IN THE BIRKENHEAD COUNTY COURT

Claim No. 2IR08894

76 Hamilton Street
Birkenhead
CH41 5EN

Tuesday, 24th April 2012

Before:

DEPUTY DISTRICT JUDGE DAWSON

Between:

MR MARIO MOZZANO

Claimant

-v-

RIWA LIMITED

Defendant

Counsel for the Claimant: MR LINDSAY

Costs Draftsman for the Defendant: MR PARKER

TRANSCRIPT OF PROCEEDINGS UP TO JUDGMENT

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THE DEPUTY DISTRICT JUDGE: Yes, good morning.

MR PARKER: Good morning, sir.

MR LINDSAY: Good morning, sir.

THE DEPUTY DISTRICT JUDGE: Good morning. Yes and we have Mr Lindsay for the claimant—

MR LINDSAY: Yes, sir.

THE DEPUTY DISTRICT JUDGE: —and Mr Parker, counsel for the second defendant... No, for the defendant.

MR PARKER: For the defendant, yes.

THE DEPUTY DISTRICT JUDGE: There is only one defendant, yes. By way of preliminary, can I just introduce this lady who is sitting in today, she is spending a day shadowing, looking out for some interesting cases. Yours probably has a fascination and an interest.

MR LINDSAY: To certain people.

THE DEPUTY DISTRICT JUDGE: Yes. So, she has thrown up a novel point, I think, and... I will wait for Mr Parker to—

MR PARKER: Yes, sorry about this.

THE DEPUTY DISTRICT JUDGE: It is all right. Yes, I have had the benefit of considering the skeleton arguments that both of you have filed.

MR LINDSAY: Yes, sir. Sir, I am sure you have seen the order of, I think it was, Deputy District Judge McCulloch on 24th February 2012 listing today.

THE DEPUTY DISTRICT JUDGE: Yes.

MR LINDSAY: Sir, two preliminary issues have arisen that I am instructed to take. Sir, the order of Deputy McCulloch asserts that service of skeleton arguments should have been made 14 days prior to today's hearing. The claimant's skeleton argument is dated 29th March, so it was served upon the defendants on 4th April, it was sent on the 2nd. Sir, the defendant's skeleton argument was sent by fax at, and I shall just confirm the exact time, 44 minutes past five on the 10th, so, sir, deemed service would only have been the 11th, so that is not 14 days prior to today's date. So, on the basis of the order as made the primary submission on behalf of the claimant is that they should be precluded from relying upon their skeleton argument because it was filed very late. And, sir, I remind you, of course, that the order is 24th February so they had two months before today's date to try and get it in, but still did not get it in, in the timeframe envisaged. Sir, what I say has effectively strengthened the claimant's submission is this. The skeleton argument provided by the defendants is no more than a response to the skeleton argument provided by those who instruct me because, sir, if

even one looks at the layout of the defendant's skeleton argument it is almost verbatim that of the claimant. At paragraph 5 the claimant says, "Chronology". The next substantive paragraph is titled "Portal Timeout". Lo and behold the defendant's is called "Portal Timeout". We then have "CNF sent by third party solicitors"; the defendants say the same and so on and so on. So, sir, what we have here is the defendants and I would be bold to say that, sir, it is a cynical tactic because what has happened here and it has to be this, they have waited for the claimant's skeleton argument to come in and then responded to it. They have not felt the need to put forward their own submissions in relation to the costs issue, they have merely sought to hold back, not cards on the table, open approach that the CPR advocates, but have effectively waited and gained, and it is, an unfair advantage because they have got their responses in before the court at a time when the is claimant ignorant, we have not seen the defendant's at all when we formulate our submissions. So, sir, the primary submission is the defendants should be precluded from relying upon the skeleton argument.

Sir, if you are not with the claimant on this, then I would say this point. The claimant's skeleton argument is there and, of course, the usual course would be for the defendants to respond. Sir, I would say they have already had their response, they have had time to actually sit down, they have almost a week that they have the claimant's skeleton argument to sit down and formulate a response. With respect to my friend who attends today, I say, because of the actions of solicitors, they have precluded his capability to respond today, so I say they have had their cake, they should not get their cake and eat it too.

So, sir, to preliminary points: one, the defendant should be debarred from relying upon the skeleton argument because it is in flagrant breach of the order and, two, effectively today the response of my friend has gone because they have already had it.

THE DEPUTY DISTRICT JUDGE: Yes, Mr Parker?

MR PARKER: Sir, I have the fax transmission sending the order. We did this *[inaudible]* outside, but I think we looked at the wrong document. It clearly states that it was sent at 20 past four. Obviously, I do not know whether there is a delay in faxes going across, but at the top there, 16:19 on the day. I understand this is very late in the day, but, obviously, it was quite some time ago and I do not think it is a last minute before the hearing attempt to get the arguments in. There has been plenty of time to review the matter and I do not think such late service would have affected any decisions made by the claimant.

THE DEPUTY DISTRICT JUDGE: All right.

MR PARKER: With respect to the skeleton argument, the issues in this matter are not particularly narrow. I do not feel that the fact that the skeleton argument—

THE DEPUTY DISTRICT JUDGE: Can I ask, did you prepare the skeleton argument?

MR PARKER: I did not prepare the skeleton argument, sir.

THE DEPUTY DISTRICT JUDGE: Was that prepared by the solicitors or—

MR PARKER: It is prepared by a further member of—

THE DEPUTY DISTRICT JUDGE: Of chambers.

MR PARKER: —Berrymans, yes.

THE DEPUTY DISTRICT JUDGE: All right. Yes.

[Judgment follows]

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JUDGMENT APPROVED BY THE COURT

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JUDGMENT

1. THE DEPUTY DISTRICT JUDGE: Having considered the facts that have been presented, I am satisfied that the skeleton argument has been served within the permitted time and, even if it were to be the case that it was late, it is only a day late and I would grant relief from the sanctions that would otherwise follow, so I am prepared to allow that to be admitted.

MR LINDSAY: Sir, in relation to the second submission then about the response because it is a response to the claimant's skeleton, it cannot be read any other way because it has the exact same paragraph numbers—

THE DEPUTY DISTRICT JUDGE: Yes.

MR LINDSAY: —the exact same titles.

THE DEPUTY DISTRICT JUDGE: Yes.

2. THE DEPUTY DISTRICT JUDGE: Each of you, obviously having seen the other's skeleton argument, will be allowed and will have the opportunity to expand and elaborate on any arguments and any points that have been raised, but it does seem to me that both of you have covered the salient points. Obviously, you should not be necessarily restricted to what is in the skeleton argument, if there is any elaboration or any amplification then that should be allowed.

MR LINDSAY: Sir, the claimant's skeleton argument, as I have indicated, is dated 29th March. Sir, looking at the chronology that I have set out; sir I do not intend to go through it in full detail, but pertinent dates that will draw: obviously, road traffic accident 27th July 2011. You will note and it is exhibited at exhibit 1 and 2 that, effectively, those who instruct me make contact with the defendant's driver on 17th August 2011. Thereafter, Bridge Insurance Brokers Limited contact those who instruct me and assert and, sir, this is crucial, I say, to the context of this case—

THE DEPUTY DISTRICT JUDGE: Yes. Can I just stop you there—

MR LINDSAY: Yes, sir.

THE DEPUTY DISTRICT JUDGE: —Mr Lindsay because looking at the letter of 17th August it says, "We write further in relation to this matter".

MR LINDSAY: Yes.

THE DEPUTY DISTRICT JUDGE: So, was there an earlier letter?

MR LINDSAY: Sir, there was, it was in relation to the employers of Mr Peter Cotton, who then forwarded his details.

THE DEPUTY DISTRICT JUDGE: I see, yes, all right.

MR LINDSAY: Yes. So, sir, what we have and, sir, I say the crucial one, is exhibit 2 because Bridge Insurance Brokers Limited expressly assert that the letter of 1st August is sent to Allianz Insurance, so the relevant Road Traffic Act insurers in this case. So, sir, the point that I will raise later, is there is an argument to say if that had been forwarded on to them—

THE DEPUTY DISTRICT JUDGE: Well, that letter, it is said that it is 1st August—

MR LINDSAY: Yes, sir.

THE DEPUTY DISTRICT JUDGE: —but it cannot be 1st August.

MR LINDSAY: No, sir, because it says 17th August—

THE DEPUTY DISTRICT JUDGE: Yes.

MR LINDSAY: —on it, but, sir, one can assume that if they have got correspondence dated 17th August that around about that time it has been sent to Allianz so, sir, there is an argument to say that on or about just after 17th August Allianz would have had notice that Camps Solicitors are writing on behalf of the claimant.

Sir, other pertinent dates from the chronology is the CNF, and I have used that because it is the claims notification form, sent to the defendant's insurers on 2nd September. Now, the defendant's insurers do respond on 6th September and they request signed forms of authority from the claimant, sir, and that is exhibit 5.

THE DEPUTY DISTRICT JUDGE: You can understand why they asked for that.

MR LINDSAY: Yes, sir. So that is the 6th, that is exhibit 5. So, exhibit 6, this is stated to be "Urgent, by post and fax". So, sir, if it is by post it is dated 23rd September, so one can assume by first class it is deemed served on 25th, that is when they would have had the forms of authority. By fax it is sent on the same day, 23rd September they would have had that. Exhibit 7, sir, on the 27th, so there are four or five days to that point where the protocol period has expired. So, sir, we have 27th September. Sir, the next crucial date is the admission of liability from the defendant is not until 14th October.

THE DEPUTY DISTRICT JUDGE: All right, so what you are saying is that you send the CNF on 2nd September—

MR LINDSAY: Yes.

THE DEPUTY DISTRICT JUDGE: —and then you say on—

MR LINDSAY: Sir, it is not until 27th September that we say it has dropped out.

THE DEPUTY DISTRICT JUDGE: Yes.

MR LINDSAY: I should say, sir, that, of course, if anything, we provided the defendants with an additional week because it is 15 days in which for them to respond.

THE DEPUTY DISTRICT JUDGE: All right, but this is a problem, is it not, that the claim was started under the protocol—

MR LINDSAY: Yes, sir.

THE DEPUTY DISTRICT JUDGE: —by Halsall's and indeed stage one costs seem to have been paid to Halsall's and then Camps come on the scene somehow and they send a separate claims notification form and this is something that I do not think the rules or the protocol will help on the situation where there are two firms of solicitors.

MR LINDSAY: Sir, what I was going to do, I was going to go through the relevant dates now, I was going to address on particular points.

THE DEPUTY DISTRICT JUDGE: All right, yes, I am sorry.

MR LINDSAY: Sir, you will see the skeleton argument does address the additional firm.

THE DEPUTY DISTRICT JUDGE: Yes.

MR LINDSAY: So, sir, we have an admission of liability on 14th October, we then have proceedings are issued on 13th January, so, sir, effectively, it is some, what, three months later that those who instruct me issue. Of course, sir, you will be aware that once an admission is made we send the Straker letter and we know what the Straker letter is, sir, the medical report, and that is sent on 8th December and we can issue 21 days thereafter and we actually issued beyond that time period. So, sir, they are the key days. Sir, dealing with the substantive issues of the skeleton argument, obviously the first issue is as you have identified, the portal, and, sir, I think the rules do actually assist, sir, with respect, and I am looking at, to begin with, the current edition of the White Book, page 2721—

THE DEPUTY DISTRICT JUDGE: Yes.

MR LINDSAY: I will wait for my friend to get that. Sir, as we know, a CNF, claims notification form, was sent on 2nd September. Now, if one looks at rule 6.11 it says, "The defendant must..." It does not say "may", there is no discretion, "...must complete the insurer's response and send to the claimant within 15 days", so that would have been 17th September. Sir, I refer back to paragraph 5.5—

THE DEPUTY DISTRICT JUDGE: Sorry, we have got rule 6.1, which says: "The claimant must complete and send the CNF to the defendant's insurer", yes?

MR LINDSAY: Yes.

THE DEPUTY DISTRICT JUDGE: Then where are you taking me to?

MR LINDSAY: Sir, I am looking at 6.11, it is over the page, paragraph 6.11. You will see that this is about the response from the insurers. Sir, at page 2723, it is just about halfway.

THE DEPUTY DISTRICT JUDGE: Yes, all right.

MR LINDSAY: So, sir, this says, "The defendant must complete within 15 days". Now, sir, this is all done electronically, so, sir, it is almost instantaneous.

THE DEPUTY DISTRICT JUDGE: All right.

MR LINDSAY: Now, sir, I will refer you back, if I can, a page—

THE DEPUTY DISTRICT JUDGE: Can you help me with one thing which I have noticed in both the skeleton arguments?

MR LINDSAY: Yes.

THE DEPUTY DISTRICT JUDGE: The CNF form does not appear to be signed by the claimant or somebody on his behalf.

MR LINDSAY: Sir, it is an electronic form which is sent in, it is all typed in the computer.

THE DEPUTY DISTRICT JUDGE: No. I see, yes, all right.

MR LINDSAY: So, sir, what we have is, as I have indicated, 6.11 says 15 days. Sir, if I could refer you back to paragraph 5.5 and, sir, this emphasises actually the mandatory requirements of the need for a response. "All time periods, except those stated in paragraph 6.11, may be varied by agreement between the parties". So, sir, what we have is, with respect to the defendants, it is a little bit of, "Tough, we have sent you a CNF", they have to respond. Sir, there is no discretion in the portal because it says "must". So, in many regards the instruction of Michael Halsall in a way is a little bit of a red herring because the rules are quite clear, sir, it is echoed on two occasions, "The defendant must respond". Now—

THE DEPUTY DISTRICT JUDGE: But if you take that argument to its conclusion that means that firm one sends a CNF to the defendant's insurers, that has got to be responded to within 15 days, and obviously stage one costs to be paid.

MR LINDSAY: Yes.

THE DEPUTY DISTRICT JUDGE: Firm two comes on the scene, they also send a CNF; do you say that the defendants have to respond to that and they must pay another set of stage one costs?

MR LINDSAY: Sir, that is as the rules state because I was about to go on because, if you look over the page again, 6.18 talks about the sending of the stage one costs where liability is admitted or liability is admitted and contributory negligence alleged within ten days of sending a response. So, sir, again, that is must. Now, sir, what I say is this and the defendants seem to think that this is in many ways the claimant's problem, but, sir, it is not because the defendants request from those who instruct me signed forms of authority from the claimant who provides them in terms of, "I instruct Camps Solicitors to represent me". Now, sir, that is why I say in a way the Halsall part in this case is a bit of a red herring because it is not a matter for Camps Solicitors or the

claimant as to who the defendant pays, if Michael Halsall inappropriately or improperly request payment from the defendant then that is a fight between them and Michael Halsall's, it has got nothing to do with Camps Solicitors. So, what the defendants cannot ignore and I say the court cannot ignore is this, when a CNF is sent the defendants must respond, they must do; that is what the rules say. When liability is admitted they must make payment. Sir, you have seen from the correspondence and I think even the defendants own chronology echoes and at no time before the mater dropping out of the portal do they respond with payment or respond with an admission of liability or respond by alleging contributory negligence. None of that is done. So, sir, from the outset it is quite clear that this matter has dropped out of the portal.

Now, sir, you will see it is said in the skeleton argument at paragraph 7.21 that once a matter is out of the portal the claimant is entitled to issue part 7 proceedings. Now, one matter that should be clarified from the defendant's skeleton argument at paragraph 9, which seems to suggest that those who instruct me are somewhat jumping the gun because it says that when we sent the forms of authority that was the same day, but the claimant's solicitors said that it dropped out of the process. Well, sir, that is not correct because if one looks at the letter of 23rd September, which I do not know if you have a copy of it in front of you, but it is at exhibit 6 of the claimant's skeleton argument, sir, it says, "Enclose our client's forms of authority and request for payment of stage one within the required timeframe, otherwise this case will drop out". It does not say it is, it does not say it has; it says will and, sir, if one looks at exhibit 7 it is not until four days later that those who instruct me say there has been no response to liability and at that point it has dropped out, but, sir, as I said before, if one looks at the timeframe, we have CNF sent 2nd September, the defendants response was due on 17th September and so, if anything, those who instruct me have given the defendants an additional ten days, which we do not need to do and yet, despite the fact that they had the forms of—

THE DEPUTY DISTRICT JUDGE: When you say the defendants' response by 17th September—

MR PARKER: It is by the 23rd, is it not, 15 business days?

THE DEPUTY DISTRICT JUDGE: Yes.

MR LINDSAY: Oh, sorry.

THE DEPUTY DISTRICT JUDGE: It is 15 business days, yes.

MR LINDSAY: Sorry. Well, we have given them an extra four days. Sorry, thank you to my friend for clarifying that.

THE DEPUTY DISTRICT JUDGE: Yes.

MR LINDSAY: So, sir, one has to question where we have the mandatory requirement of the portal to respond, where those who instruct me have given them extra time, that the defendants knew that it was Camps Solicitors who had the claimant's authority, not Halsall's, and, sir, there is an argument to say as well, of course, that the defendants knew in August when their insurance brokers forwarded the correspondence to them

that Camps Solicitors were involved in these proceedings. So, sir, with respect, the court has no discretion here, this claim has dropped out of the portal.

Now, sir, I go on then, you will see in the skeleton argument, to, as I have termed it, the red herring, as it were, Michael Halsall, because, as I have indicated before, this is not a matter between Camps Solicitors and the defendant's insurers because to follow the defendant's argument through is this, you could have a rogue solicitor saying, "I represent a claimant", the defendants then pay them away, yet, lo and behold, the solicitor that the claimant actually instructed and, of course, the claimant through them is entitled to his costs is being effectively out of pocket because the defendants say, "Well, we have paid someone else". Sir, it is a matter between the insurers and Michael Halsall's. If there is a genuine mistake then clearly the defendant will have strong grounds for recovering—

THE DEPUTY DISTRICT JUDGE: Well, you say it is a matter between the defendants and Michael Halsall, is it not a matter between Camps and Michael Halsall because the defendants cannot be expected or should not be expected to pay stage one costs twice; here they are being expected to pay stage one costs twice because the claimant, for whatever reason, has decided to instruct or have other solicitors representing him. Surely that is a matter for the two claimant's solicitors to sort out, not for the defendant to try to sort out with Michael Halsall.

MR LINDSAY: Well, sir, I can say this can fall in many different circumstances. You know, if a purchaser pays the wrong seller a sum of money it is not for him to get it out of the other seller.

THE DEPUTY DISTRICT JUDGE: But he has not paid the wrong seller, he has paid somebody upon receipt of a claims notification form, quite properly.

MR PARKER: In line with the portal—

MR LINDSAY: Well, sir, I should say—

MR PARKER: —which is set in stone, as you say.

THE DEPUTY DISTRICT JUDGE: Yes.

MR LINDSAY: Sir, I should say, what the defendants do not have on their skeleton argument and I have certainly not seen it is anything from Michael Halsall. We have only taken the defendants' word on this from the letters which I have exhibited to the skeleton argument. It says, "Michael Halsall's have sent us a CNF". Sir, I say the defendants' submissions would have some strength if we had, one, the correspondence received from Michael Halsall's; two, any other detail in relation to the enquiries. We have got the CNF, but what enquiries did the defendant's insurers take with Michael Halsall to ensure them or satisfy them that they were instructed to, as it were, accept the claim on behalf of this claimant, Mr Mozzano? What they do have is the signed forms of solicitors from Camps Solicitors.

THE DEPUTY DISTRICT JUDGE: Well, there is a letter here, which is exhibit 2 on the defendant's skeleton argument, sending the stage one payments.

MR LINDSAY: Yes, sir, but that is sending stage one, we do not know what enquiries were taken because, of course—

THE DEPUTY DISTRICT JUDGE: Well, that is sent on 18th August.

MR PARKER: Yes, sir.

THE DEPUTY DISTRICT JUDGE: So, that is sent in response to the claims notification form.

MR PARKER: Yes, sir.

THE DEPUTY DISTRICT JUDGE: So, there is the evidence. We have got the claim form from Michael Halsall and we have got this letter sending the stage one payment.

MR LINDSAY: But, sir, what we know is before the portal time is out for Camps we have those that instructing me being requested to send signed forms of authority that they are acting for the claimant, which they do.

THE DEPUTY DISTRICT JUDGE: Yes.

MR LINDSAY: So, I say why should the claimant, when the defendants have made a mistake, they must have because the claimant has instructed Camps solicitors—

THE DEPUTY DISTRICT JUDGE: Why have the defendants made a mistake?

MR LINDSAY: Well, they have because they paid the wrong solicitors.

THE DEPUTY DISTRICT JUDGE: No, they have not.

MR LINDSAY: Sir, they have because—

THE DEPUTY DISTRICT JUDGE: They have not because they have paid the claimant's solicitors on 18th August and the evidence is that they did not know the existence of Camps at least until some time after 17th August, which is when Camps send the letter to Bridge Street Insurance Brokers who then respond. All right, the date of the letter is wrong, but they say, "We have notified Allianz Insurers". So, on the face of it, it would appear that when they sent the cheque on 18th August they did not know about Camps, or it is certainly open to doubt.

MR PARKER: My friend seems to be sort of contradicting his own arguments here. He says that the portal is set in stone and yet he is arguing that the defendant should not comply with the portal by paying stage one costs once the claim notification form from Halsall's has come in. So, he seems to want the defendants to ignore the portal and then later on he wants them to stick exactly by the portal so it just seems an absurd argument in that respect.

THE DEPUTY DISTRICT JUDGE: All right—

MR LINDSAY: Well—

THE DEPUTY DISTRICT JUDGE: Yes, I take the point, but I just wanted to check that and clarify the dates.

MR LINDSAY: Well, sir, with respect to that though, the defendants are saying that the claim has run out *[inaudible]* because the defendants say "We respond to Michael Halsall's". Well, why do they not respond to Camps Solicitors, which they never do? So, sir, that is why it drops out of the portal.

MR PARKER: In this matter the defendants did respond requesting forms of authority. As we discussed, you cannot have two claimant's solicitors acting for one claimant, it is just simply not possible for the same accident. So, the defendant was taking what I would say is the common sense, the equitable approach to get a form of authority from Camps to say that they are acting for them and we would submit that the portal time limit should have started from when that formal authority came in and if the court agrees with us then the admission of liability was made within the 15 business days, so this matter never should have gone and dropped out of the portal. As you touched upon, it is not a straightforward matter, I have never come across a situation like this and the rules do not say anything about a situation like this. I think the approach should be that the time limit runs from the form of authority because that is when everything became clear and so the defendant should not be punished for this sort of miscommunication.

MR LINDSAY: Sir, with respect to my friend, the time limit cannot run from that date because the rules do not prescribe it. I deliberately referred you to paragraph 5.5 because it says, "All time limits, except those stated in this defendant's response, may be varied by agreement". Now, sir, one thing which is missing, I say, from the defendant's argument is this, is we have the initial obviously clarification letter with the signed forms of authority, but at no time prior to the portal elapsing do the defendants ever come back to those who instruct me to effectively seek any, as my friend seems to say, further timeframe for when the portal commence or when their response should be.

THE DEPUTY DISTRICT JUDGE: But, according to your argument, they cannot seek any variation because—

MR LINDSAY: No.

THE DEPUTY DISTRICT JUDGE: —the time limits are set in stone—

MR LINDSAY: Yes, sir.

THE DEPUTY DISTRICT JUDGE: —which obviously it says "must" in all that.

MR LINDSAY: Yes, sir. In reference the second submission we have made, it is a matter, as I see it, between the defendants and Michael Halsall's if there has been a genuine mistake and it is for them to seek recovery and, of course, if there is a genuine mistake, they would have a strong claim against Michael Halsall's for that recovery because there is an argument here that there is a binding agreement. Well, of course, that can

be nullified by frustration or mistake or any misrepresentation and so, of course, where we have a signed form of authority by a claimant to say, "Camps Solicitors are representing me", well then maybe that does indicate some form of innocent representation, maybe, at the least.

THE DEPUTY DISTRICT JUDGE: Yes.

MR LINDSAY: Sir, the final point is if you are with the claimant that this matter did fall out of the portal and did not reach stage two then one moves to the issue of well, is this premature issuing and, sir, looking back at the protocol and it is paragraph 6.17... Now, sir, where we do have the matter dropping out of the protocol you will see 6.17 says that where it does drop out effectively the pre-action protocol for personal injury claims will start at paragraph 3.7 and that is to allow a maximum of three months for the defendants to investigate the claim. Now, we know that the CNF was sent on 2nd September, which with a three month period would have started then, that is the letter of claim.

THE DEPUTY DISTRICT JUDGE: Yes.

MR LINDSAY: But despite the three months, the defendants actually take less time because they make an admission on the 14th day of October.

THE DEPUTY DISTRICT JUDGE: Yes.

MR LINDSAY: Now, sir, I have not noted it, apologies, in my skeleton argument, but it is exhibit number 9 and, sir, I am sure you have had sight of these letters in the past, they are called, colloquially, Straker letters because of the case of *Straker v Tudor Rose [2007] EWCA Civ 368.* That is where the medical report, special damages, documentation in support are all sent and the defendants are invited within 21 days to make their best and final offer, or, sorry, an offer that reflects the level of damages which the client can reasonably expect to make and they give them 21 days to do so. Now, the defendants responded on 16th December, but no offers were made in relation to general damages. Sir, those who instruct me have responded saying, "Can we treat the offers on special damages as interim payments?" Now, sir, why I say it may be echoed that the defendants are of a like mind on this is because when one looks at exhibit 12 of 23rd January I say there is an inferred acceptance of that stance because the defendants effectively say... Apologies, sir, exhibit 12 this is. This is where we have the offer of £7,869.80 and it is at paragraph 3 where it says, "This offer includes the interim payment made in respect of PAV, hire and storage". Sir, do you have that?

THE DEPUTY DISTRICT JUDGE: Yes.

MR LINDSAY: Sir, court proceedings were not issued until 10th January, four months after the letter of claim, three months after the admission and 33 days after the medical report, schedule of loss and supportive documentation was sent. Sir, you will see the skeleton argument refers to paragraph 5 of the pre-action protocol for personal injury claims, which is at page 2595 in the current White Book—

THE DEPUTY DISTRICT JUDGE: Yes.

MR LINDSAY: —and, effectively, sir, I think we are probably familiar with this, but, effectively, it says, "Where the defendants admit liability the claimant should send special damages documentation and medical reports and delay issuing for 21 days", sir, which is done. 2595, sir.

THE DEPUTY DISTRICT JUDGE: 2595, that is right, yes.

MR LINDSAY: You will have to go back if you have got the portal, sir.

THE DEPUTY DISTRICT JUDGE: Yes.

MR LINDSAY: So, sir, in theory, the admission was made on 14th October, so if the claimants were being, you know, premature or trying to beat any dates or trying to pull one over on the defendants, we could have sent all that documentation in early November. We do not, we give the defendants some additional time. The documentation is sent, as I have indicated, under cover of a letter of 8th December and yet issue is not made, as I have indicated, until 13th January. Now, I accept there will be a time period for Christmas in there, sir, but 33 days.

So, sir, if you are with the claimant that the matter had exited the portal in the absence of any reasonable offers of settlement because it is being suggested, I think, by the defendants in their skeleton argument the claimant should have made offers of acceptance, well, sir, no, because the defendants are not making offers themselves in settlement of this claim, no reasonable offers, not until issue is made and that prompts, effectively, the defendants to seek to settle this claim. The defendants suggest, sir, and it is in their skeleton argument at paragraphs 25 and 26 that the claimants should have provided a response to the offer for hire and storage, which we did, we asked, "Can we treat this as an interim?" and, sir, I have already referred you to the letter of 23rd January where the defendants inferably accepted that they were interims.

So, sir, as I have indicated, three primary submissions: one, it has dropped out of the portal; two, as it were, the input of Michael Halsall's, well, does not preclude the defendants from responding and it is a matter between them and Michael Halsall's for recovery of the monies; and, sir, three, finally, this is not a premature issue case and, if anything, we have allowed them more time than we needed to.

THE DEPUTY DISTRICT JUDGE: Yes.

MR LINDSAY: Sir, can I be of any further assistance?

THE DEPUTY DISTRICT JUDGE: No, not at this stage, thank you. Mr Parker?

MR PARKER: Sir, I have already made my points in respect of the portal. I will repeat them briefly. We feel that due to the fact that we received two claim notification forms and we did admit liability 15 days after receiving the form of authority that this matter should have stayed in the portal and portal costs should apply. Obviously, if the court disagrees with this we will be arguing that this matter was prematurely issued for the reasons stated in our skeleton argument, briefly being—

THE DEPUTY DISTRICT JUDGE: But do you accept, Mr Parker, that there was no offer in respect of general damages?

MR PARKER: I accept that, sir, but this matter was sent to court to be litigated on 4th January, there is a letter stating this from the claimant's solicitors to the defendants. That is after the Christmas period. We all know that things get lost over that time when Camps offices are actually closed until the 3rd. They sent our cheque back for the hire charges on the 3rd and then proceedings were sent to the court on the 4th. The defendant has obviously made offers for special damages and has admitted liability. This was a matter that—

THE DEPUTY DISTRICT JUDGE: Sorry, you said the defendants have made offers in respect of the special damages.

MR PARKER: Yes, sorry, the hire charges, sorry. This was a matter that should never have been litigated, it is contrary totally to the overriding objective. Once liability is admitted in a matter such as this you go on to discuss damages, including hire charges. We, as the defendants, were going down that route to try and settle this claim without the need for proceedings to be issued. Obviously the 21 days has not been adhered to, but we would argue that to send the documents to court on the 4th when it only ended on the 29th and that was during the Christmas period is totally unreasonable and inequitable. There were obviously no offers made by the claimant during this time.

THE DEPUTY DISTRICT JUDGE: Can I just go on to the... On 16th December you send a cheque for—

MR PARKER: Hire and storage.

THE DEPUTY DISTRICT JUDGE: Yes. On 16th December in the letter you say, "We have raised cheques for recovery and storage in full—

MR PARKER: Yes.

THE DEPUTY DISTRICT JUDGE: —and offer £1,100 for the hire claim", and the cheque is for £1,974.80. Does that include the £1,100 for the hire claim?

MR PARKER: No, the—

THE DEPUTY DISTRICT JUDGE: Sorry, are the recovery and storage charges £1,974.80?

MR PARKER: I do believe they are, yes.

THE DEPUTY DISTRICT JUDGE: Is that correct?

MR LINDSAY: Sir, my reading of this and I have had a look is you will see that the defendants' letter of 23rd January refers to interims of £3,924.80—

MR PARKER: Yes.

MR LINDSAY: —that includes a PAV payment, so I think the £1,974.80 is for hire and recovery and storage and there was an additional element for PAV.

MR PARKER: Yes, which is just the £1,100, I do believe, sir.

THE DEPUTY DISTRICT JUDGE: Ah, yes, looking at the particulars of claim you have got recovery and storage charges of £874.80 and then you have got the replacement vehicle hire charges in the particulars of claim are £1,512 and the cheque for £1,974.80 includes £1,100 for the hire charges. So, the cheque does not include the full amount of the hire charges.

MR PARKER: No, sir.

THE DEPUTY DISTRICT JUDGE: So, that cheque is sent back, Mr Lindsay, on the—

MR PARKER: On the 3rd of the first.

MR LINDSAY: The *[5th?]*

THE DEPUTY DISTRICT JUDGE: Yes, all right, and then the £3,924.80 would be the £1,974.80 plus the pre accident value of the vehicle?

MR LINDSAY: Yes.

MR PARKER: Yes, sir, obviously this cheque was raised and it was sent back on 3rd January, I believe, asking whether it could be banked as an interim. What the defendant is sort of puzzled about is to why the claimant's solicitors did this when they know this matter is heading towards settlement; why then send proceedings to court on the 4th? I do not want to keep repeating myself, sir, but it just goes against everything that is in the overriding objective and in the end this case settled on the first offer made by the defendant's solicitors, which I think is a key indicator that the defendants were looking to settle this, liability had been admitted and payments had already been made in respect of, obviously, hire and the storage and it was totally unnecessary to issue proceedings and, therefore, predictive costs should apply.

THE DEPUTY DISTRICT JUDGE: Yes. Does that complete your submissions?

MR PARKER: Yes, sir, yes.

THE DEPUTY DISTRICT JUDGE: Yes. Mr Lindsay?

MR LINDSAY: Sir, if I could respond—

THE DEPUTY DISTRICT JUDGE: Yes.

MR LINDSAY: —just on the latter. I mean, I think we are portal'd out and I am not going to address you on the portal. Sir, in relation to the predictive costs point, sir, I would say this. One, my friend suggests that settlement was being sought. Well, sir, it was not because, as you have identified, the defendants did not make offers on the full hire or the personal injury, so those who instruct me were entitled to issue for those

parts at least anyway. Sir, the second point is this. My friend says, "Well, it is a key indicator here that the first time an offer is made that settlement is achievable". Well, sir, I say that does not really strengthen from the defendants' case because the remedy is in their hands. Now, sir, the case of *Straker v Tudor Rose [2007] EWCA Civ 368* has been referred to in relation to the letters. If the court is not familiar with that I am sure I an endeavour to have a copy of the authority brought, sir. I am not sure my friend will be familiar with it. Sir, the Court of Appeal on that case effectively said the remedy is in the defendant's hands. They can put forward their best part 36 offer and, therefore, that would offer them protection. Sir, in this case the defendants do not offer themselves that protection because what they do is they drip feed offers, they offer us all the recovery and storage, only some of the hire, do not make us an offer on the personal injury. Sir, that is not how litigation should be conducted and, sir, what the Court of Appeal said in *Straker v Tudor Rose [2007] EWCA Civ 368*, I am sure my friend will correct me if I am wrong, but, effectively, the court to look back on what would have happened in negotiations... That is the approach there, *[inaudible]* that is the approach that the court should not take because it is too hypothetical, it is asking too many what ifs. Sir, bluntly, the defendants would have a stronger hand in this case if one, they made offers in settlement of all heads of loss, or, two, had actually made offers which were reasonable, but, sir, to drip feed offers or make part offers, sir, is not the way that litigation should be conducted and, sir, as I have already indicated, those who instruct me afforded the defendants more time than they needed to because we could have issued before the time that we did anyway, so, sir, it is not premature issue.

THE DEPUTY DISTRICT JUDGE: Yes, all right. Thank you. Could you give me a few minutes please—

MR PARKER: Yes, sir.

[Short adjournment follows]

3. THE DEPUTY DISTRICT JUDGE: This is a hearing which has been set down to consider what costs the claimant and/or the defendant in this case should be entitled to following a settlement of the claimant's claim for damages arising out of a road traffic accident which occurred on 27th July 2011. Settlement of this action was arrived at following the issue of proceedings under part 7 and under the terms of settlement it was directed that the defendant should pay the claimant the sum of £7,869.80 in full and final settlement of his claim for damages and Deputy District Judge McCullach indicated that the matter should be listed for a hearing today to consider the question of costs of the action.

4. This is a road traffic accident where the value of the claim is for less than £10,000 and it fell to be dealt with initially under the Ministry of Justice Portal. The defendant's insurers are Allianz Insurance Company. The accident was on 27th July, and it appears that a claims notification form under the portal scheme was sent to the defendant's insurers, Allianz, on 28th July. This was from Michael Halsall Solicitors. It appears that liability was admitted by Allianz and a stage one payment of costs of £480 was made on 18th August 2011.

5. In the meantime, the claimant seems also to have instructed Camps Solicitors and on 17th August 2011 Camps sent a letter to the defendant, which was passed on to Bridge Insurance Brokers, who are the insurance brokers for Allianz, and Bridge Insurance Brokers, some time after 17th August, wrote back to Camps saying that they had sent the correspondence to Allianz. After that, Camps, on 1st September 2011, wrote to Allianz to request an interim payment for £1,950, representing the pre accident value of the vehicle, net of salvage. They then on the following day sent electronically a claims notification form to Allianz and that was dated 2nd September 2011.

6. On 6th September Allianz replied to this letter, indicating that they had already received a claims notification form from Michael Halsall's and had paid the stage one costs to them. They, therefore, requested a signed form of authority from the claimant to confirm that indeed Camps were the instructed solicitors. This form of authority was sent back to Allianz on 23rd September 2011 and they requested payment of the stage one costs within a requisite timescale, otherwise the case would drop out of the portal and this also applied to an admission of liability done under the portal. Then on 27th September 2011 Camps wrote to Allianz to confirm that the case had dropped out of the portal because they had not received a response with regard to liability. That would be within the 15 working days, which is the period under which the admission of liability had to be made under the rules.

7. Notwithstanding that, on 14th October 2011 Allianz wrote back to Camps to say that liability was accepted in this instance and asked for details of any treatment that the claimant had received and also asked for full details of the claimant's losses, including details of any loss of earnings. There seems to have been no response to that and the next thing that happens is that on 8th December 2011 Camps, in reliance on the fact that the claim had dropped out of the portal, sent a pre action letter in accordance with the pre action protocol for personal injuries, sending the medical report, schedule of damages and documentation in respect of special damages and in that letter they said that they would not issue court proceedings within the next 21 days so as the position could be considered. That is in line with what is provided for in the protocol.

8. Mr Lindsay on behalf of the claimant maintains that the claimant should be entitled to his normal costs of the action. He says that the case is no longer within the portal so that the costs provided for under the portal scheme are no longer applicable and that the normal provisions as to costs should apply. He says that Camps sent out the claim notification form on 2nd September 2011, the rules say that any response must be made within 15 days and under rule 5.5 he says that there is no discretion to vary the time period for dealing with the response and the admission of liability. It seems to be the case that the rules do not cover specifically the position that has arisen in this case where there is more than one firm of solicitors acting or purporting to act on behalf of the claimant. The defendants say that they have already admitted liability and paid stage one costs, that they were already dealing with one firm of solicitors and they maintain that they are entitled to know the correct identity of the claimant's solicitors or his representatives and, in effect, until that position is clarified time does not begin to run.

9. Throughout the pre action protocol dealing with the requirements and what steps the claimant has to take there is a reference simply to the claimant, it does not make any reference, so far as I can see it, to claimant's solicitors, but in my judgment it must be

implied within the reference to claimant that this must include him or his duly authorised representative. Because of the doubt as to the identity of who exactly is the authorised representative it is, in my judgment, incumbent upon the claimant to clarify who is acting for him and who his representative is, which seems to have been accepted by Camps because they took the steps to obtain a form of authority and to provide that form of authority.

10. In my judgment, the only logical interpretation that can be given to this situation is to direct that the time for any admission of liability did not begin to run until after the delivery of the forms of authority and clarification as to the correct identity of the claimant's solicitors and that, therefore, means that the time did not begin to run until 23rd September 2011. It, therefore, follows in my judgment that the admission has been made within the 15 working days, as provided for by the rules.

11. Mr Lindsay sought to argue that the question of who was acting for the claimant was not really for the claimant to deal with, it was for the defendant to sort out and to refer the matter to Michael Halsall to sort out matters with them. That seems to me to be an unreasonable expectation on the part of the solicitors. In my judgment, it is clearly for the claimant to sort out the identify of his representative and to deal with that matter, especially as £480 had already been paid in respect of stage one costs. Therefore, in my judgment this matter should have been dealt with under the portal and, therefore, the costs that can be recovered by the claimant shall be restricted to stage two costs under the portal.

12. If I am wrong on that matter I should also express an opinion on the second argument that was put forward by the defendant, that is to the effect that proceedings had been issued prematurely. In this case, as I have indicated, there was a letter before action which was dated 8th December 2011 which included all the relevant documentation and gave the appropriate notice to the defendant's solicitors, requesting them to make an offer within 21 days. The defendant's insurance company did make an offer of sorts within the 21 day period, it was a full offer in respect of recovery and storage, only a partial offer in respect of the hire claim and did not include any reference to general damages whatsoever. The claimant's solicitors sent the proceedings to the court on 4th January 2012, which was outside the 21 day period, and whilst I accept that for part of the time it was the Christmas period, nevertheless the insurance company had purported to deal with the matter well before the Christmas period had started, but had omitted any reference to general damages.

13. Whilst perhaps it might have been desirable for the claimant to have gone back to the defendant's solicitors, given that they had given proper and fair warning in their letter of 8th December 2011, I do not consider that they were premature in issuing the proceedings in the absence of any response from the defendant to the question of general damages, but, as I have indicated, this decision would only apply if I had found in favour of the claimant on the first point.

THE DEPUTY DISTRICT JUDGE: So, what follows from that is the form of the order which should read that the costs (and correct me if there is another way of putting it) of the claimant be restricted to stage two costs under the portal—

MR LINDSAY: Sir, I will just enquire from my friend, were stage one costs ever paid?

MR PARKER: Yes to Halsall's.

THE DEPUTY DISTRICT JUDGE: To Halsall's.

MR LINDSAY: Yes.

MR PARKER: Sir, that needs to be sorted out *[on another time?]*, I think, sir.

THE DEPUTY DISTRICT JUDGE: Then if I go on to a summary assessment of the *[stage?]* 2 costs, that will be £800 plus VAT, plus—

MR LINDSAY: Uplift.

THE DEPUTY DISTRICT JUDGE: 12.5 percent, is it?

MR LINDSAY: Yes, it is £1,080.

THE DEPUTY DISTRICT JUDGE: Yes.

MR LINDSAY: Sir, it would also include the ATE fee and the medical report.

THE DEPUTY DISTRICT JUDGE: Yes.

MR LINDSAY: There is also a fee claimed for DVLA search and engineer's report.

THE DEPUTY DISTRICT JUDGE: Yes.

MR PARKER: Sir, that comes to £987, does it not, I think, those disbursements in total. Sorry, £987.50.

MR LINDSAY: Let me just check the disbursements I have got. It is £88, £371 plus.... £987.50, yes.

MR PARKER: Yes.

MR LINDSAY: So, sir, total costs would be £2,067.50.

THE DEPUTY DISTRICT JUDGE: Yes, anything else?

MR PARKER: Sir, obviously it follows that as we made this offer quite some time ago and this matter has come to a head at this hearing we would submit that the order should include our costs of this assessment.

THE DEPUTY DISTRICT JUDGE: Is that opposed, Mr Lindsay?

MR LINDSAY: I do not think we can, sir—

THE DEPUTY DISTRICT JUDGE: No.

MR LINDSAY: —given your finding.

THE DEPUTY DISTRICT JUDGE: All right.

MR LINDSAY: Sir, I have not seen a schedule.

MR PARKER: I do have a schedule.

MR LINDSAY: I do not think one was served on those instructing me because I had some correspondence sent to me yesterday.

MR PARKER: There is a copy there.

MR LINDSAY: Thank you.

MR PARKER: Would you like a copy, sir?

THE DEPUTY DISTRICT JUDGE: Please, yes. Thank you.

MR LINDSAY: Sir, looking at the schedule, no issue with the grades claimed. Attendance on opponents, looking at attendance on opponents and others, well, that is probably fine, so the real issue is the work on documents, it is 6.4 hours. Sir, I drafted the skeleton argument, it did not take me six hours to do, so I would say maybe two hours is maybe generous.

MR PARKER: Sir, I would say that the work on documents includes reviewing a schedule of costs that we received from Law Costings that were instructed to act on behalf of Camps.

MR LINDSAY: Sir, even again—

MR PARKER: Obviously, it is not just the skeleton argument, it is reviewing offers, reviewing the portal costs, preparing the skeleton argument and also reviewing our file of papers and reviewing a schedule of costs that we had received.

MR LINDSAY: Sir, again, I would say I had the full file to draft it, so that would have been all the documents which one can assume the defendants have, it certainly did not take me almost a whole day. So, I would say two hours. Attendance at hearing of one hour I take no issue with, but travel time of four hours – I think this firm of solicitors are based in Manchester; it does not take four hours to get here from Manchester and back. Sir, maybe applying a broad brush maybe £750?

THE DEPUTY DISTRICT JUDGE: Yes, in respect of the costs I will allow all the costs on the first page, so we have got £178.50. I will allow a total of five hours in respect of the work done on documents, the £85, one hour for the hearing and £255, i.e. three hours, for the travel and waiting time. So, that will be a total of £765 on the second page, plus the £178.50, plus the train fare, so a total of £956.

MR PARKER: Agreed, sir.

THE DEPUTY DISTRICT JUDGE: All right?

MR LINDSAY: Yes, sir. A further application, sir, I am afraid, an application for leave to appeal. Sir, basically on the primary finding that was made today, the note I have is that the time for admission did not start until after the forms of authority were sent on 29th September. Sir, I would say, effectively, that finding is contrary to the rules as stipulated, *[so you can probably anticipate it would be?]* the main submission the claimant would make. Effectively the rules are clear that the defendant must respond. There is no discretion of must respond to any document, it is respond after receipt of the CNF. Now, sir, I think it has to be accepted that the CNF was sent on 2nd September, therefore response was due 15 days thereafter. That was not made and, sir, effectively the claimant's submission would be that given that rule 5.5 says that there is no discretion to the vary the timetables, that the court has effectively erred in its discretion in exercising, as the court has, that the CNF ran from 23rd September.

THE DEPUTY DISTRICT JUDGE: Yes, yes, but there is one further aspect to this, which I perhaps did not fully cover in the judgment, and that is that it could be said that an admission of liability had already been made in response to the original CNF, so that, therefore, should Camps have automatically gone on to stage two and dealt with that because stage one costs had been paid and, therefore, it was unnecessary for a second claim form to have been issued. Mr Lindsay, obviously that would be there on the tape if necessary—

MR LINDSAY: Yes

THE DEPUTY DISTRICT JUDGE: —but I will grant you permission to appeal—

MR LINDSAY: Thank you, sir.

THE DEPUTY DISTRICT JUDGE: —I can foresee that this could be a case for argument. I have to say, although I am granting you permission to appeal, I am quite clear in my mind that it would be an absurd situation if it were to be the case that the defendant's insurers had to deal with a second claim form without clarifying what the position is and who was acting on behalf of the claimant, but, yes, I will grant you permission to appeal.

MR LINDSAY: Thank you, sir.

[Recording ends]