

IN THE MOLD COUNTY COURT

Claim No. 2ML00661

Law Courts
Civic Centre
Mold

Wednesday, 2nd October 2013

Before:

DISTRICT JUDGE HUMPHRIES

Between:

SIMON SHIRTCLIFFE

Claimant

-v-

SANDRA ELIZABETH BAKER

Defendant

Costs Draftsman for the Claimant:

MR. PAUL TIDMAN

Counsel for the Defendant:

MISS ERICA BEDFORD

TRANSCRIPT OF PROCEEDINGS UP TO AND FOLLOWING JUDGMENT

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(Please note that the District Judge was not able to be heard clearly due to interference/faulty recording and short gaps within the recording; therefore, we have used our best efforts to transcribe)

A

MISS BEDFORD: Good afternoon, sir.

THE DISTRICT JUDGE: Good afternoon. Yes. Sorry, your name, please?

B

MISS BEDFORD: Miss Bedford, sir.

THE DISTRICT JUDGE: Miss Bedford, I think it is only fair to mention... Are you aware?

MISS BEDFORD: Yes. Yes, sir.

C

THE DISTRICT JUDGE: It was many years ago that Mr Tidman was employed by the firm in which I was a partner. We have had no contact since, have we, Mr Tidman, and no social contact? I do not think I need to recuse myself, but I thought it fair to mention it. Mr Tidman has clearly already raised it with you.

MISS BEDFORD: Yes, indeed, sir, he has. Thank you, though, sir.

D

THE DISTRICT JUDGE: Very well. I have (*inaudible*) in some detail. There (*inaudible*). Is this a sort of an accurate assessment of where we are? Firstly, it is not an argument here that there is a concluded agreement, is there, because there is a Tomlin Order that allows for costs?

MISS BEDFORD: No, sir.

E

THE DISTRICT JUDGE: So it reasonableness of those costs but you say they should be limited to the fixed costs of the protocol.

MISS BEDFORD: Yes, sir.

F

THE DISTRICT JUDGE: That is the starting point. I think also, looking at the dates, that both parties are agreed, I think, are they not, on these points? Both parties are agreed that the defendant's final offer was made within five days of the end of the total consideration period.

MISS BEDFORD: Yes, sir.

G

THE DISTRICT JUDGE: Yes?

MR. TIDMAN: We do not agree that the five-day extra period should have been applied in the first place; that is the whole—

H

THE DISTRICT JUDGE: My understanding of it is this (and you can come back to me if I am wrong); that 24th February fell within five days of the end of the total consideration period. Do you not, therefore, agree...? I accept that you do not agree that the payment runs from the end of the extra five days – I accept that.

MR. TIDMAN: Yes.

A THE DISTRICT JUDGE: But is the argument not that the five-day period for consideration was triggered and that the settlement achieved was within the initial consideration period not within the extended consideration period? Yes? So the only argument really is, when it comes to section 7.40 when it says “the relevant period”, is it the end of the original total consideration period or does it run from the end of the extended consideration period? That is right, is it not?

B MR. TIDMAN: That is one of the arguments that is obviously being raised by my friend, but, if you look at page 3 of my friend’s submissions, you will see that they state that the defendant’s second offer was made on 23rd February.

THE DISTRICT JUDGE: Yes.

C MR. TIDMAN: Which is correct; that was the day that they made their offer of £4,091.96.

THE DISTRICT JUDGE: Yes.

D MR. TIDMAN: The original 35 consideration period expired on 29th February; that is an agreed point. That is six days; so the five-day extra period would not kick in. Therefore, 7.28 would then kick in. Ten days should run from the 24th; therefore, payment should be made by 9th March.

THE DISTRICT JUDGE: That (*inaudible*) us to whether or not the additional five days was triggered in the first place. I thought that was agreed.

E MISS BEDFORD: I was also under the impression that it was agreed from the claimant’s replies. The offer was, therefore, made exactly five days before the expiry of the total consideration period, and that is on page 2 – sorry, sir, forgive me, page 3 – of the replies under section 7.30.

THE DISTRICT JUDGE: I can see that.

F “On 23rd February, the defendant made an offer to settle in the sum of (*inaudible*) which was accepted the next day. The defendant’s offer was again within the total consideration period.”

Yes.

G “It is accepted that if an offer of settlement is made within five days or less of the total consideration period, there is a further five days at the end of the total consideration period. The defendant’s increased offer was made on 23rd February. The expiry of the total consideration period was on 28th February. The offer was, therefore, exactly five days before the expiry of the total consideration period.”

H Is that not an acceptance that—?

MR. TIDMAN: That is something that we put in our points of dispute, but it transpired that 5.4 of the protocol is something that I was not aware of until I was preparing but it is actually...

A THE DISTRICT JUDGE: Right. Listen. I cut across you there because I thought that those were agreed facts and that the only issue for me to determine was whether or not the payment period ran from the end of the initial consideration period or the extended consideration period. If there is an argument about whether or not the extended consideration period applied at all then we are not at that point of agreement, so I will have to hear from both of you on that point.

B MISS BEDFORD: Sir, if I may, just potentially cutting across that argument, the defendant's position is exactly the position that you have just outlined there – that there was an agreement on that particular fact – and what we have here are the replies. Those replies are signed with a statement of truth by the claimant's solicitors and, therefore, there would be required, in my submission, a formal resile from that particular statement from that particular fact. If that would be the case then, in my submission, sir, it needs to be formally accepted by my friend upon instructions, because that would appear to go against – wholly against – the document which is, on its face of it, an acceptance of that fact and placed before the court.

C THE DISTRICT JUDGE: There is a relevant point there, is there not, Mr Tidman?

D MR. TIDMAN: Yes, sir, there is, but, if you look at their submissions, they then (*inaudible*) the total consideration period – shall we say the first period expires on the 29th? – and they made their offer on the 23rd and they said that equals five days. Well, that is not correct; that is six days. It does not take a mathematician to work out that that is correct. When I prepared my replies, I had gone through my instructing solicitor's file of papers, dealing with particularly when we accepted – sorry, rather the defendant accepted – sorry, the defendant made its second offer, and I was under the impression that it would run from the next day, which would be the 24th, but obviously preparing for this assessment hearing I had discussions with my client and it runs from the actual business day that it was made; therefore, it would not be the next day; it would have been the 29th.

E MISS BEDFORD: Sir, if I may, the explanation just given by my friend there does not, in my mind, appear to go to whether the position has been resiled from formally from the points of reply or not; and if that is the case, sir, then that is something which my instructing solicitor is not aware of and that would be required for me to go and take instructions on that point, because it is a point of fact, sir, and, if that is unfortunately the case then it is going to be a potential that my client may request an adjournment as a result of the claimant resiling from its previous position.

F MR. TIDMAN: Well, I do not think—

G MISS BEDFORD: It has never been formally even raised in correspondence, sir, as far as I am aware.

H MR. TIDMAN: It is a case of, when we have these detailed assessment hearings, points are raised by either party. I do not think one person can say, "Well, hold on. We weren't aware you were going to say that, so we need to go and seek instructions from our client."

THE DISTRICT JUDGE: That is slightly different, though, is it not, because you are adopting a different position today to that which you have put in your written

A submissions; so it is not that I am not allowing you to make additional arguments; you are changing your stance, if you like.

B MR. TIDMAN: It is simply a case that when I was preparing I did not think that it would be an issue for me to write to the defendants, bearing in mind that the whole point of the protocol is that they work on specific time limits (you have ten days from this, or 35 days from that); so it is not hard for us to determine exactly what the start date is – what the end of the 35-day initial period is – which would then constitute the extra five days.

THE DISTRICT JUDGE: But, even on your submission, because I could not understand it when I was looking at the two as to whether or not the initial period finished on the 28th or the 29th... Was it a leap year that year?

C MISS BEDFORD: *(short gap in recording)* ...calendar on the back of it.

MR. TIDMAN: I have a calendar.

THE DISTRICT JUDGE: Was it a leap year?

D MR. TIDMAN: It is a leap year.

THE DISTRICT JUDGE: It was a leap year. There we are. That suddenly occurred to me. I did not work it out because I did not think that there was a dispute on it, but I had seen that one party said 29th and the other said 28th. But, in your submission, Mr Tidman, you are saying that the end of the total consideration period was the 28th not the 29th, and so even on your argument of the 23rd it would still be within five days, would it not?

E MISS BEDFORD: Yes, sir. Yes. I was just going to take you to it.

F MR. TIDMAN: But at 5.4 it says, “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,” so we have run from... Let me just get my law calendar. Sir, if it was accepted on Friday, the 24th...

THE DISTRICT JUDGE: Ignore the acceptance. Let us work out, to begin with, when it was made and whether it was within five days of the end of the total consideration period—

MISS BEDFORD: Sir, I do not know whether—

G THE DISTRICT JUDGE: —because there seems to be a disagreement about that, is there not?

MISS BEDFORD: Sir, do you have a copy of the calendar prepared by my instructing solicitors?

H THE DISTRICT JUDGE: I have not seen that, no.

MISS BEDFORD: Right. Mine is attached to the...

MR. TIDMAN: Well, we have not...

A MISS BEDFORD: I was told it was served on the (*inaudible*).

THE DISTRICT JUDGE: Well, is it any difference?

MISS BEDFORD: Are you all right for me to show you?

MR. TIDMAN: Yes, of course.

B MISS BEDFORD: I have to say I have not seen it set out like this until my instructing solicitor (*inaudible*) my writing (*inaudible*) seen it. but it sets out in colour codes the dates, etc. The handwriting on it is obviously mine, and we have here the... I am referring to 10th January, the acceptance of the consideration—

C THE DISTRICT JUDGE: Yes. The original offer.

MISS BEDFORD: Exactly. No, no, the Stage 2 settlement pack, sir.

THE DISTRICT JUDGE: Yes, sorry, that is the original settlement pack. Sorry. So that is the start of the 35 working days.

D MISS BEDFORD: That has to start the next business day, which is the 11th.

THE DISTRICT JUDGE: Yes.

MISS BEDFORD: We then count the days, which takes us to here.

E THE DISTRICT JUDGE: You accept, therefore, that it expired on the 28th, by this, is that right?

MISS BEDFORD: Yes, sir, the consideration period ended on the 28th and the further consideration period began on the 29th.

F THE DISTRICT JUDGE: Yes.

MISS BEDFORD: Therefore, five days back from there, the defendant's second offer—

THE DISTRICT JUDGE: Was made on the 23rd.

G MISS BEDFORD: It was made within five working days, sir.

THE DISTRICT JUDGE: Yes. Even if it was the 29th it would still be within five working days, would it not?

MISS BEDFORD: Indeed, sir, and if it was the 27th we would still be within five working days.

H THE DISTRICT JUDGE: Is that all right, Mr Tidman?

MR. TIDMAN: I get the final date of the first consideration period would be the 29th.

A THE DISTRICT JUDGE: No, the 28th, is it not? Which is, in fact, (*inaudible*) oral submissions.

MR. TIDMAN: Well, I am counting it is the 29th if it runs from the 11th.

THE DISTRICT JUDGE: All right. We will have to do it again. The 28th is what I get it to on this calendar. The 8th is day one, is it not? I think that must be right, the 28th.

B MR. TIDMAN: I have been working it out from that it starts on 10th January when the Stage 2 settlement pack was submitted.

MISS BEDFORD: No, because 5.3 clearly states that it is the next business day.

C THE DISTRICT JUDGE: That is the next working day, is it not? Do you want to have that back?

MISS BEDFORD: Thank you, sir.

THE DISTRICT JUDGE: We have to accept, have we not, that it was made within five days of the expiry of the consideration period? It was accepted on the 24th, was it not? Is that right?

D MISS BEDFORD: Yes, sir. Yes.

THE DISTRICT JUDGE: So is the only issue between us not, when you are looking at the time for payment, whether it runs from the date of the initial consideration or the extended consideration period?

E MISS BEDFORD: In my submission, sir, yes, it is actually a very narrow point; it is, in fact, the interpretation of 7.40.

THE DISTRICT JUDGE: Yes. Agreed? Who is going to address me first on that?

F MISS BEDFORD: That would be me, sir; I bear the burden. I had intended, sir, to address you in respect of all the facts, but it strikes me that you are wholly seized of those.

THE DISTRICT JUDGE: I have read them, yes.

G MISS BEDFORD: Thank you, sir. In that instance, I intend to take you straight to the law on this matter. There appears to be the broad agreement in respect of the working days and the initial consideration period, etc, sir, as we have just gone through, which leaves us with 7.40 being the crux of the matter between the parties. If I could refer you to that provision, sir—

H THE DISTRICT JUDGE: Yes, I have got it here.

MISS BEDFORD: Thank you, sir. There are four constituent elements, sir, in relation to that provision, in my submission, and the pertinent element of the paragraph is about two-thirds down, just after subsection (5): the defendant must pay “within ten days of the end of the relevant period in paragraphs 7.28 to 7.30 during which the parties agreed a settlement”.

A In my submission, sir, there are four pertinent questions which fall to be considered as a result of that paragraph. Firstly, we need to identify when settlement was reached; secondly, identify which period settlement was reached within; thereafter, identify the end of this period, and then, finally, add on the additional ten days thereafter. This subsequently gives the due date for payment. So it is quite a formulae approach.

B First of all, when was settlement reached? Well, we have identified that that was the 24th. In respect of the relevant period, 7.30 informs that that must be the further consideration period, being as a result of the offer being made within the last five days of the negotiation period, which is the 20 days after the initial 15 days period.

C THE DISTRICT JUDGE: Well, I am going to take you up on that point because what it provides for is a further consideration period, is it not?

MISS BEDFORD: Yes, sir. That is under 7.30.

THE DISTRICT JUDGE: Yes.

MISS BEDFORD: Sir, in effect, there is an initial 35-day period.

D THE DISTRICT JUDGE: Yes.

MISS BEDFORD: That is broken down into the first 15 days and then the second 20 days. Now that is the last 20 days or the overall 35. Whichever way you cut it – it is as broad as it is long – we have an ability to extend that period, be it by, first of all, agreement under 7.29 or, importantly, the automatic effect of 7.30.

E THE DISTRICT JUDGE: But is it not the case (and this is what I want you to address me on) that that extension, though, is to allow for further consideration so that the claimant could accept that counter offer on day 40, for example?

F MISS BEDFORD: Sir, in my submission—

THE DISTRICT JUDGE: But rather (*inaudible*), in fact, he accepts it within the initial consideration period, does he not?

G MISS BEDFORD: Yes, sir, but there is a delineation between the two. The extension of the consideration period is obviously dealt with by 7.30, and that does allow the claimant to consider the offer (or the defendant, as it may be, depending on which foot the boot is on), in fact, up until the final deadline date when the guillotine acts. However, that has to be considered separately and distinctly from 7.40 and that governs when payment is due, and, in order for us to quantify or calculate when payment is due, we must fall within the four questions which I have outlined, and the specific wording of 7.40 is “within ten days” – importantly – “of the end of the relevant period”.

H THE DISTRICT JUDGE: But the issue is what the relevant period is, is it not?

MISS BEDFORD: Indeed, sir.

A THE DISTRICT JUDGE: There is no guidance on that, is there? When the offer is accepted within the original consideration period, even though the extended period kicks in, but if he accepts within the initial consideration period is it not arguable that that is the relevant period?

B MISS BEDFORD: In my submission, sir, no, the reason being that the RTA protocol (or RTAP to give it its short name) is a self-contained code – so you either fall within RTAP or without RTAP – and the specific provisions in relation to the relevant period allow a further five days. It is not up to five days; it is five days; so there is no ambiguity to be given, and that is entirely appropriate, in my submission, given the intention behind RTAP, which is, of course, to limit any arguments, or any wriggle-room, if I can put it in the colloquial. It is a further five days. That is it. You get your further five days. It is not four and half days; it is not three days. There is no ambiguity; there is no room for movement. It is governed by 7.30 and 7.30 says five days.

C THE DISTRICT JUDGE: It might say five extra days for consideration but you are not addressing the point that I am making. He does not use those five days; he accepts within the initial consideration period. There are two distinct periods here, are there not? There is an extended period for consideration, but if he does not utilise it (and I am not making findings; I just want you to address me on it) but accepts within the original consideration period then is that not the relevant period for 7.4?

D MISS BEDFORD: In my submission, no, sir, because that would require an additional wording to be put into either 7.30 or, indeed, 7.40 (depending on which way, again, you wish to look at it) which says that the relevant period will end upon acceptance. That is not what it says, in my submission; it says there will be a further five days after the end of the total consideration period for the relevant party to consider that offer.

E THE DISTRICT JUDGE: To consider that offer.

F MISS BEDFORD: Indeed, sir, but it does not say “consider that offer up until which the relevant period will end”. It is that the further five days is there, and that has to be considered in the light of what 7.40 says, which is at “the end of the relevant period”, and that is not at the end of acceptance.

G THE DISTRICT JUDGE: I am not saying that it runs from acceptance, am I?

MISS BEDFORD: No, sir, but—

H THE DISTRICT JUDGE: That is not the point I am making to you. The point I am making is that there is a period that expires on the 28th.

MISS BEDFORD: Mmm-hmm.

H THE DISTRICT JUDGE: There is an extended period which kicks in for consideration. If he then accepts within the initial period – so he does not require the additional five days – is it really the intention that the defendant’s insurers should have the luxury of an extra five days to pay?

A MISS BEDFORD: Well, sir, again we have to consider it in the light of what RTAP says, and that is, on the face of it, what RTAP says. It allows for that movement and it allows for that room. Whether—

THE DISTRICT JUDGE: I am not sure that it does say that. I am not sure that there is any clarity on it.

B MISS BEDFORD: Sir, in my submission, it would require there to be an additional provision here, either, firstly, for the period to end (and expressly end) at upon an acceptance of an offer – and 7.30 does not say that; it simply says “a further period of five days after the end of the total consideration period” and that, in my submission, governs the time frame. What, of course, the parties do within that time frame is a matter for them, but the time frame is set out and it is present and it is expressly mandated, and that has to be considered in conjunction with 7.40 which governs the time frame for payment. Of course, the period in 7.30, in my submission, would have to be fixed because, of course, it is meshed with 7.40; otherwise we would end up with skirmishes like this all up and down the country – which would wholly pull against the intention of the protocol.

C THE DISTRICT JUDGE: Well – and I am just playing devil’s advocate here to hear what you have to say, and I will listen to what Mr Tidman has to say – I do not think that is right, because there are two distinct points then, are there not? Either it is settled within the initial consideration period or it is settled within the extended period. There is no room for argument between those two, is there, so there would be no skirmishes? It is an interpretation of, if you settle within the initial consideration period even though the extended period has kicked in, what is the relevant date? Is it the end of the initial period? I am not suggesting that it is the date of settlement. Is it the date of the initial period or is it the date of the extended period? Those are two very distinct dates. No argument – just two very distinct dates.

D E MISS BEDFORD: Well, no, sir, but, applying the claimant’s argument to taking aside the extended period, if deploying the claimant’s argument to the initial period (or, indeed the negotiation period – either of those two), in order to succeed, on the claimant’s case it would be such that if the offer was made on the first day and then it was accepted on the second day, when would the time for payment run? The argument, in my submission, would still stand to be the same consideration of the same point – it is just the flexibility on which period it is in – but we then still have to go to 7.40. It still does not take the claimant any further. We still have to go to 7.40, and it is “within ten days of the end of the relevant period” – not ten days of the date of settlement; it is ten days—

F G THE DISTRICT JUDGE: Nobody has suggested that.

MISS BEDFORD: Sorry, sir.

H THE DISTRICT JUDGE: You keep saying that; nobody has suggested that.

MISS BEDFORD: No, sir. Well, that, in my submission—

THE DISTRICT JUDGE: It is what is the relevant period, is it not?

A MISS BEDFORD: Indeed, sir, but that is what the claimant would appear to be arguing; that it would be within ten days of the agreement date. It would have to be at the end of the relevant period irrespective of whether the—

THE DISTRICT JUDGE: I think the claimant is arguing that it is ten days from the end of the initial consideration period, are you not?

B MR. TIDMAN: Yes, sir. It is pretty much the case, because if we were arguing that it was five... If it was that we had to wait until the end of the five-day period, that means my client, who agreed his damages or gave us instructions to settle on the 24th, would then have to wait until 7th March for the defendant to say, "Right. Fine. Even though we agreed it 13 days ago, I don't have to confirm to you formally now that it's agreed and then I'm not going to pay you for another ten days;" so, in effect, the client is waiting another two or three weeks on something that was agreed on the 24th. Extrapolating my friend's argument back to, say, for example, the first date of the 35-day period (10th January), if, when we submitted our Stage 2 settlement pack, the defendant said, "Yes. Accepted," should our client have waited around until the end of the first consideration period before then being given the—?

C THE DISTRICT JUDGE: I am sorry; I have misunderstood. You are quite right. Looking at your arguments, you are saying that it runs from the date of settlement.

D MISS BEDFORD: Yes, sir.

THE DISTRICT JUDGE: Sorry. I beg your pardon. It was my interpretation. That cannot be right, though, can it, Mr Tidman?

E MR. TIDMAN: It is just one of the submissions that I was going to put to the court, but it has always been in... We have been trying, in discussions with the defendant, to say, "We accepted it within the first consideration period, so surely the date has got to run from that date."

F THE DISTRICT JUDGE: From which date? The date of settlement or the date of the end of the consideration period?

MR. TIDMAN: The date of the end of the consideration period before the five days kick in. Then it should be remembered that—

G THE DISTRICT JUDGE: Well, sorry, let Miss Bedford finish and then I will come back to you, Mr Tidman. Sorry, Miss Bedford, I was on a different point to the claimant there.

H MISS BEDFORD: Not at all, sir. Sir, finishing off, sir, where I began, the position is simply this: one must go through the matrix of those four questions outlined in 7.40. When the relevant period is identified, one must then, as mandated by 7.40, go to the end of that period. The end of that period is five days after – sorry, ten days after – the further consideration period, but my friend has just outlined to you that the claimant's position is such that the offer was accepted and made within the negotiation period as opposed to the initial consideration period, which is the final 20 days. It was my understanding that the parties and the court addressed that point at the outset of this hearing as to whether the offer was made within the last five days of the negotiation period such that the

A additional five days was triggered or not. It was my understanding, sir, that that point had been conceded. Perhaps I was wrong on that.

THE DISTRICT JUDGE: Well, that is my interpretation of it.

B MISS BEDFORD: Thank you, sir. If that is the case then the relevant period for the purposes of 7.40 is under 7.30 (which is the further consideration period) which takes us up to 7th March. That is when the extended period ended. We then need to calculate ten working days from that date, which leads us to 20th March 2012. Payment was received on 15th March 2012, five days before the time frame allotted under 7.40 for the defendant to make payment. Consequent to that, sir, in my submission, it ought to be such that the costs consequences under 45.36 bite.

C THE DISTRICT JUDGE: Why was an application not made, because it troubles me that the defendants in this case agreed to a Tomlin Order? Why did they not simply make an application that there was an agreement, a concluded agreement, because that Tomlin Order makes it difficult for you, does it not?

MISS BEDFORD: No, sir, in my submission, it does not, owing to the effects of—

D THE DISTRICT JUDGE: It makes it difficult in that you cannot argue that those fixed costs apply. All you can argue is that I should limit the costs allowed on a reasonable basis to those fixed costs.

E MISS BEDFORD: Indeed, sir. It moves it from a mandated argument to a discretionary point; that, of course, being the effect of 45.36 in any event. Sir, I hold no instructions at all as to why an application was not made. For my part, I (*inaudible*). It would appear to be an alternative route that perhaps would have been considered. It was not, in the end, and the position is such that the decision was made that the argument on costs would be the prevalent argument which the defendant would take, it being perfectly open to it to be able to do so, of course. In relation to the difficulty of the costs order and whether that restricts the defendant from being able to argue that it ought to be restricted on a reasonable basis through quantification or not—

F THE DISTRICT JUDGE: I understand that, yes. Yes.

G MISS BEDFORD: Thank you, sir. Finally, sir, in so far as the claimant may seek to place emphasis on the offer of £3,700 in respect of general damages, the defendant submits that that is a red herring for the following reasons. First of all, that the pertinent position is the settlement achieved at the time of the claimant's exit from RTAP and obviously, sir, in my submission, to do otherwise would be to apply hindsight, which the court is restricted from doing.

H THE DISTRICT JUDGE: Sorry, I do not follow you there. It is a different settlement, is it, a different figure to that—?

MISS BEDFORD: It was around £150 above the original general damages. To put it in précis, sir, in the event that the claimant does seek to rely on that, that would be a red herring because it would require the court to stand at the point of the offer and look backwards rather than standing at the point of which the claimant fell out of the RTA protocol and look forwards.

A THE DISTRICT JUDGE: I do not follow that argument because we have already conceded that there is no argument here – there cannot be any argument here – that the costs are limited by the Rules. That there is a concluded agreement, that is not the argument that is being pursued, is it?

MISS BEDFORD: No, sir. No, it is not at all. Perhaps, sir, I can address this point—

B THE DISTRICT JUDGE: From that point of view, I do not quite understand on what you basis you say that, because it did fall out. There was not an argument put before the court that it should not have fallen out because there was a concluded agreement. There is a further settlement achieved which is actually higher than the settlement in the portal or the agreement in the portal, and they have signed a Tomlin Order confirming that and entitling the claimant to reasonable costs to be assessed if not agreed on a standard basis. I am not sure I follow your argument that it is a red herring as such.

C MISS BEDFORD: In terms of the amount ordered, sir, perhaps I can address you on this in the event that my friend raises it in the starting point.

THE DISTRICT JUDGE: Yes, Mr Tidman.

D MR. TIDMAN: Sir, dealing with three separate issues that have been raised here but maybe taking them slightly out of order and dealing with the consent order point, the consent order which was agreed between the parties was, as you quite rightly say, reasonable costs of the action to be assessed if not agreed. It must have been in the minds of both parties that reasonable costs would be the correct form of payment, not as we see in a lot of orders these days. where, for example, it is “the defendant do pay the claimant’s costs of £5,000 and the issue of the claimant’s costs to be dealt with as a preliminary issue” – which I have most weeks. It was solely in the defendant’s solicitor’s mind that they are prepared to pay reasonable costs. It is only when it has landed on the costs draftsman’s step that they have gone, “Well, hold on. I think we can go behind the signing of, and the agreement of, the Tomlin Order,” and I think it is pretty damning for the defendant that both parties have said, “Right. Fine. We are not limited to mandatory fixed costs. We are agreeing that costs are to be assessed by the court.”

E
F
G Re the “red herring”, as it were, it is simply our submission that we are not bound by Stage 1 and 2 costs and that the final amount agreed was more than agreed within the portal, and the defendants should have stuck with what their offer was. They had offered £3,503.96 for the actual personal injury element of the claim and increased that to £3,700. It is not too sure from my correspondence, and from speaking to my solicitor client, as to why it was increased, but it is a case of, “Well, hold on. We have paid within the allotted time period a certain amount which has been rejected, but we are now, after you have issued, willing to agree to pay more.”

H Dealing very, very briefly with my friend’s original argument as regards 7.3 and 7.4, it has always been the claimant’s case that there is this grey area here as to exactly when payment does start. There is no other part of the CPR – Part 36, Part 47 or Stage 1 – that says that the date that a party agrees settlement of a certain figure is when it runs from; so it would be slightly perverse if we have got to wait from the 24th until 7th March, which is when the five days expired (with weekends, etc), if we said to our client, “We have agreed your costs but, officially, we can’t agree them now for another

A 13 days,” as it would be the case of if we agreed... Or, rather, when we submitted our
settlement pack on 10th January, if my friend’s firm accepted it on the 11th, should we
B have then waited another 34 days for the end of that consideration period to expire,
because it is perfectly within their rights if we are going by the rule that we have to go to
the end of that particular time period? That surely cannot have been the thought of the
courts when they put these in place to say to our client on 11th January, “Excellent. We
have agreed everything. They have accepted our offer of £4,600 [*or whatever it was*]
C but you are now going to have (*short gap in recording*) before they will acknowledge
that, they will request a cheque and then a further ten days to make it.” That is simply
not—

THE DISTRICT JUDGE: It is clear, though, is it not, from the Rules, Mr Tidman? I do not
see that there is any scope for misunderstanding, however perverse it may be. The
defendant must pay agreed damages, Stage 2 fixed costs, relevant disbursements and
success fee “within ten days of the end of the relevant period in paragraph 7.28 to 7.30
during which the parties agreed a settlement”. I cannot see that there is any room for
manoeuvre on that, however perverse it may be. (*pause*) Yes, sorry.

MR. TIDMAN: Sir, the last point the claimant wishes to make was that it has been the case
the acceptance was within the original consideration period rather than the extended
D period; therefore, we would say that it would run from the 28th rather than the expiry of
the extra five days for the consideration. It has always been the claimant’s case that the
reason why these five extra days are there is if, at the eleventh hour, a phone gets made
–“Right. We’ve just got instructions. Sorry, our guy’s been on holiday. We’ll increase
to four and a half thousand pounds but it expires tomorrow. Let’s give you another five
E days if you then need to phone your client” – but this was agreed literally the next day
within the first consideration period, so the date should run from that day, which would
then obviously mean that we expected a cheque by the 9th. It has flashed up on my
instructing solicitor’s portal system on the date that it has now fallen out; hence the
issuing of Part 7 proceedings.

THE DISTRICT JUDGE: I am just looking at the difference. The portal costs would have
F been £1,798, is that right, (your points of dispute, page 4)? Is that the total figure that it
would have been?

MR. TIDMAN: Yes.

MISS BEDFORD: Yes, sir.

MR. TIDMAN: Yes, that is agreed, sir. Hold on. It is not. That is—

MISS BEDFORD: Sir, I (*inaudible*)—

MR. TIDMAN: The ATE premium is at £424 but the medical report is in at £360. The
H medical report fee nets in at £360.

THE DISTRICT JUDGE: So it will be slightly more than that.

MR. TIDMAN: The figure that is within my friend’s points of dispute is not correct. It was
£1,924.

A MISS BEDFORD: Yes, (*inaudible*).

MR. TIDMAN: Yes.

MISS BEDFORD: That is what I was trying to get to.

MR. TIDMAN: Yes.

B MISS BEDFORD: Yes, it is £1,924, sir.

THE DISTRICT JUDGE: £1,924, and you say, Mr Tidman, in your submissions, that this is essentially an all or nothing case. Either I limit the figure to the portal costs fee, or I allow it in full, because no other points of dispute have been raised. Is that what you say?

C MR. TIDMAN: Yes, I think it pretty much is. We would expected in the alternative and then you would have obviously made your ruling, and if it comes down in the claimant's favour then we would have done a detailed assessment hearing, but if it is a case of... I think it is agreed between myself and my friend.

D MISS BEDFORD: Not entirely. It is accepted that there were no additional points of dispute raised, sir; however, the only point that I would raise on that is simply that the court's position is to ensure that reasonable costs are paid – are awarded – so if there is anything... Sir, in my submission, that includes an additional fetter by the court; so it is not just the defendant that the claimant has to get these costs past; it is also that they have to get past the court's consideration of what is reasonable or not. In the event that there is anything, upon the court's consideration of these costs, which screams out to be unreasonable then, in my submission, the court does have the jurisdiction to reduce those costs to a figure that it sees fit. However, it strikes me that what the court cannot do is ask the defendant what the defendant considers ought to be—

E THE DISTRICT JUDGE: Yes, it is part of the court's overall discretion as to costs, I suppose.

F MISS BEDFORD: Exactly, sir. Exactly, sir. So it is not simply black and white. It is perhaps not as grey as it could otherwise be had the defendant raised additional points of dispute, but there is the discretionary element for the court to consider whether there is anything which pulls at the court's eye which strikes the court as being unreasonable such that it warrants reduction.

G THE DISTRICT JUDGE: Is there anything else you want to say? It is an interesting argument. I am going to go away and have a think about it. It seems to me that, in any event, my judgment is not going to be a judgment specifically on that point. It will deal with it but it is not a finding on that specific point because we are still talking about reasonableness here, are we not? Do you follow me?

H MISS BEDFORD: Sir—

THE DISTRICT JUDGE: It is almost an *obiter* point, is it not?

A MISS BEDFORD: No, sir, in my submission, it is not, for the following reasons. In the event that you do find that the claimant unreasonably exited RTAP then it is within the court's discretion (as we previously addressed) that the court can limit those costs to the amount of the costs which would otherwise have been awarded under RTAP for (*inaudible*) of the claimant's unreasonable conduct for falling outside of RTAP and exiting it unreasonably. There is a scale, sir – it has to be accepted – and, in my submission, it ought to be considered where the claimant's culpable conduct falls on that scale. Here, B sir, in my submission, it ought to fall at the end of the scale, so that the claimant is restricted to RTAP costs, for the following main reason: the claimant had an agreed settlement figure, so the claimant had agreed—

THE DISTRICT JUDGE: That is not right, though, is it, because there was not a—?

C MISS BEDFORD: Well, there was an initial—

THE DISTRICT JUDGE: By the fact that there is a consent order subsequently for a higher figure, the defendant's argument is not that there was a concluded agreement.

D MISS BEDFORD: No, sir, it is not that there is a concluded agreement but that the claimant had agreed; rather than a concluded binding agreement, the claimant had agreed in principle to accept the figure.

THE DISTRICT JUDGE: Yes, well, I think that has to be right. Yes.

MISS BEDFORD: Yes. Thank you, sir.

E THE DISTRICT JUDGE: Yes.

MISS BEDFORD: The claimant had agreed to accept a figure in full and final settlement of this matter, including RTAP costs. The claimant then subsequently resiled from the preliminary agreement on the basis that the cheque (in their position) was not received by the due date.

F In my submission, sir, that is manifestly unreasonable because it takes it out of the realms of does this claimant want this the £3,500 in respect of damages and it turns it into a costs argument; therefore, the only beneficiary of this argument at that point, sir, in my submission, was the claimant's solicitors. Obviously, sir, at that point, the claimant was wholly unaware that the defendant would subsequently offer an additional £150/£200 in respect of the general damages.

G Sir, this ties in with my point earlier in respect of the red herring, because to consider otherwise, and to consider the additional amount, would require hindsight and to be addressed either at today's hearing looking backwards or, indeed, at the time at which the offer was made. In my submission, sir, that is the wrong approach. It ought to be considered at the point of which this claimant fell outside of the protocol and whether H that was reasonable or not. In my submission, it is manifestly unreasonable to withdraw from the process for no other reason than the claimant's perception that the costs cheque had not been received in time. Sir, in effect, what the claimant has done—

THE DISTRICT JUDGE: And the damages. Is that right?

A MISS BEDFORD: The damages and the costs cheque, sorry, sir, yes. The claimant rushed, at the earliest opportunity, to litigate and that pulls wholly in the opposite direction of the ethos of the protocol. Furthermore, sir, had the claimant in fact wished to recover a higher amount – so the £3,700 as opposed to the £3,500, and something that the defendant had offered – it was, of course, completely open to the claimant to have rejected that offer and sought an increase on those damages. The claimant did not do so and that ought to be taken at face value.

B Finally, was there any ability to have negotiated further within RTAP, any argument such that the claimant may say, “Well, we’d come to the end of the negotiating period. That’s it. We’d had our lot; we had to now issue”? Well, sir, in respect of that there are two submissions. First of all, there was the ability to extend the negotiation period under 7.29 and so there was whole ability for the claimant, under RTAP, to have sought the additional damages. They chose not to do that.

C Finally, had an agreement still not been reached in respect of damages then this claimant would have proceeded under RTAP to Stage 3 settlement. Therefore, whichever way the cake is cut, Part 7, with the additional costs-bearing consequences, was wholly and manifestly unreasonable given the alternatives open to this claimant. In any event, sir, in my submission, weight ought to be given to the intention of this claimant to settle at the £3,500 in respect of generals, and that, in my submission, ought to be taken at face value.

D Weighing all those in the balance, in my submission, sir, it would be unreasonable, and an unreasonable exercise of discretion, to award this claimant anything other than costs quantified by reference to those otherwise recoverable under RTAP.

E THE DISTRICT JUDGE: Yes. Thank you.

MISS BEDFORD: Thank you, sir.

F THE DISTRICT JUDGE: Very good. Thank you very much. It is three o’clock and (*inaudible*) back half hour or so, perhaps less, so that I just have an opportunity to consider what I have heard.

MISS BEDFORD: Thank you, sir. Are you happy for us to leave our papers—?

THE DISTRICT JUDGE: Yes, of course.

G MISS BEDFORD: Thank you very much.

(Short adjournment)

(Judgment followed)

H MISS BEDFORD: Thank you, sir. The only issue, sir, is the defendant’s costs of the application. The defendant has beaten its offer. It had offered the £1,924 and consequently the defendant does seek its costs accordingly.

THE DISTRICT JUDGE: I have not seen a schedule from the defendant.

A MR. TIDMAN: The only offer that I am aware of is an offer of £1,506.50.

MISS BEDFORD: No, (*inaudible*) 5th March 2013.

THE DISTRICT JUDGE: That was before the issue of proceedings, was it not?

MISS BEDFORD: No, sir, that was 2013.

B THE DISTRICT JUDGE: I am sorry.

MISS BEDFORD: Forgive me, sir; it is my fault.

THE DISTRICT JUDGE: March and February is...

C MISS BEDFORD: All very close days.

THE DISTRICT JUDGE: Right, so this year. Have you got that offer and have you got a schedule? I have not seen a schedule.

MISS BEDFORD: Sorry, sir. It was filed yesterday. I only actually have one copy, sir.

D Sorry. Forgive (*inaudible*). You can have my copy.

THE DISTRICT JUDGE: (*handed*) Thank you. Have you seen this, Mr Tidman?

MR. TIDMAN: I had a copy emailed to me this morning, yes.

E THE DISTRICT JUDGE: It may well be that the problem is that the administration here is in Wrexham so things filed the day before normally do not reach the file, unfortunately.

MISS BEDFORD: Forgive me, sir. I shall feed that back to my instructing solicitor.

THE DISTRICT JUDGE: Have you got the letter of offer then?

F MISS BEDFORD: Mr Tidman has said that he does not require me to produce it, as I say that it was made, but I am just looking through now, sir, to pull it out in any event. I actually removed my tab, unfortunately, I think, when we were having a side discussion as to the amount.

THE DISTRICT JUDGE: If it is not disputed then I do not need to see it.

G MR. TIDMAN: It is not in dispute.

MISS BEDFORD: All right. Thank you.

H MR. TIDMAN: Sir, it is the usual arguments that any party will make to the court after a detailed assessment hearing. Who would the letters be to? Obviously I have no objection to the hourly rate; the hourly rate is obviously not a problem. We have four hours of letters and telephone calls between someone – presumably the costs draftsman and the insurers or costs draftsman and counsel. I do not know if there is any time for documents on here. Is there?

A THE DISTRICT JUDGE: There is a schedule at the back.

MR. TIDMAN: Right. "Assessment of file and costs" – I am not too sure what that would be – "(inaudible) dates; (inaudible) from client's comments; reviewing bill". Reviewing bill – why an hour? Drafting PODs an hour – why that long? "Considering replies" – fine. "Preparing submissions for DA" – what submissions for DA? "Periodic file reviews" – why? – "drafting N260". An hour to do a costs schedule? Again, I find that excessive.

B
C The thing that always concerns me when we have these sorts of assessments is why, when a costs draftsman has had such a heavy involvement – looking at the regulations, researching the correct parts of the CPR (in this instance obviously the low value portal system) – do they then see it fit to instruct counsel with a fee of £600? Why? I have not hidden behind counsel. I have been man enough to come to the court and put submissions as best I can to the court, with the arguments that are in front of me, and obviously the ruling has gone against me, so I always try and ask the court to look at it from a point of view of how long the fee earner would have taken to prepare for the hearing.

D I notice that there is 100% success fee, a CCFA, but we are not aware if there is any CCFA. We certainly have not been filed with a notice of funding. Presumably the defendants will be VAT registered, as it is an insurance firm rather than an individual, so any VAT would come off. I think £4,260 is a little bit high.

E Obviously I have submitted my own costs schedule which my friend will, no doubt, wish to rely on to say, "How dare he say that our costs are excessive, bearing in mind that his costs are £47,000(?) for coming on what is a dead straightforward detailed assessment? It is the most complicated thing in the whole wide world and a very experienced costs counsel should have attended, and it is quite right," but, at the end of the day, no doubt my friend would have serious concerns with the amount of time that we would have spent for what should have been a straightforward argument and obviously – bearing in mind the fact that I do not think counsel should have been instructed, and certainly the success fee is not claimable – I would ask you to look at it and reduce accordingly.

F MISS BEDFORD: Sir—

THE DISTRICT JUDGE: Thank you. What about the CFA point to begin with?

G MISS BEDFORD: I am not entirely sure about that position, sir. We have a document here that is signed by a solicitor which confirms that there was a CCFA in place. I have not seen the CCFA, for obvious reasons.

H In relation to the 100% success fee, sir, I cannot see that it triggered, under 45, to such that it is 100%. *Thenger(?) v Quinn*, albeit was a hearing before the Court of Appeal, concerned the exact point; that is, in the event that a hearing goes to a detailed assessment, does that in itself trigger the final hearing for the purposes of Part 45? It was a permission to appeal hearing – that has to be said – but it strikes me that the principle was correct, and that is such that in any ancillary hearing – i.e. a costs hearing – it cannot be considered to be a final hearing for the purpose of Part 45; so the success fee is 12½%.

A THE DISTRICT JUDGE: I am grateful to you for that. I think that must be right, must it not? It would seem entirely wrong, I think, that one party should be limited by the Rules, effectively, and it would not apply to the other party.

MISS BEDFORD: Sir, I do not have any instructions on the point.

B THE DISTRICT JUDGE: No. No. Well, there we are, but I am grateful to you, yes.

MISS BEDFORD: However, as counsel's analysis of the position, that is—

MR. TIDMAN: I have the notice of change when (*inaudible*) were put on record rather than (*inaudible*) and there is no usual CCFA documentation attached to it.

C THE DISTRICT JUDGE: Is there no notice of funding?

MR. TIDMAN: No. Well, it would only have been us that were obliged to serve a notice of funding. Well, no, they would have been obliged—

THE DISTRICT JUDGE: No. They would have to if they—

D MR. TIDMAN: —within seven days of entering into agreement, to file their notice of funding, as well, and there is nothing (*inaudible*).

MISS BEDFORD: Sir, that strikes me as being a point of fact. I do not have instructions on the point. Perhaps if my friend was going to seriously run the point then it ought to be something that I need to take instructions on as to whether, factually, the MN251 was, indeed, served or whether it was not served. In respect of whether the—

E THE DISTRICT JUDGE: Well, I think what I could so is I could assess the base costs, could I not?

MISS BEDFORD: Yes, sir.

F THE DISTRICT JUDGE: I could make an order for an entitlement for the success fee upon the defendant producing to the claimant's satisfaction within the next seven days the relevant documentation. If the claimant wishes to raise issue in relation to that success fee then we could have a further hearing by telephone or something.

G MISS BEDFORD: Sir, yes. Thank you.

THE DISTRICT JUDGE: I think that must be the only way to deal with it. If you have not got the documentation with you then—

MISS BEDFORD: I only have the costs files, as one would imagine.

H THE DISTRICT JUDGE: Yes, (*inaudible*) then they may not have the same impact, so they may not raise the issue, but there we are.

MISS BEDFORD: Thank you, sir.

(Short inaudible discussion between advocates)

A

MR. TIDMAN: Sir, if it may assist the court, in my ancillary papers I have found my friend's notice of funding.

MISS BEDFORD: Thank you.

B

MR. TIDMAN: It is dated 24th April.

THE DISTRICT JUDGE: There we are. Thank you for that, Mr Tidman. Thank you.

MISS BEDFORD: I am grateful.

C

MR. TIDMAN: So that is obviously (*inaudible*) to 12½.

MISS BEDFORD: Thank you. I am very grateful to my friend for that. Obviously the hourly rate is accepted. In relation to the following arguments, I am afraid that I was slightly unsure of the position. I appreciate my friend was making submissions in respect of whether counsel ought to have been instructed and whether the defendant's solicitor ought to have hidden behind counsel or not. I am not quite sure whether those go to the issue of my brief fee or whether it went to the issue of the time expended. I would just be grateful for clarification on that.

D

MR. TIDMAN: It goes to the fact that there is quite a lot of prep towards £1,003 worth of time spent by the solicitor for want of... All I can see them doing is preparing the replies and considering the PODs but—

E

THE DISTRICT JUDGE: Can I say this on the counsel point? I am going to allow the brief fee—

MISS BEDFORD: Thank you, sir.

F

THE DISTRICT JUDGE: —for this reason, Mr Tidman; because, in your claim for costs, you have claimed three hours for the advocacy and travel here today, which, at £161 an hour, takes us to almost £500 in any event. I do not think that the brief fee is unreasonable for the arguments that we have had today, so I am going to allow that. Do you want me to take a broad brush approach on the rest of it?

G

MISS BEDFORD: Sir, if it assists, the total time claimed by the defendant is 8.5 hours on documents.

THE DISTRICT JUDGE: Yes, 8.5 hours, I have seen that, yes. I think that is too high.

H

MISS BEDFORD: Indeed, sir. I can see the court's mind on that. It strikes me, sir, that a broad brush approach in respect of documents, bearing in mind the content of the replies and the... It was a technical argument, sir. It was not such that we are just talking about the nuts and bolts and having a bun fight over whether it is 12 minutes or 18 minutes. It was a technical argument that did require consideration of the Rules in quite considerable depth. In the event that you are content to take a broad brush approach, sir, perhaps a reduction to around six hours.

A THE DISTRICT JUDGE: Six hours is the exact figure I had in mind. It seems to me, especially with reference to the claimant's schedule (and Mr Tidman was kind enough to concede that you had made the point), I would not have allowed your schedule, Mr Tidman, and I am sure you are not surprised to hear that. I think 6 hours, taking off 2.5 hours on the schedule here is entirely reasonable.

B MISS BEDFORD: Thank you, sir. In relation to the balance of the attendances—

THE DISTRICT JUDGE: I am going to allow those.

MISS BEDFORD: Thank you, sir. I am grateful.

C MR. TIDMAN: I do not have a schedule in front of me at the moment, but is there VAT being claimed on the—?

MISS BEDFORD: I am sorry, sir. In relation to the VAT point, I am afraid that my friend is wrong on law on that. The position in respect of whether VAT is recoverable or not is not linked to whether the insurer is VAT registered but whether the ultimate defendant is VAT registered, and this is an individual person we are talking about: Sandra Elizabeth Baker.

D THE DISTRICT JUDGE: Yes.

MISS BEDFORD: I doubt very much that she brought these proceedings in the course of her business such that she could offset the VAT; so the VAT is recoverable as—

E THE DISTRICT JUDGE: Yes, that must be right, unless sometimes you find there is a farmer or something who is VAT registered; then it would not be recoverable.

MISS BEDFORD: Sir, that leaves us with 10 hours in total at £118 (£1,180), plus VAT, plus the success fee is £1,417.13, plus my fee, including VAT, is £720. That brings us to £2,134.13.

F THE DISTRICT JUDGE: Two one...

MR. TIDMAN: Three four.

MISS BEDFORD: £2,134.13 – is that what you got?

G THE DISTRICT JUDGE: Fourteen days?

MISS BEDFORD: Yes, sir.

THE DISTRICT JUDGE: For both, yes? Very well. Thank you both (*inaudible*).

H MR. TIDMAN: Thank you, sir.

MISS BEDFORD: Thank you very much for your time, sir.

IN THE MOLD COUNTY COURT

Claim No. 2ML00661

Law Courts
Civic Centre
Mold

Wednesday, 2nd October 2013

Before:

DISTRICT JUDGE HUMPHEYS

Between:

SIMON SHIRTCLIFFE

Claimant

-v-

SANDRA ELIZABETH BAKER

Defendant

Costs Draftsman for the Claimant:

MR. PAUL TIDMAN

Counsel for the Defendant:

MISS ERICA BEDFORD

JUDGMENT APPROVED BY THE COURT

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(Please note that the District Judge was not able to be heard clearly due to interference/faulty recording and short gaps within the recording; therefore, we have used our best efforts to transcribe this judgment)

APPROVED JUDGMENT

1. THE DISTRICT JUDGE: This is an interesting costs assessment which, to an extent, turns on the interpretation of the protocol for low value personal injury claims in RTA matters. I say to an extent because the argument is somewhat unusual. It is not disputed that the claim was entered on the portal on 13th September 2011 or that the claimant's first Stage 2 pack offer was made for £4,641.96 on 10th January 2012. The 35 day total consideration period pursuant to rule 7.28 of the portal runs from the following day. There was some disagreement initially but I think then conceded, and certainly I find as a fact that the last day of that period was 28th February 2012.

2. On 23rd February, the claimant made a further offer, having previously made an offer on 30th January, and that offer was accepted on 24th February. The 23rd February is, on any reading, within five days of the 28th namely the end of the total consideration period and, therefore, 7.30 of the protocol was triggered. That says:

“Where a party makes an offer 5 days or less before the end of the total consideration period (including any extension to this period under paragraph 7.29), there will be a further period of 5 days after the end of the total consideration period for the relevant party to consider that offer. During this period (‘the further consideration period’) no further offers can be made by either party.”

However, despite the settlement agreement, the claimant issued proceedings on the 12th March, because the claimant says that the defendant was in breach of 7.40 of the protocol which relates to payment. That says that except where the claimant is a child (or other provisions apply), the defendant must pay the agreed damages and costs, as set out in that provision, within ten days of the end of the relevant period in paragraphs 7.28 to 7.30 during which the parties agreed settlement.

3. The defendant submits that as the 5 day extension pursuant to 7.30 was triggered here, payment, was not due until 20th March – and payment was made prior to that – and hence the claimant issued prematurely. The Part 7 proceedings were actually then settled by negotiation at a higher figure than the pre-issue settlement, once those proceedings had been issued and served, and a Tomlin Order was filed with the court which provided for a stay of the proceedings in the usual way and provided for the defendant to pay the claimant's reasonable costs to be assessed if not agreed. Therefore, it is the defendant's case that as proceedings were issued prematurely the costs should be limited to those fixed costs which they would have received at the point of agreement within the RTA protocol on 24th February. Therefore, as I say, I am not asked to decide whether or not there was a concluded agreement which give rise to an automatic entitlement to fixed costs. What I have to decide is whether the costs claim put forward by the claimant is unreasonable and whether I should limit those costs to those which they would have received, if the protocol provisions had been complied with.

4. Dealing initially with rule 7.4 and the requirement for payment within 10 days, the claimant's case, in the written submissions and before me today, is that it should run from settlement. I have to say I do not accept that. However, perverse it may be, it

A seems to me that the rules are entirely clear and unequivocal: 7.40 says that the costs are payable and the damages are payable within ten days of the end of the relevant periods in paragraphs 7.28 and 7.30. Those relevant periods are the total consideration period (the initial 35-day period), or the mandatory five-day extended period, or any period agreed between the parties. It is clear that the trigger point for the ten days, on a bare reading of those rules, must be the end of the period and not the date of the settlement.

- B 5. In this case, the total consideration period ended on 28th February. Ten working days from then takes us to 13th February. There was a leap year in 2012 and so ten working days takes us to 13th February. Cheques were sent out on 12th February. There is no evidence before me—

MR. TIDMAN: I think it is March, is it not?

C MISS BEDFORD: Yes, it is March.

D THE DISTRICT JUDGE: March, sorry. Sorry, yes, I am into March. I beg your pardon. Thank you. Ten working days, of course, takes us to 13th March. Cheques were sent out on 12th March. There is no evidence before me as to whether they were received on the 13th or later, but they were certainly sent back by the claimants solicitors on the 15th so it must have been before then.

- E 6. I am told proceedings were issued on 12th March; that is, even before 13th March which was the last day for payment. There is an interesting argument as to when the extended period under the protocol kicks in, when settlement is achieved within 5 days of the end of the original total consideration period whether the ten-day period and runs from the end of the original period (which would be the 28th here) or from the extended period five working days later. It seems to me that I do not have to make a determinative decision on that point, but I have to say that the argument put forward on behalf of the defendant is persuasive.

- F 7. My role is to decide what is reasonable for costs purposes, and here, it seems to me, we have a situation, on my interpretation (and I think it is a clear interpretation), where, even if we take the original consideration period that expired on the 28th, that ten working day period would not have expired until the 13th, and the proceedings were issued on the 12th. I find, in those circumstances, that the conduct of the claimant was unreasonable and that, on any view and any interpretation of the rules, those proceedings were issued hastily and prematurely in an attempt to avoid the fixed costs regime.

- G 8. I am told that, had the protocol agreement been honoured, the claimant would have received £1,924 in costs and disbursements, and, in exercising my unfettered discretion in relation to costs in a detailed assessment, I find it entirely reasonable to limit the costs recoverable in these proceedings to those costs which would have been recoverable at that stage. Therefore, there will an order for costs in favour of the claimant for £1,924.

H *(End of judgment)*

(Submissions on costs and assessment of costs followed)