquith disagrees. Accordingly, he argues that Mr. Latham's submission that CPR 45.29A(1) can be considered as incorporated into CPR 36.20 in isolation from CPR 45.29A(3), is wrong. He further submits that if Mr. Latham's argument that only specific provisions of Section IIIA of Part 45 were picked out and brought into CPR 36.20 by the draftsman of that provision was correct, that would give rise to some surprising results. For example, CPR 45.29B and CPR 45.29C would not apply to costs claimed under CPR 36.20. As I have set out already, those include entitlements to, for example, London weighting and VAT.

28. I questioned Mr. Latham on this latter point during the course of submissions and his argument was that London weighting and VAT could be inferred somehow into Tables 6B, C and D. It is not a strong argument, in my judgment. It seems the careful selection by the draftsman of specified provisions of Part 45 for incorporation into CPR 36.20 for which the Claimants contend in Mr Latham's earlier submissions is now not, in fact, so careful. It seems to me that the Claimants would like to rely on those specified provisions plus cherry pick, by inference, such other provisions which are helpful to them or in relation to which it cannot sensibly be argued that there was an intention deliberately to exclude them. I am afraid this exposes, I think, some of the difficulties with the submissions made by Mr. Latham for his clients.

29. In any event, in my judgment it is clear from looking at CPR 45.29C that the Claimant's argument is not correct. If it was correct then there would be entitlement to those elements when CPR 36.20 applies whereas, for example, when a Part 36 offer outside of the time limits is accepted out of time and, therefore, outside CPR 36.20, there would be no such an entitlement. I consider that to be a very difficult result to accept for two reasons: first it is difficult to understand why that would be the intention; and second, if that really was the intention, why was is not made clearer? So I accept both of those two initial submissions by Mr. Asquith: (i) that CPR 45.29A(1) really incorporates within it both subsection (3) of that rule and also CPR 45.24; and (ii) that there would be an unattractive result that would be given if Mr. Latham's argument for the Claimants was correct, namely that neither London weighting nor VAT could be pursued under section CPR 36.20 in these circumstances. I do not think that can be the intention.

30. Mr. Asquith further submits that the interpretation sought by the Claimants would also have the effect of discouraging defendants to make Part 36 offers, and that it is not enough to say that a Calderbank or an open offer should be made instead, as the Claimants submit. He submits that there are specific public policy considerations which mean that Part 36 offers and the acceptance of Part 36 offers should be

encouraged. He has support for that public policy argument in the judgment of Moore-Bick LJ, in *Solomon v. Cromwell* at paragraph 20 after the marking at D:

> "…If the Appellant's arguments were correct the acceptance of a Part 36 offer would always result in an order for costs on the standard basis in low value road traffic accident cases. That would undermine the fixed costs regime and provide a powerful incentive for defendants not to make Part 36 offers in such cases."

And a little further in the same paragraph:

> "None of these consequences fits well with the broader scheme of the rules which seek to encourage settlement by the use of Part 36 and to control the costs of low value road traffic accident claims in the manner described."

I do consider that, notwithstanding the change to the rules which has taken place since *Solomon v. Cromwell* was decided, the public policy considerations identified by Lord Justice Moore-Bick are equally valid today.

31. Mr. Asquith makes a number of other submissions, specifically in relation to, for example, interim applications and the effect of disease claims on Mr. Latham's argument which I consider Mr. Latham dealt with to my satisfaction. Accordingly I do not accept them for the reasons that he gave. I also specifically acknowledge that the drafting of CPR 36.20, 45.24 and 45.29A, is not perfect and accordingly I cannot make a literal interpretation of those provisions; in my judgment I must seek to give a purposive interpretation of how these provisions work together. However taking it all into account, I am satisfied that, although CPR 36.20 does not clearly express it, it was open to the Deputy District Judge to consider whether the Claimants acted unreasonably and to make an order under CPR. 45.24 if she found that they did, notwithstanding the acceptance of the Part 36 offer, for the following reasons:

i) in my judgment the scope of section IIIA has been brought into CPR 36.20 by the effect of 45.29A and specifically 45.29A(1) and (3) in conjunction;

ii) reading CPR 36.20 without allowing that interpretation would give rise to some absurdities which I do not consider can have been intended by the draftsman that rule;

iii) for that reason I consider that, even when a Part 36 offer is accepted in time when a claim has started under the protocol but has been discontinued and Part 7 proceedings have been started, that CPR. 45.24 does provide a route to make a different costs order to that prescribed within CPR 36.20 – CPR 36.20 does not oust it.

32. Accordingly, ground 2 fails.

33. I will deal next with ground 3. As I have found that Deputy District Judge Lynch was entitled, therefore, to consider whether the Claimants acted unreasonably and whether to make an order under CPR 45.24 the question is whether she wrong to do so. There are really two areas I need to consider. First of all, was her finding that the Claimants

discontinued the process from the protocol prematurely a finding of fact, in which case I should be slow to disturb it save on *Wednesbury* principles, or was that a matter of law? If it was a matter of law, secondly, was her decision correct?

34. It is the Appellant Claimants' case that the judge's decision that the Claimants prematurely ejected from the protocol (found at paragraph 2 of the transcript of her decision) is not a factual finding but a matter of law and so it is open to me to look at that decision and determine whether the judge was wrong to reach it. Mr. Asquith for his client says no, that paragraph 2 falls within the legal principle set out in *Watson Farley & Williams (a firm) v. Ostrovizky* [2015] E.W.C.A. (Civ) 457. Mr Asquith refers me in particular to paragraph 8 of that judgment which deals with the correct approach of an appellate court when invited to interfere with factual findings, and within that paragraph there is reference to the decision of Lewison LJ, in *Fage U.K. Limited & Anr. v. Chobani U.K. Limited & Anr.* [2014] EWCA (Civ) 5 at paragraph 114 where he said:

> "Appellate courts have been repeatedly warned by recent cases at the highest level not to interfere with findings of fact by trial judges unless compelled to do so. This applied not only to findings of primary facts but also the evaluation of those facts and to inferences to be drawn from them and the reasons for this approach are many".

Lord Justice Lewison then sets out six reasons for that, which broadly relate to being unable to replicate what a trial judge has experienced, in an appeal court. Mr. Asquith says that, although the finding of the judge in paragraph 2 cannot be a finding of primary fact (I believe he concedes that) it is certainly a finding which comes out of the evaluation of the evidence that was before her, namely the correspondence and, therefore, that is a finding which an appeal court should be slow to overturn. I am not sure that it is of enormous relevance in this case because it is clear that there was no oral evidence before the trial judge which she needed to evaluate. It was really two or three pieces of paper, lines of a few letters long which an appeal court can evaluate just as well as a trial judge, so is it a finding of fact or not? I think probably I would incline towards Mr. Latham's view that it is a matter of law. If I am wrong about that and it is a finding of fact I am still able to deal with it just as well as the judge at first instance was. It hinges on this letter really that was written on 4th August:

> "We have been advised by our insured of potential L.V.I. concerns. We therefore request access to your client's vehicle to arrange a without prejudice inspection in line with *Kearsley v. Klarfeld*", going on to say: "Pending the above investigations we may wish to raise *Casey v. Cartwright.*"

35. I have had a clear exposition of the cases of *Kearsley v. Klarfeld* and *Casey v. Cartwright* in the skeleton argument of Mr. Latham for which I am grateful. We have had some discussion about it. I think he has identified where my thinking was going when we did have that discussion. Certainly the Deputy District judge appears to have reached a decision that I would have reached if I was in her position and that I reach now, which is that *Kearsley v Klarfeld* sets out all the difficulties inherent in proving low value impact road traffic accidents and the difficulty of evidence that is required and the analysis of such evidence. I accept Mr. Asquith's submission that that reference to *Kearsley v. Klarfeld* is clearly a reference to requiring inspection of a

client's vehicle in order to establish what sort of damage has been caused to it in the context of potential L.V.I. concerns. In my judgment, the mere reference to *Casey v. Cartwright* in the letter of 4 August does not make this a '*Casey v. Cartwright* letter', as I think I made clear in my discussions with Mr. Latham during the course of his submissions. *Casey v. Cartwright* sets out very clearly the notice that must be given or that should be given in cases where it is going to be raised as a matter of causation that the low velocity impact was such as it was really impossible – that is probably setting it too high – to have caused the injuries complained of and paragraph 30 specifically says:

> "Where in a particular case a defendant wishes to raise the causation issue he should notify all other parties in writing that he considers this to be a low impact case and that he intends to raise the causation issue."

I am satisfied upon considering the letter of 4th August that that does not fit the case. In that letter, the Defendant makes clear that until the car is inspected they do not know whether they are going to be raising causation and low velocity per *Casey v. Cartwright*, but they are providing advance warning that this is the way that their thinking is going and that is why they want to inspect the vehicle.

36. Mr. Latham submits that a lot of costs can arise at this stage for the Claimants - that they will have to serve proofs of evidence, they will have to start sending their client to medical experts. Yes they will, but not until a *Casey v. Cartwright* letter is sent. That is when the Defendnat provides the notification that he considers that this *is* a low impact case, and that he *intends* to raise causation. If the Claimants choose to incur these costs beforehand, that is entirely up to them but it is not a reasonable action to eject or discontinue from the protocol upon receipt of an early warning flag of a letter such as that of 4th August, which refers to Casey v Cartwright but is not a 'Casey v Cartwright letter'. That is clearly also the decision reached by Deputy District Judge Lynch. I cannot criticise it of course because I would have reached the same decision. So ground 3 must fail.

37. That leaves ground 1: were the reasons given by the Deputy District Judge adequate in accordance with the case law? I regret to say that, in all the circumstances, I am satisfied that they were not sufficient to enable the parties and this court to fully understand the analysis she undertook and the reasons she came to for rejecting the Claimants' case that CPR 36.20 ousted CPR 45.24. Of course I have every sympathy for District Judges and their Deputies doing busy lists under tremendous pressure of time, perhaps more so than many in my position having been a District Judge myself for five years. Nonetheless, to do justice to the many technical arguments which were clearly well structured and well expressed to the Deputy District Judge, as I can see from the transcript of the hearing, I am satisfied that adequate reasons were not given. That is why I gave permission to appeal, because I could see that this ground had a real prospect of success, and because I could not fully analyse whether ground 2 or ground 3 would have a real prospect of success because of the inadequacies of the Deputy District Judge's reasons for reaching her decision. To that extent the appeal succeeds but, as I say, the meat of the issue is not in ground 1, it is in ground 2 and ground 3 and those have been unsuccessful.
