Case No: IUC66538

IN THE LEICESTER COUNTY COURT

**Before** :

MR RECORDER MORGAN

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**Between :**

|  |  |  |
| --- | --- | --- |
|  | **JAYKISHAN PATEL**  | Claimant |
|  | **- and –** |  |
|  | **FORTIS INSURANCE LIMITED** | Defendant |

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**Barry Coulter** (instructed by **Your Lawyers**) for the **Claimant**

**Sarah Robson** (instructed by Berrymans Lace Mawer LLP) for the **Defendant**

Hearing date: 5th December 2011

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JUDGMENT

**MR RECORDER MORGAN:**

**INTRODUCTION**

1. This is my reserved judgment on the issue of costs following settlement of a personal injury claim. In the ordinary course of events, such an issue would not require a reserved judgment. However, after conclusion of argument on 5th December 2011, I decided that this was appropriate because:
	1. Important issues have been raised as to the construction of the ***Pre-Action Protocol For Low Value Personal Injury Claims in Road Traffic Accidents*** (“the RTA Protocol”);
	2. So far as counsel were aware there were no prior decisions on those points and;
	3. As a result, both counsel indicated that their respective clients might well appeal if my decision went against them.
2. Mr Coulter of counsel represented the Claimant. Mrs Robson of counsel represented the Defendant. I had before me the bundle of evidence for the trial on quantum which was avoided by the settlement. The only evidence specifically filed in relation to costs was a witness statement from the Defendant’s solicitor, Louise Martindale a partner at Berrymans Lace Mawer LLP, dated 30th November 2011. No evidence was filed by the Claimant on the issue of costs.

**OVERVIEW OF THE RTA PROTOCOL**

**General**

1. Before setting out the facts it is necessary to provide an overview of the RTA Protocol.
2. The application of the RTA Protocol is evident from its name. It was designed to expedite, and reduce the costs associated with, the resolution of low value personal injury claims arising out of road traffic accidents. It is structured on the basis that in such claims the insurer, rather than the alleged tortfeasor, is the real party interested in the defence.
3. It is clearly of a different character to other Pre-Action Protocols: it is more prescriptive, it is a largely self-contained scheme; it has a fixed costs regime and it is linked to bespoke court process under ***CPR Part 8***. There are also specific rules as to costs contained in Part V of ***CPR Part 45*** and these link with specific rules as to offers to settle contained in Part II of ***CPR Part 36***.
4. Paragraph 2.1 of the RTA Protocol is headed “Preamble” and states:

“*This Protocol describes the behaviour the court will normally expect of the parties prior to the start of the proceedings where a claimant claims damages valued at no more than £10,000 as a result of personal injury sustained by that person in a road traffic accident.*”

1. The aims and scope of the RTA Protocol are set out in the following paragraphs:

“*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 period of time;*

*(3) the claimant’s legal representative receives the fixed costs at the end of each stage in this Protocol.*

 *4.1 This Protocol applies where-*

*(1) a claim for damages arises from a road traffic accident occurring on or after 30th April 2010;*

*(2) the claim includes damages in respect of personal injury;*

*(3) the claimant values the claim at not more than £10,000 on a full liability basis including pecuniary losses but excluding interest (‘the upper limit’);*

*(4) if proceedings were started the small claims track would not be the normal track for that claim...*

*4.3 A claim may include vehicle related damage but these are excluded for the purpose of valuing the claim under paragraph 4.1.*

*4.4 This Protocol does not apply to a claim [not relevant].”*

1. An important part of the RTA Protocol is that insofar as it requires parties, lawyers and insurers to send information to one another, it is (with one irrelevant exception) expected that it will be sent electronically – see paragraph 5.1. Contact details for insurers can be found at [www.rtaclaimsprocess.org.uk](http://www.rtaclaimsprocess.org.uk). The claimant’s lawyers will provide their details when submitting a claim.
2. In order to facilitate the transfer of information, an RTA Portal (“the Portal”) has been created with the agreement of stakeholders and the Ministry of Justice. It provides a secure medium for transfer and access is restricted to registered users only controlled by individual id/password combinations. It may be used via Web Browser-based access to a secure Web Server. Alternatively, the Web Server may by linked via Application-to-Application (A2A) interfaces to the internal systems used by the claimant’s lawyers or insurers. This option used standard XML-based messages. It may be possible to mix and match these two options.

**Stage 1 (Paragraphs 6.1 to 6.18)**

1. Stage 1 begins when the claimant completes and sends a Claim Notification Form (“CNF”) to the defendant’s insurer (paragraph 6.1). That is a prescribed form running to 8 pages which contains boxes for completion of relevant details about the claimant, the accident and the injuries suffered. It must be signed with a statement of truth.
2. The insurer has to respond and the RTA Protocol states:

“*6.10 The defendant must send to the claimant an electronic acknowledgment the next day after receipt of the CNF,*

*6.11 The defendant must complete the ‘Insurer Response’ section of the CNF (“the CNF response”) and send it to the claimant within 15 days.*”

1. There is no prescribed form for the electronic acknowledgment (“the Acknowledgment”). There is such a form for the CNF Response. It runs to 2 pages and in Section A the insurer is required to say whether it admits (i) the accident occurred, (ii) it was caused by the defendant’s breach of duty and/or (iii) it caused some loss to the claimant, the nature and extent of which is not admitted. If it does not admit liability it must provide reasons (see also paragraph 6.16).
2. There are certain circumstances in which the claim will no longer continue under the RTA Protocol, including a failure to admit liability (see paragraph 6.15(3)). I shall refer to these circumstances in more detail below. Assuming that it does continue then, if the insurer admits liability (or admits it subject to contributory negligence arising solely from the failure to wear a seat belt), it must pay the Stage 1 fixed costs in ***CPR 45.29*** within 10 days after sending the CNF Response.

**Stage 2 (Paragraphs 7.1 to 7.67)**

1. This Stage sets out a detailed process for the parties to try to agree quantum. Example provisions include: the obtaining of medical reports (paragraphs 7.1 to 7.6); a stay of proceedings (paragraph 7.7); interim payments (paragraphs 7.8 to 7.23); and the time-limits for the parties to take certain steps and reach agreement (paragraphs 7.28 to 7.66). Stage 2 fixed costs calculated in accordance with ***CPR 45.29*** are required to be paid on the happening of certain events.

**Stage 3 (Paragraph 8.1)**

1. Paragraph 8.1 simply states that the Stage 3 Procedure is set out in ***CPR PD 8B***. Paragraph 1.1 of that Practice Direction states:

“*This Practice Direction sets out the procedure (“the Stage 3 Procedure”) for a claim where-*

*(1) the parties-*

 *(a) have followed the...RTA Protocol...; but*

*(b) are unable to agree the amount of damages payable at the end of Stage 2...*

 *(2) (a) the claimant is a child;*

*(b) a settlement has been agreed by the parties at the end of Stage 2...*

*(c) approval of the court is required in relation to settlement...*

*(3) compliance with the RTA Protocol is not possible before the expiry of a limitation period and proceedings are started in accordance with paragraph 16 of this Practice Direction.*

*1.2 A claim under this Practice Direction must be started in a county court and will normally be heard by a district judge.*”

1. There follow detailed provisions including: the requirement to make an application for the court to determine damages by claim form (paragraphs 5.1 to 5.2); for the court to dismiss the claim if the Protocol has not been followed (paragraph 9.1); for the court to assess damages on the papers or at a Stage 3 hearing (paragraphs 11.1 to 11.2); in relation to limitation/stays (paragraphs 16.1 to 16.7); and that the claim will not be allocated to a track (paragraph 17.1). Stage 3 costs are also prescribed by ***CPR 45.29***.

**Key Provisions of CPR Part 45**

1. Section VI of Part 45 applies to claims that have been or should have been started under Part 8 in accordance with the Stage 3 Procedure: ***CPR 45.27(1)***. Sub-rule (2) provides that “*Where a party has not complied with the RTA Protocol rule 45.36 will apply.*”
2. ***CPR 45.36*** relevantly provides:

“*(1) This rule applies where the claimant-*

*(a) does not comply with the process set out in the RTA Protocol; or*

*(b) elects not to continue with that process,*

 *and starts proceedings under Part 7.*

 *(2) Where a judgment is given in favour of the claimant but-*

*(a) the court determines that the defendant did not proceed with the process set out in the RTA Protocol because the claimant provided insufficient information on the Claim Notification Form;*

*(b) the court considers that the claimant acted unreasonably-*

*(i) by discontinuing the process set out in the RTA Protocol and starting proceedings under Part 7;*

*(ii) by valuing the claim a more than £10,000 so that the claimant did not need to comply with the RTA Protocol; or*

*(iii) except for paragraph (2)(a), in any other way that caused the process in the RTA Protocol to be discontinued; or*

*(c) the claimant did not comply with the RTA protocol at all despite the claim falling within the scope of the RTA Protocol;*

*the court may order the defendant to pay no more than the fixed costs in rule 45.29 together with the disbursements allowed in accordance with rule 45.30 and success fee in accordance with rule 45.31(3).*”

1. Accordingly, the sanction for non-compliance with the RTA Protocol by the claimant is a restriction on the costs he may recover. The sanction for non-compliance by the defendant is the claim coming out of the RTA Protocol and Part 7 proceedings being issued (which are not subject to the fixed costs regime).

**THE FACTS**

1. On 24th September 2010, Ms Anisha Daudia (“Ms Daudia”) drove her vehicle into the rear of the vehicle in which the Claimant was travelling as a passenger and thereby caused the Claimant a minor whiplash injury to his neck and left shoulder. Another person travelling with the Claimant was also injured. I mention this because, although that person’s claim was not before me, there is some reference to it in the evidence. The Defendant (which is now known as Ageas Insurance Ltd) was Ms Daudia’s insurer.
2. The Claimant wasted no time in consulting solicitors, Your Lawyers, and entered into a conditional fee agreement with them on 27th September 2010. He also obtained an ATE insurance policy dated 6th October 2010.
3. Your Lawyers acted with alacrity and at 17.16 on 12th October 2010 they sent a CNF to the Defendant using the Portal. It set out the required details of the accident and provided contact details (including email) for those solicitors.
4. The Portal log records the following entry at 17.17 on 12th October 2010: “*F\_0\_25\_AcceptClaimDecision*”. Although the evidence is not particularly clear on this point it appears that this entry was automatically generated by the Defendant’s system following receipt of the CNF and it would have been available for Your Lawyers to view if they had logged onto the Portal.
5. However, it was accepted in the Defence that no Acknowledgment within the meaning of paragraph 6.10 had been “sent” to Your Lawyers and that was confirmed by Mrs Robson at the start of the hearing before me. The evidence of Ms Martindale is that the Defendant’s A2A system is, unlike a Web Browser-based system, not capable of sending an electronic acknowledgment.
6. The following entry appears on the Portal log at 09.53 on 14th October 2010: “*F\_0\_43\_InsurerResponseSent*”. The Defendant’s evidence (which was not challenged) was that this was a reference to the sending of the CNF Response. I have seen a hardcopy of that document and in Section A, the Defendant admitted that the accident had occurred, Ms Daudia had caused it by her breach of duty and that the Claimant had been caused loss (the nature and extent of which was not admitted).
7. On 18th October 2010, the Defendant received a letter from Your Lawyers dated 14th October 2010. It relevantly stated:

“*We write further to the Claim Notification Form which was submitted to you on 12th October 2010.*

*In accordance with rule 6.10 of the RTA protocol you* ***must*** *acknowledge receipt of the CNF the next day after receipt.*

*Unfortunately you have failed to provide such an acknowledgment; as such we consider that this is a breach of the protocol and permits removal from the RTA protocol. We confirm that we no longer consider the RTA protocol to be appropriate as a result of your breach and confirm that the PI protocol must now be followed.*

*In accordance with paragraph 2.10A of the PI protocol the CNF amounts to a letter of claim which must be acknowledged within 21 days of receipt. Failure to acknowledge receipt within the required time permits the Claimant to commence Court proceedings without further recourse to you.*

*We trust this will not be necessary and look forward to hearing from you.*”

1. Surprisingly, the Defendant did not respond to this letter. However, the Claimant did not immediately issue proceedings. On 7th February 2011, he obtained a medical report from Mr Z I Nur (Consultant Trauma & Orthopaedic Surgeon) which confirmed that he had suffered the injuries referred to above and that he would make a full recovery by no later than August 2011.
2. That report was sent to the Defendant under cover of letter dated 30th March 2011 with the request that an offer of general damages be made within 21 days of the date of the letter failing which proceedings would be issued. That letter was received by the Defendant on 12th April 2011.
3. On 28th April 2011, an employee of the Defendant telephoned an employee of Your Lawyers and informed them that the medical report had to be submitted through the Portal (i.e. in compliance with Stage 2 procedures). The response was that the claim had already been withdrawn as set out in the letter dated 14th October 2010. On the same day, the Defendant sent a letter to Your Lawyers referring to the conversation which relevantly stated:

“*Unfortunately we do not agree with your interpretation of the new MOJ rules. We do not have the facility to send an acknowledgment of the CNF via our A2A system. If you have any issue with this you will need to take the matter up with CRIF the operators of the MOJ portal.*

*We therefore await settlement packs for both clients via the MOJ portal. If you are unwilling to do this the matter will be referred to the Behaviour Committee.*

*Your urgent response is awaited.*”

1. Your Lawyers’ response was to issue these proceedings by way of Part 7 claim form dated 11th May 2011. It bears the statement that the value of the personal injury claim exceeded £1,000 but was not more than £3,000 including a claim for pain, suffering and loss of amenity in a sum greater than £1,000. In other words, a claim falling squarely within the scope of the RTA Protocol.
2. On 18th May 2011, there was a further conversation between employees of the Defendant and Your Lawyers in which the latter explained that they had issued proceedings because they had not responded “*within 1 business day*”. The reply as summarised in the call log was that “*we have 15 business days to ack...as we make our liab enquiries.*” Following this, the Defendant instructed Berryman Lace Mawer LLP.
3. Thereafter the Defendant filed a Defence dated 20th June 2011 admitting liability and not admitting quantum. It also pleaded that Your Lawyers had acted unreasonably by discontinuing the process under the RTA Protocol. By order dated 8th August 2011, the claim was allocated to the fast track and a trial window set for December 2011.
4. It was not until 3rd October 2011 that the Defendant made a Part 36 offer of £2,300 and on 5th October 2011 this offer was withdrawn and restated as a Calderbank offer. On 11th October 2011, the Claimant made a non-Part 36 counteroffer of £2,950. On 30th November 2011, the parties agreed quantum at £2,500 with the court to determine costs. That issue came before me on 5th December 2011, the day that had been fixed for the trial.

**ARGUMENTS / THE ISSUES**

1. During the course of argument, Mr Coulter accepted (rightly in my view) that in the absence of any prescribed form for the Acknowledgment, the Insurer Response could – if sent in time – satisfy the requirements of both paragraph 6.10 and paragraph 6.11 of the RTA Protocol. Mrs Robson argued that the Insurer Response was sent within the time permitted by paragraph 6.10.
2. Mrs Robson argued that, in any event, any failure to comply with paragraph 6.10 did not automatically mean, or provide a valid reason for the Claimant to decide, that the claim should no longer continue under the Protocol. Mr Coulter submitted to the contrary, emphasising that the language of paragraph 6.10 was mandatory (“must”). He said that if there was no sanction, then the rule was pointless.
3. On that basis, the Claimant seeks an order for his costs to be assessed in the normal way without reference to the fixed costs regime. By contrast, the Defendant seeks an order (a) limiting the Claimant to the fixed costs it would have recovered under the RTA Protocol (which inevitably involves a degree of speculation as to what would have happened if that process had been followed) and (b) that the Claimant do pay its costs because it says it would not have incurred them if the claim had continued under the Protocol. There is something of the order of around £15,000 turning on these arguments.
4. In the light of those arguments, the issues I have to determine are as follows:
	1. Was the Insurer Response sent within the time limit for sending the Acknowledgment? (“Issue 1”)
	2. If it was not, did this automatically mean that the claim should no longer continue under the Protocol or provide a valid reason for the Claimant to decide that it should not? (“Issue 2”)
	3. What order should be made in relation to the Claimant’s costs? (Issue 3”)
	4. What order (if any) should be in relation to the Defendant’s costs? (“Issue 4”)

**ISSUE 1: TIME LIMIT**

**General**

1. Paragraph 6.10 is in straightforward terms – the Acknowledgment must be sent “*the next day after receipt of the CNF*”. As a matter of first impression, as the CNF was received on 12th October 2010, that would suggest that the Acknowledgment should have been sent on 13th October 2010. As the Acknowledgment was not required to be anything more than an automatic “read receipt” I see no difficulty in it being provided the next day even if the CNF was received outside normal business hours.

**Application of CPR**

1. Mrs Robson sought to persuade me otherwise by relying on certain deemed service provisions within the CPR. Her first argument was that:
	1. ***CPR 6.2(c)*** provides that “*“claim” includes petition and any application made before action or to commence proceedings and “claim form”, “claimant” and “defendant” are to be construed accordingly*”;
	2. The CNF fell within that (non-exhaustive) definition and was a “claim form”;
	3. ***CPR 6.14*** provides that a claim form served within the UK is deemed to be served on the second business day after completion of the relevant step under ***CPR 7.5(1)***;
	4. Under ***CPR 7.5(1)*** service may be effected by email or other electronic transmission;
	5. The “time of day” provisions no longer apply (compare ***Anderton v Clywd CC (No.2)*** [2002] EWCA Civ 933; [2002] 1 WLR 3174) and therefore deemed service of the CNF was 14th October 2010;
	6. Accordingly, the Acknowledgment did not have to be sent until 15th October 2010.
2. Her second argument was that:
	1. Even if the CNF was not a “claim form”, ***CPR 6.26*** applied;
	2. That provides that for documents, other than a claim form, if the email or other electronic transmission is sent after 4.30pm then it is deemed served on the next business day after the day on which it was sent;
	3. Accordingly, the CNF (being sent after 4.30pm) was deemed served on 13th October 2010 and therefore the Acknowledgment did not have to be sent until 14th October 2010.
3. In support of both arguments she said that, unless reference was made to the provisions of the CPR, the interpretation of “time” under the RTA Protocol was wholly unclear.
4. I do not accept that latter point for the following reasons:
	1. Paragraphs 1.1(8) and 5.3 to 5.6 of the RTA Protocol contain express provisions as to the calculation of time which have clearly been specifically drafted to function within its self-contained and prescriptive regime;
	2. For example, paragraph 5.3 provides that “*A reference to a fixed number of days is a reference to business days as defined in paragraph 1.1(8)*” and paragraph 5.4 provides that “*Where a party should respond within a fixed number of days, the period for response starts the first business day after the information was sent to that party.*”
	3. Further, the definition of a “business day” in paragraph 1.1(8) is identical to that in ***CPR 6.2(b)*** which is a strong indication that it is not necessary to have regard to the CPR. See also the fact that there is a definition of “child” in paragraph 1.1(7) which would be unnecessary if provisions in the CPR were imported (see ***CPR 2.8*** and ***CPR 21.1(2)***);
	4. In my judgment, the provisions as to calculation of time within the RTA Protocol are clear and do not require supplementing in order to allow the scheme to operate in a clear and effective manner;
	5. That includes the operation of paragraph 6.10 which, for the reason I have already given, can properly be read as requiring an Acknowledgment the next day whether or not the CNF was sent after 4.30pm (or any other time);
	6. I am supported in those conclusions by the notes in ***Civil Procedure (2011)*** at C13A-005 which state “*Normally, CPR rules are supplemented directly by practice directions and indirectly by pre-action protocols. Here those relationships are reversed. The RTA Protocol is the primary source governing party behaviour in the claim to which it applies...*”.
5. Against that background and as a matter of construction, I do not accept that the provisions of the CPR relied upon apply for one or more of the following reasons:
	1. ***CPR 2.1*** provides that the Rules apply to “*all proceedings in (a) county courts...*”. In my judgment, they do not apply to steps under the Protocol prior to the issuing of a claim form under Stage 3 because those steps do not constitute “proceedings”;
	2. The CNF is plainly not a “claim form” within the meaning of ***CPR 6.2(c)*** as it does not commence court “proceedings”. In so far as necessary, this is confirmed by paragraph 5.7 of the Protocol which deals with the commencement of “proceedings” where compliance the RTA Protocol is not possible before expiry of the limitation period;
	3. ***CPR 26.6*** does not apply because it applies to documents “*served...in accordance with these Rules or any relevant practice direction*” and the CNF was served in accordance with the RTA Protocol rather than those provisions.

**Summary**

1. Accordingly, I hold that the Acknowledgment had to be sent on 13th October 2010. As the Insurer Response was not sent until 14th October 2010, the Defendant cannot rely on its transmission as constituting compliance with paragraph 6.10.

**ISSUE 2: CONTINUATION UNDER PROTOCOL**

**General**

1. In keeping with its prescriptive regime, the Protocol specifies certain circumstances in which it will (or may) cease to apply. A distinction is to be drawn between two categories: (a) those provisions which make cessation automatic and (b) those which give a party the right to elect not to continue under the Protocol.
2. For the purposes of this claim, the most important provision falling within the first category is paragraph 6.15 which provides:

“*The claim will no longer continue under this Protocol where the defendant, within the period in paragraph 6.11 or 6.13-*

*(1) makes an admission of liability but alleges contributory negligence (other than in relation to the claimant’s admitted failure to wear a seat belt);*

*(2) does not complete and send the CNF response;*

*(3) does not admit liability; or*

*(4) notifies the claimant that the defendant considers that-*

 *(a) there is inadequate mandatory information in the CNF; or*

*(b) if proceedings were issued, the small claims track would be the normal track for that claim.*”

1. Other examples of this category include:
	1. paragraph 7.33 (defendant does not respond within the initial consideration period); and
	2. paragraph 7.39 (withdrawal of an offer at Stage 2).
2. Examples of the second category include
	1. paragraph 6.19 (if defendant fails to pay Stage 1 fixed costs within time claimant “*may give written notice that the claim will no longer continue under this Protocol*”);
	2. paragraph 7.21 (if defendant does not make interim payment claimant “*may start proceedings...*”);
	3. paragraph 7.66 (if defendant does not pay settlement sums on time claimant “*may give written notice that the claim will no longer continue under this Protocol...*”).
3. There is also paragraph 7.67 which gives the claimant a more general right to remove a claim from the Protocol on the ground of “unsuitability” but at his risk on costs. It provides:

“*Where the claimant gives notice to the defendant that the claim is unsuitable for this Protocol (for example, because there are complex issues of fact or law in relation to the vehicle related damages) then the claim will no longer continue under this Protocol. However, where the court considers that the claimant acted unreasonably in giving such notice it will award no more than the fixed costs in rule 45.29.*”

1. Of course, a claimant may always choose not to comply or continue with the process under the RTA Protocol other than in the specified circumstances, but that will be at his risk as to costs - see ***CPR 45.36*** set out above.

**Discussion**

1. Although the language of paragraph 6.10 is in mandatory form (“must”) it is a notable feature that the consequences of non-compliance are not specified. This is by way of contrast to non-compliance with paragraph 6.11, as to which see paragraph 6.15 set out above. It is therefore necessary for me to decide what consequences (if any) follow from the non-compliance. As Lord Hailsham said in oft-cited passage (see, for example, the judgment of Lord Steyn in ***R v Soneji*** [2005] UKHL 49; [2006] A AC 340) in ***London & Clydesdale Estates Ltd v Aberdeen DC*** [1980] 1 WLR 182:

“*When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another...In such cases, though language like ‘mandatory,’ ‘directory,’ ‘void,’ ‘voidable,’ ‘nullity’ and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition...*”

1. In my judgment, the failure to comply with paragraph 6.10 does not (unlike the failure to comply with paragraph 6.11) mean that the claim automatically ceases to continue under the RTA Protocol. Further, that failure does not give the claimant the automatic right to elect that the claim should not continue under the RTA Protocol without being at his risk as to costs.
2. I reach those conclusions for the following reasons:
	1. The RTA Protocol is highly prescriptive and if it had been intended that the failure to comply with paragraph 6.10 was intended to have either of those effects then I would have expected it expressly to so provide;
	2. That is underlined by paragraph 6.15 which makes reference to the consequences of failure to comply with only paragraph 6.11 despite the fact that it this paragraph in the same section (Response from insurer) as paragraph 6.10;
	3. The purpose of sending the Acknowledgment is probably to provide comfort to the claimant’s solicitor that the CNF has been received. However, on the evidence before me, even if it was not “sent”, a form of acceptance is available for viewing by the claimant’s solicitor by logging on to the Portal;
	4. Further, the Acknowledgment does not trigger any further step by the claimant or the defendant; on the contrary, the next step is the Insurer Response which is to be provided within 15 business days starting the day after the CNF was sent (see paragraphs 5.3 and 5.4). If the Insurer Response is not sent within that tight timeframe, then the claim automatically ceases to continue under the Protocol (see paragraph 6.15);
	5. It follows from this that the Acknowledgment will have no relevance to the timing of subsequent events under the Protocol. (In this context, I should mention that paragraph 5.7 specifically deals with the situation where compliance with the Protocol is not possible before the expiry of the limitation period);
	6. Accordingly, there is no good reason to interpret the Protocol in the manner contended for by the Claimant which, in my judgment, would not be consistent with its express provisions.
3. For completeness, I should note that Mr Coulter argued that unless and until the insurer sent the Acknowledgment the process under the RTA Protocol did not even commence. However, in my judgment, that argument is not tenable in light of the wording of paragraph 6.8 which provides that inadequate mandatory information in the CNF is “*a valid reason for the defendant to decide that the claim should no longer continue under this Protocol*”. That makes it clear that the process starts with the sending of the CNF.
4. I therefore conclude that the processing of the Claimant’s claim should have continued under the RTA Protocol and that Your Lawyers were incorrect to state that the failure to provide the Acknowledgment “*permits removal from the RTA Protocol*”. That removal was, in my judgment, at the Claimant’s risk as to costs.

**ISSUE 3: CLAIMANT’S COSTS**

**General**

1. It follows from the above that ***CPR 45.36*** was engaged – the Claimant had elected not to continue with process under the RTA Protocol and/or had not complied with the process by following the requirements of Stage 2.
2. I note that ***CPR 45.36(2)*** is prefaced on the basis that “*judgment is given in favour of the claimant*”. The parties have not asked me to enter judgment for the agreed damages sum of £2,500 and I assume that it is being paid pursuant to the out of court agreement only. However, I consider that sub-rule (2) applies to the situation in the present case either as a matter of necessary construction or by analogy. If that were not the case there would be an unwarranted lacuna where (as in this case) Part 7 proceedings had been issued, settlement was reached, but the issue of costs could not be resolved. Obviously if the claim fails, then the claimant will have to pay costs in any event.

**Unreasonableness**

1. I must therefore move on to consider whether the Claimant acted unreasonably by discontinuing the process under the RTA Protocol and commencing Part 7 proceedings: ***CPR 45.36(2)(b)(i)***.
2. In my judgment, the Claimant did so act. In arriving at that conclusion I rely on the following matters:
	1. As I have already held, non-compliance with paragraph 6.10 is not a recognised ground for bringing the process under the RTA Protocol to an end;
	2. Your Lawyer’s letter, dated 14th October 2010, did not identify any reason over and above technical non-compliance for bringing the process to an end;
	3. If they had been genuinely concerned as to whether or the CNF had been received by the Defendant then Your Lawyers could have (a) checked the Portal (which would have resulted in them seeing at least the entry set out in paragraph 23 above) and/or (b) written in appropriate terms to the Defendant;
	4. The Claimant did not wait until the end of the period for the Defendant to send the Insurer Response before taking any action;
	5. Although the evidence is insufficiently clear to allow me to conclude whether or not the letter of 14th October 2010 was sent prior to the sending of the Insurer Response at 09.53 on the same day, it is a fact that the Defendant sent this document very promptly and that Your Lawyers acted with haste to try to end the process under the RTA Protocol;
	6. The inference that I draw is that the Claimant (through Your Lawyers) was playing a tactical game with the aim of trying to get out of the restrictive fixed costs regime and into the more generous costs regime under Part 7;
	7. Whilst such conduct may be understandable from a commercial perspective, it runs directly contrary to the letter and spirit of the Protocol and in my judgment is exactly the sort of conduct that should be classified as “unreasonable”.
3. I should, for completeness, deal with one further point that was dealt with in argument. That concerned whether or not, in Spring 2011, the Claimant should have taken up the invitation of the Defendant to continue the process under the RTA Protocol. That invitation was made prior to the issue of proceedings. Mrs Robson argued that he should have done and this was further evidence of unreasonableness.
4. Paragraph 5.11 of the RTA Protocol provides “*Claims which no longer continue under this Protocol cannot subsequently re-enter the process*”. Clearly, if one of the events for automatic cessation occurs that provision will apply. Similarly, if the claimant has gone so far as to issue Part 7 proceedings, then there is no turning back. What about the present situation prior to the issue of proceedings?
5. I cannot see that any mandatory time limits had been breached and on a practical level, there was nothing to stop the Claimant from moving to Stage 2. Further, all the information was still on the Portal. However, in my judgment, the process under the RTA Protocol is bilateral. Once one party has communicated his decision not to participate in it then it ceases to “continue”. That construction is supported by the terms of ***CPR 45.36(1)(b)*** which refers to the situation where the claimant “*elects not to continue...*”. See also the similar wording in paragraph 7.67.
6. Accordingly, I do not consider that the parties were at liberty to resume the process. That construction supports the decision I have already made as to “unreasonableness”. Such is the drastic nature of making the election that a party should not do it lightly and should certainly not do it on technical grounds that, as I have found, were not justified.

**Discretion**

1. I read the closing words of ***CPR 45.36(2)*** as giving the court a discretion to order the Defendant to pay costs to the Claimant in a sum up to those specified. In exercising that discretion the court should have regard to the overriding objective and also to the matters set out in ***CPR 44.3***.
2. Mrs Robson did not argue that I should not order the Claimant to receive any costs. She said that I should limit them to Stage 1 costs because of his conduct, alternatively, to Stage 1 and 2 costs because the matter would have settled prior to Stage 3. Unsurprisingly, Mr Coulter argued that the Claimant should receive all the costs permitted by ***CPR 45.36(2)***.
3. There is inevitably a degree of speculation as to what would have happened if the RTA Protocol had been followed and, given the Claimant’s default, I am inclined to give the Defendant the benefit of any doubt in that regard.
4. However:
	1. There is no doubt that the claim would have proceeded to Stage 2 and the obtaining of a medical report;
	2. The medical report was received by the Defendant on 12th April 2011 under cover of a pre-action letter and yet, not only was no offer made prior to the issue of proceedings, none was made until nearly 5 months post-issue;
	3. It then took the parties nearly a further 2 months to reach settlement, which was only very shortly before the trial was listed;
	4. In the circumstances, it is more likely than not that the parties would have entered Stage 3 with the issue of Part 8 proceedings;
	5. However, it is more likely than not that the parties would have settled prior to the court determining the claim at a Stage 3 hearing or on the papers.
5. Accordingly, I consider it appropriate to exercise my discretion to require the Defendant to pay all the relevant Stage 1, 2 and 3 fixed costs under ***CPR 45.29***, together with disbursements allowed in accordance with ***CPR 45.30*** and success fee in accordance with ***CPR 45.31(3)***. I do not consider it appropriate to reduce these costs in light of the Claimant’s conduct; in my judgment that conduct has already been adequately dealt with by restricting the Claimant to this fixed costs regime. On the basis of information provided to me during submissions, this decision is likely to deprive the Claimant (or more accurately, Your Lawyers) of over £10,000 of costs.
6. Further, this is not a case where the Defendant had protected itself by making an offer to settle that was equal to or better than final settlement figure. The fact that the final settlement was slightly nearer to the Defendant’s (rather than the Claimant’s) offer is of no significance.
7. Accordingly, on the basis of my findings in paragraph 67:
	1. The relevant fixed costs will be the Stage 1 and 2 costs and the Stage 3 Type A fixed costs only– see ***CPR 45.37(2)*** which so provides where the settlement is during Stage 3 and is at a sum in excess of the defendant’s RTA Protocol offer;
	2. The disbursements will be those falling within the terms of ***CPR 45.30*** (including the court fees that would have been payable as part of the Stage 3 proceedings);
	3. The success fee will be 12.5% of Stage 1 and 2 fixed costs and 12.5% of the relevant Stage 3 fixed costs – see ***CPR 45.31(6)*** and ***CPR 45.37(2)(d)***.

**ISSUE 4: DEFENDANT’S COSTS**

1. In support of her argument that the Claimant should bear the Defendant’s costs (which during submissions were said to be around £3,700), Mrs Robson relied upon paragraph 4.5 of the ***Practice Direction – Pre-Action Conduct*** which states “*The Court will look at the overall effect of non-compliance on the other party when deciding whether to impose sanctions*”. Paragraph 4.6 sets out a non-exhaustive list of orders the court may make, including that the party at fault pay s the costs, or part of the costs, of the other party. As before, the court should also have regard to the overriding objective and to the matters set out in ***CPR 44.3***.
2. I accept that the Practice Direction is relevant to the exercise of the court’s discretion. However, in my judgment, the terms of ***CPR 45.36*** provide a strong indication that the “normal” sanction for non-compliance will be a limitation on the claimant’s costs rather than any order that he pay the defendant’s costs. The RTA Protocol and the related Rules appear to be prescriptive as to costs consequences as they are in respect of other matters. That approach has the benefit of simplicity which is consistent with a low value/cost regime.
3. In any event, on the facts of the present case, I am not satisfied that the Defendant has incurred costs that it would not have otherwise done so. There is no specific evidence as to this in Ms Martindale’s statement. During argument, Mrs Robson said that insurers will usually instruct solicitors for Stage 3 and may in some case also do so during Stage 2. Given my findings in paragraph 67 above, I conclude that even if the claim had been dealt with fully under the RTA Protocol it is likely that the Defendant would have incurred all or most of the same legal costs in any event.
4. Accordingly, with one caveat, I decline to exercise my discretion to order the Claimant to pay any of the Defendant’s costs. That caveat is as to the costs of the hearing before me. Whilst neither party has been entirely successful, the Defendant has won on the key point as to whether the Claimant should be restricted to fixed costs and therefore I conclude that the Claimant should pay 50% of the Defendant’s costs of this hearing.

**CONCLUSIONS**

1. I therefore award the Claimant only the fixed costs set out above. I do not consider it appropriate to order the Claimant to pay the Defendant’s costs save possibly for the partial order in respect of the costs of this hearing that I have provisionally indicated above. I hope that counsel will be able to agree an order to reflect this judgment, failing which the matter will have to be listed for further hearing.

Dated this 23rd day of December 2011