JUDGMENT : DISTRICT JUDGE JACK : Stoke on Trent CC. 6th December 2005

1. In the case of claim number 5SQ04848, Sarah Binch (claimant) has issued proceedings against David Freeman claiming damages for loss arising out of a road traffic accident which occurred on 15 December 2004. The bare facts are that the claim was issued on 24 August 2005, judgment was requested on 13 September 2005 and was actually entered on 19 September 2005.

2. I say the bare facts because there is correspondence interspersing those dates which, if I do not wish to be too disrespectful to Harry Woolf, would have him turning his hair grey. I say right at the outset that that correspondence casts no good light upon either the claimant's solicitors or the defendant's insurers. It is so typical of correspondence between claimant and defendant in the old days, and it is precisely what the Civil Procedure Rules, the pre-action protocol and the overriding objective was intended to try to eradicate.

3. There is little difference between the parties in relation to the chronology of the letters, but they are worth referring to. The letter of claim is dated 21 December 2004. It is replied to by letter from the defendant's insurers dated 31 December 2004, confirming that liability is not an issue and asking for full details of the claimant's claim. There is a subsequent letter, correctly within the protocol, of 6 January proposing, on the part of the claimant's solicitors, three medical experts. That letter, does not appear to have been responded to by the defendant, and Dr King is then instructed.

4. By letter of 25 January, an offer of £1,000 is made without sight of any medical evidence. The offer is rejected on 17 February and rejection of the offer is acknowledge on 25 February by a letter which says: "We assume you will now be instructing Dr King to prepare a report. We await sight of his report, in due course."

5. There is the inevitable gap whilst the claimant's solicitors receive Dr King's report, which is then sent by letter of 22 June. That letter reads: "We enclose a copy of our client's medical evidence. Should we receive an unacceptable offer to settle, or not hear from you within twenty one days, we shall issue."

6. The defendant's insurers wrote to the claimant's solicitors on 8 July, making, as a result of the medical report an offer of £2,750 in full and final settlement of the whole of the claimant's claim for personal injury. That letter does not appear to have been received by the claimant's solicitors and on 1 August 2005, they wrote to the defendants giving notice pursuant to section 151 of the Road Traffic Act 1988 that proceedings had that day been issued against the insured.

7. The defendant's insurers do nothing about that letter. The proceedings are issued, as I have said, on 24 August, served upon the defendant, no action is taken and judgment by default is entered with detailed directions to bring the matter before the court in a trial window by way of assessment of damages.

8. Subsequently, solicitors for the defendant are instructed on 20 October. They write on 21 October and make reference to the offer to settle and on 27 October pay into court £2,750. I should add that prior to that, back in March, they had already paid £460 to the claimant's solicitors in relation to an insurance policy premium.

9. Following the letter of 21 October, this case continues to today. The figure of £2,750 is acceptable to the claimant, but not accepted within the relevant period of time and therefore an order is needed. But no agreement can be reached on the question of costs, hence the matter before me today.

10. Against that background, there are several aspects of the Civil Procedure Rules to which reference must be made. Let me start with CPR 44.3(2), which says: *"If the court decides to make an order about costs -*
(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
(b) the court may make a different order."

    Sub-paragraph (4) says: "In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including -
(a) the conduct of all the parties;
(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36)."

Finally I need to refer to paragraph 5(a): *"The conduct of the parties includes - (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol…"*

11. This is a case to which the pre-action protocol for personal injury claims applies. Paragraph 2.13 says: *"Parties and their legal representatives are encouraged to enter into discussions and/or negotiations prior to starting proceedings. The protocol does not specify when or how this might be done but parties should bear in mind that the courts increasingly take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is in reasonable prospect."*

12. In addition to that part of the protocol, by the time this case enters the realms of correspondence between the solicitors, there has been an amendment to that protocol in April 2005, with the addition of a further paragraph 5.3, which says: *"Where the defendant has admitted liability, the claimant should send to the defendant schedules of special damages and loss at least 21 days before proceedings are issued (unless that would cause the claimant's claim to become time-barred)."*

Finally, in approaching this case, I need to have in mind the overriding objective. It is very clear how the court is to approach the Civil Procedure Rules. 1.1(1) says*: "These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly."*

Then paragraph (2) then sets out what the court has to do: ensuring that the parties are on an equal footing; saving expense, etc. That is the obligation placed upon the court. But CPR 1.3 says: *"The parties are required to help the court to further the overriding objective."*

That is their duty.

13. With all that in mind, I approach the facts of this case. First of all, there appears to be a huge amount of importance which has to be attached to the letter from the defendant's insurers dated 8 July 2005 which contains a very clear and very proper Part 36 offer by way of settlement, in an amount for which the claimant is prepared to compromise this case. The claimant's solicitors, through the statement of Peter Hartley, which contains a statement of truth, say that they did not receive that letter and they confirm that the first time they ever received the letter was when it was attached to the statement of Christopher Edward Perry.

14. The defendants say, yes but the letter has never been returned to us by the dead letter post, so we can only assume that it was received. Unfortunately, the experience of this court in relation to correspondence, or indeed claim forms, is that they so often just do not arrive.

15. This was sent not through the document exchange system but by first class post, and it is not at all uncommon for the courts to be told that a letter has never been received. In this instance there is no evidence to suggest that the letter was ever received by the claimant's solicitors and I have no evidence to gainsay the statement of truth of Peter Hartley. I have to accept, therefore, that it was never received by the claimant's solicitors. Had it been, that would have been a complete end to this argument as far as I was concerned because, had it been received and ignored, the claimants would have had no costs at all in relation to the issue of these proceedings. But that is not the case. I therefore have to consider what happened in relation to the correspondence.

16. The letter of 8 July was in reply to a letter from the claimant's solicitors of 22 June which I have already read. As a reminder, it was enclosing a copy of the medical evidence of the claimant. It is, in my view, important to refer to the wording of the letter. It says (and I repeat): *"Should we receive an unacceptable offer to settle or not hear from you within twenty one days, we shall issue."*

17. I find myself wondering and thinking *"now are those words in the spirit of co-operation or negotiation? Are they within the spirit of the CPR? Are they within the spirit that is encouraged by the pre-action protocol?"* It seems to me that they are in no uncertain terms an ultimatum. There was no reply to that letter as far as the claimant was concerned. I have already referred to the defendant's insurer's letter, but if I adopt the position of the claimant's solicitors, they have sent the medical evidence, they have not heard

anything from the defendants. So what do they do? They write on 1 August and say: *"We hereby give you notice pursuant to Section 151 of the Road Traffic Act 1988 that we have today issued County Court proceedings against your insured. Proceedings will be served on your insured in due course."*

18. Apart from being factually incorrect anyway, proceedings being issued on 24 August, are the claimant's solicitors justified in writing in those terms? Should they, in a spirit of co-operation and negotiation, have written to the defendant's solicitors saying, "*Why have you not made us an offer? You did in January without the medical report and we rejected it. Are you not going to negotiate?"* Do they do that? No. They do not write in any such terms, apart from writing factually incorrect letters, they then simply issue proceedings.

19. Is that action justified? First of all, it is in breach of paragraph 5.3 of the protocol, because when the proceedings are issued, a schedule of loss is attached, which had not been served 21 days before the issue of the proceedings. Are the claimants in difficulty and under pressure to issue proceedings by virtue of the Limitation Act? No, they have ample time before proceedings need to be issued.

20. So are they justified in issuing proceedings? Looking at the way in which it was done, I have to come to the conclusion that they were certainly not justified in taking that step. The defendants had already indicated from January a willingness to make offers. Liability had never been in issue, nor could it be having regard to the circumstances of the accident. It seems to me to be quite wrong for solicitors to send the medical report and, in the absence of reply, issue proceedings without further enquiry.

21. It is suggested and submitted on behalf of the defendant that this is an aggressive approach. Aggressive is perhaps an emotive word, but what I would say is that factually this was a premature approach, without attempting to negotiate within the spirit of 2.13, and there was no reason for the claimant's solicitors to conclude that there could not be negotiations, having regard to what had gone in the past.

22. Having received the letter of 1 August warning that proceedings had been issued, what do the defendants do? Unfortunately nothing until a letter of 22 September, which says: *"We have yet to receive the claim form or particulars of claim in this matter, have you issued court proceedings - if so please provide us with copies of the same."*

23. There is no suggestion that the claimants did not receive that letter. They had in fact already entered judgment on 19 September. But having received the letter of 22 September, what do the claimants do? Again it seems they do nothing. They do not contact the defendants and say, *"Look, you are in a bit of trouble here because we have already got judgment, but nevertheless let us talk about this case. Let us try and settle it."* They do not seem to have done anything, and the next piece of correspondence comes from the defendant's solicitors dated 21 October 2005. That letter clearly makes reference to an offer, but there was no copy of the offer attached. The letter is followed by a payment into court on 27 October 2005.

24. I have no knowledge nor do I really care about any underlying tension between the claimant and the defendant's solicitors, or indeed insurers. I am going to make my decision based upon the facts of this particular case and the facts of this particular case lead me to conclude, first of all, that the claimant's solicitors were not justified in issuing proceedings and had they contacted the defendant's insurers to find out what was going on, I am satisfied that settlement would have been reached, exactly as it was reached, on the terms that it was reached, without the need for proceedings to have been issued.

25. For those reasons, I am satisfied that the claimant's conduct is a factor which I should take into account with regard to any order as to costs. Had they not behaved in what I have described as a premature way by the issue of proceedings, this matter would and could have been settled on the basis of the fixed costs regime. For those reasons, that is the extent to which I shall limit the claimant's solicitors.

26. That does not, however, end the matter because there is before me a request by the defendant's solicitors for the claimant to pay the defendant's solicitor's costs, originally on the basis of the letter of 8 July, but that cannot follow because of my findings that it was not received. But subsequently on the basis of the reference to the offer in the letter of 21 October from the defendant's solicitors.

27. That, however, also cannot follow because it is merely a reference to an offer. It does not exhibit a copy of the offer. It is not written in such a form as to attempt to bring finality to the proceedings at that point. There is also the question to be taken into account of the defendant's conduct before the issue of proceedings through their insurers, ignoring the letter of 1 August.

28. All that was needed for the defendants, having received that letter, was to find out what was going on. I am not satisfied that they were justified in making assumptions that their offer had been rejected. They had not heard from the claimants about their offer. That was quite contrary to what had happened in January and February, where they had a clear rejection. There was no justification for the defendant's insurers making those assumptions. They could, and in my view should, have telephoned or written to the claimant's solicitors and said, *"Hang on a minute, why are you issuing proceedings? What about our offer? You are in the wrong. You should be negotiating with us."* Had the defendants taken that very simple step upon receipt of the letter of 1 August, before indeed the proceedings were actually issued on 24 August, all of the costs consequent thereto could have been avoided.

29. Whilst on the one hand the claimant should not have issued proceedings, I have come to the conclusion that costs incurred by the defendants have been brought upon themselves by their own inactivity rather than by any action on the part of the claimant. Therefore, I am not prepared to grant the defendant their costs against the claimant, or make any other order than that which I have already.

MISS HILL appeared on behalf of the Claimant
MR PERRY (Solicitor) appeared on behalf of the Defendant