IN THE COUNTY COURT AT CENTRAL LONDON **CASE NO : B00BI896**

B E T W E E N :

MRS BELINDA TANDARA

Claimant

and

EUI LIMITED T/A ADMIRAL INSURANCE

Defendant

Before District Judge Avent

3rd June 2020 (heard remotely by Skype)

Mr Marcus Grant of Counsel (instructed by Messrs Taylor Rose, Solicitors) appeared for the Claimant

Mr James Arney of Counsel (instructed by Messrs Horwich Farrelly, Solicitors) appeared for the Defendant

Pursuant to CPR PD 39A no official record need be taken of this Judgment and copies of this version as handed down may be treated as authentic.

JUDGMENT

Preamble

1. For many years English law worked on the curious notion (and perhaps still does) that people are able to remember with great clarity what happened a considerable time ago. The reasonable bystander might consider this to be difficult to comprehend given that the longer between the event and its recollection the more likely a person is to forget or interject their own reconstruction of events and masquerade it as the truth whilst, nevertheless, appearing to be an honest witness as to the facts. In addition the longer litigation lasted the greater the

impression that the law was tardy, slow and expensive, fitting of, and in keeping with, its former *Jarndyce* image and, perhaps, reputation.

2. Occasionally, often after many years, a litigant would become unhappy at his opponents lack of progress and, under the old Rules of the Supreme Court, apply for an action to be dismissed for want of prosecution but, largely, would not have a great deal of success. Although the Court had such a power it was, nonetheless, in many cases slow to exercise it. The approach to such applications became embodied within the decision of the House of Lords in *Birkett v James [1978] A.C. 297* which was subsequently the guiding light for a number of subsequent years. Lord Diplock at 318F-G had said:

> ""The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g., disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."

3. In consequence, there were cases where there had been inexcusable and lamentable failures to progress matters often involving delay of a number of years where common sense would appear to dictate that they should not proceed. However, if the Court was persuaded that a fair trial was still attainable and there would be no prejudice to a defendant, proceed they would even if it meant that the trial might not take place until several years after the event. Witnesses' memories it seems were considered to be particularly resilient to the lapse of time. It was also difficult for defendants to show or demonstrate that they would suffer prejudice and so such cases simply rolled inexorably onwards. As Lord Woolf noted, almost 20 years later, in another House of Lords case, *Grovit v Doctor [1997] UKHL 13*:

> "Defendants.....find it difficult to establish prejudice, so the requirements of the Rules of the County Court as to time can usually be ignored with a reasonable degree of confidence that nothing very serious will happen in consequence. Actions therefore take much longer to come to trial than they should and the general impression given to the public is that litigation is a very long drawn-out process with which they should try to avoid becoming involved."

4. It all seemed a much more genteel age, when litigation was essentially determined by the pace at which the (then) Plaintiff's solicitor wished to take it whether he was competent or not to do so. There were attempts to bring a degree of rigour to proceedings in the County Court by the introduction, in 1991, of CCR Order 17 Rule 11 which had a degree of success in accelerating the pace of litigation whilst still leaving a number of practitioners smarting in consequence of its Draconian strike out provisions.

5. The sea change, however, came with the Woolf Reforms and the introduction of the Civil Procedure Rules on 1st April 1999. Within just a few months, in July 1999, Lord Woolf had the opportunity, in the Court of Appeal decision of *Biguzzi v Rank Leisure plc [1999] EWCA Civ 1972*, to explain that:

> "Under the CPR the keeping of time limits laid down by the CPR, or by the court itself, is in fact more important than it was. Perhaps the clearest reflection of that is to be found in the overriding objectives contained in Part 1 of the CPR. It is also to be found in the power that the court now has to strike out a statement of case under Part 3.4..... The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.
>
> ..... Under the court's duty to manage cases, delays such as has occurred in this case, should, it is hoped, no longer happen. The court's management powers should ensure that this does not occur. But if the court exercises those powers with circumspection, it is also essential that parties do not disregard timetables laid down. If they do so, then the court must make sure that the default does not go unmarked. If the court were to ignore delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant."

6. That understanding and approach, together with the introduction of the concept of sanctions, informed the conduct of litigation in any number of ways and was largely successful in bringing recalcitrant practitioners into line. But delay in litigation, although of some import, was not the only factor which was causing consternation. There was also the issue of the costs of litigating.

7. The costs of a claim, in any number of cases, often far exceeded the amount in issue or that which was recovered and, in turn, access to justice was being impeded by the apprehension of

not being able to afford to go to Court. In November 2008 Lord Justice Jackson was appointed to lead a fundamental review into the costs of civil litigation. Part of that review, out of necessity, looked at the role of case management by the Court and this was addressed at Chapter 39 of the Review of Civil Litigation Costs: Final Report. At paragraph 6.5 Jackson LJ noted:

> "First, the courts should set realistic timetables for cases and not impossibly tough timetables in order to give an impression of firmness. Secondly, courts at all levels have become too tolerant of delays and non-compliance with orders. In so doing they have lost sight of the damage which the culture of delay and non-compliance is inflicting upon the civil justice system. The balance therefore needs to be redressed."

8. This translated into the 86th recommendation in his Report which said:

> "The courts should be less tolerant than hitherto of unjustified delays and breaches of orders. This change of emphasis should be signalled by amendment of CPR rule 3.9. If and in so far as it is possible, courts should monitor the progress of the parties in order to secure compliance with orders and pre-empt the need for sanctions."

9. A new CPR 3.9 rule was introduced and subsequently resulted in two important Court of Appeal decisions. The first was *Mitchell v News Group Newspapers Ltd (CA). Reference: [2013] EWCA Civ 1537* and the second was *Denton v White [2014] EWCA Civ 906.* Between them these cases made clear that where sanctions were imposed, or operated, either by the Rules or by orders, relief from such sanctions for their breach would only be granted after the consideration of a three stage test. The first stage was to identify and assess the seriousness or significance of the "failure to comply with any rule, practice direction or court order", which engaged rule 3.9(1). Secondly, the court should consider why the failure or default occurred i.e. was there a good reason for it; and, thirdly, the court must consider all the circumstances of the case and, in doing so, to enable it to deal with the application justly, give particular weight to the two factors at CPR 3.9(1)(a) and (b). As Jackson LJ observed at paragraph 89 of his judgment in *Denton*:

> "What litigants need is finality, not procrastination."

10. Within a relatively short period the *Denton* criteria became of almost universal application to civil litigation so that they applied not only to where a specific sanction applied or had been imposed but to situations such as setting aside judgment through to time limits in relation to an appeal. The underlying rationale was to ensure, so far as possible, that litigation came to a

timely conclusion and in that way costs would be proportionate. That remains the position and it is the present prevailing backdrop against which parties now must conduct civil litigation. Against that I can now turn to the facts of this particular case.

Introduction

11. At about 8:30 p.m. on the evening of 12th March 2012 the Claimant, Mrs Belinda Tandara ("Mrs Tandara") was involved in a road traffic accident when a vehicle driven by a Ms Stacey Palmer and insured by the Defendant in these proceedings, EUI Limited t/a Admiral Insurance ("EUI"), collided with the rear of her vehicle not far from her home in Edgware, North London. Mrs Tandara was injured.

12. She retained a firm of solicitors, Messrs Camps ("Camps") to pursue a personal injury claim on her behalf and by 28th April 2012 she had seen a medico-legal expert, a Dr Newman, who diagnosed soft tissue/whiplash injuries to her neck and back together with some headaches and anxiety which he considered would resolve within 3-6 months. However, her injuries did not resolve.

13. Subsequently, on 3rd February 2015, almost on the cusp of limitation, Camps issued protective proceedings. They were issued under the provisions of CPR 8 ("Part 8" - see below) in accordance with the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (the "Protocol"). The relevance of the Protocol is that it was concerned with and related to claims which (at the time) did not exceed £10,000. Pursuant to Practice Direction 8B paragraph 16.2 the proceedings were almost immediately stayed by an order dated 5th February 2015.

14. That stay was not lifted until more than four years later when, by an order of 26th March 2019, the proceedings were transferred to Part 7 and consequential directions were given for the service of a Particulars of Claim and a Defence.

15. On 3rd May 2019 Mrs Tandara served a Claim Form and Particulars Claim together with a Provisional Schedule of Loss. The statement of value endorsed upon this Claim Form was for "an unlimited sum in excess of £500,000" and the Schedule of Loss, described as "Preliminary", now valued the claim, some seven years and two months after the accident at a little over £760,000.

16. No warning, notice or previous information had been given to EUI or their solicitors for this most extraordinary increase in the value of the claim. After such a long time, throughout which EUI believed, and indeed understood, that the value of the claim was either up to £10,000 or might be settled for not (relatively) a great deal more, to now be faced with a claim of such magnitude was, they considered, unfair.

17. Accordingly, on 17th December 2019 EUI issued the present application to strike out Mrs Tandara's claim on the basis that the way in which the claim had been conducted amounted to an abuse of process.

18. The court has power to strike out a claim pursuant to CPR 3.4(2):

> "(2) .....if it appears to the court –.....
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order."

19. The application raises important issues as to delay generally but also, specifically, in relation to cases which have been subject to the Protocol but have then exited from it at a later stage. The facts of this case bring it within the orbit of two other recent cases which have addressed similar issues, being *Lyle v Allianz Insurance plc [2017] (A00CH865 Chester County Court)* and *Cable v Liverpool Victoria Insurance Company Limited [2019] (D34BI037 Liverpool County Court)*. Some time was spent by both Mr Grant and Mr Arney, Counsel respectively for Mrs Tandara and EUI, in their submissions dealing with these. Before I deal with them however it is necessary to look at and consider the regime under which these proceedings were issued.

The Protocol & Part 8

20. In April 2010 the Civil Procedure Rules Committee amended the CPR to introduce the Protocol and a special Part 8 procedure to deal with claims where liability had been admitted but quantum was disputed. The stated aim of the Protocol was to provide a process whereby lower value claims could be resolved reasonably quickly and thereby at little cost because the fixed stage payments received by a claimant's solicitor were already determined under the

Protocol. This not only removed wasteful satellite arguments as the amount of costs in relation to any given work undertaken but it incentivised claimants' solicitors to deal with matters more efficiently in order to maximise profit.

21. There was a three stage process, only the last of which involved the Court, and this has remained the case since its inception. Stage 1 concerned the completion of an online Claims Notification Form, or "CNF", and a response by the defendant on the issue of liability. If primary liability was not agreed or if there were issues of contributory negligence at large then the case could exit the Protocol at the end of Stage 1 and a claimant could proceed to issue a Part 7 claim.

22. Stage 2 related to a gathering of medical evidence by the claimant, the making of an interim payment if a resolution was delayed and, finally, a mechanism for settlement whereby the claimant would provide a Settlement Pack to the defendant with a suggested offer to settle which the defendant might accept or make a counteroffer upon. If quantum was not agreed the case could also exit the Protocol at that point in one of two ways. Firstly, it may have become clear that the value of the claim exceeded the upper limit (of £10,000) in which case a claimant would, as above, proceed to a Part 7 claim or, secondly, the Protocol enabled a Part 8 claim to be brought to enable the Court to determine the amount of damages, which could be determined on paper or, more commonly, at what is termed a 'Stage 3 Hearing'. In either case application had to be made to Court under Practice Direction 8B ("PD8B").

23. The ambit and principles of the Protocol can be discerned from its various provisions. The Preamble to the 2010 version set out that:

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

24. Paragraph 3 then set out the Aims of the Protocol as follows:

> "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 time; and

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

25. The Protocol continued at paragraph 4.1 to state that it applied 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'); and
> (4) if proceedings were started the small claims track would not be the normal track for that claim."

26. Paragraph 4.2 of the 2010 version made clear that:

> "This Protocol ceases to apply to a claim where, at any stage, the claimant notifies the defendant that the claim has now been revalued at more than the Protocol upper limit."

27. The Protocol was revised with effect from 31st July 2013 to increase the 'upper limit' to claims of up to £25,000 and applied to a claim for damages where the CNF was submitted after that date. Importantly, however, (and just in case that was not sufficiently clear) paragraph 4.2 of the 2013 version provided that in respect of claims notified before that date, i.e. by means of a CNF, the upper limit value of the claim would, nevertheless, remain at £10,000 and the previous 2010 version of the Protocol would continue to apply. The CNF in the case of Mrs Tandara was submitted on 23rd March 2012. Accordingly, the 2010 version of the Protocol was applicable to her case.

28. Of somewhat crucial importance was the fact (as remains the case) that if a claim exited the Protocol because liability was in issue or quantum exceeded the upper limit, it then immediately became subject to the Pre-Action Protocol for Personal Injury Claims (the "PI Protocol"). The PI Protocol proscribes a rather formulaic approach but in doing so makes it clear that there should be, and is expected to be, a high degree of voluntary disclosure and cooperation between the parties. This is reflected not only in the detail required by the Letter of Claim but also the Response required from the defendant and the subsequent steps which the parties should take. It encourages early disclosure and the joint selection of experts and this 'cards on the table' approach also applies to litigants in person.

29. For the vast majority of low value personal injury cases the Protocol works well. However, there are a small number of cases which, for what could be many reasons, are not capable of resolution before the expiry of the three year limitation period for personal injury cases (Section 11 Limitation Act 1980). Given the low value of such claims it would defeat the purpose of the Protocol somewhat if a claimant then had to incur the costs of issuing proceedings under Part 7 with the attendant requirements such a claim imposes. Accordingly, specific provision was made for this situation. The Protocol provided that:

> "5.7 Where compliance with this Protocol is not possible before the expiry of the limitation period the claimant may start proceedings and apply to the court for an order to stay (i.e. suspend) the proceedings while the parties take steps to follow this Protocol. Where proceedings are started in a case to which this paragraph applies the claimant should use the procedure set out under Part 8 in accordance with Practice Direction 8B ("the Stage 3 Procedure").
>
> 5.8 Where the parties are then unable to reach a settlement at the end of Stage 2 of this Protocol the claimant must, in order to proceed to Stage 3, apply to lift the stay and request directions in the existing proceedings.."

30. That procedure to start proceedings is governed by the provisions of paragraph 16.1-3 of PD8B which provide that:

> "16.1 Where compliance with the relevant Protocol is not possible before the expiry of a limitation period the claimant may start proceedings in accordance with paragraph 16.2.
>
> 16.2 The claimant must –
>
> (1) start proceedings under this Practice Direction; and
>
> (2) state on the claim form that –
>
> (a) the claim is for damages; and
>
> (b) a stay of proceedings is sought in order to comply with the relevant Protocol.
>
> 16.3 The claimant must send to the defendant the claim form together with the order imposing the stay."

31. Thereafter a claimant has two options. If the matter is subsequently capable of resolution but there is a dispute over quantum he can seek a Stage 3 Hearing (see: paragraph 16.5 and 16.6 PD8B). Alternatively, if quantum issues cannot be resolved within the Protocol under Stage 1 or Stage 2 he can decide to proceed under Part 7 (see: paragraph 16.7 PD8B). In either case, an application must be made to the Court to lift the stay and to seek appropriate directions if the stay is lifted (the Court having a discretion). Paragraph 16.7 is in these terms:

> "16.7 Where, during Stage 1 or Stage 2 of the relevant Protocol –
>
> (1) the claim no longer continues under that Protocol; and
>
> (2) the claimant wishes to start proceedings under Part 7,
>
> the claimant must make an application to the court to lift the stay and request directions."

32. One of the issues that arises in this case concerns the fact that, as will be noted, neither the Protocol nor the Practice Direction stipulates a time by which a claimant needs to apply to lift the stay or, indeed, provide any mechanism by which the stay might automatically come to an end if no such application is made by a claimant within a specific time period. That means, as has occurred here, that a case is able to languish in a sort of 'no man's land' with nothing happening (because of the stay) for a considerable period of time but, concurrently, avoiding the rigours and requirements of the PI Protocol, the Part 7 procedure or the exigency of limitation.

33. That state of affairs that has led to the sort of problems which to a very great extent were canvassed in the cases of ***Lyle*** and ***Cable***, thereby attracting the interest of both Counsel in this case, and to which I can now turn.

The Lyle Case

34. The case of ***Lyle*** (which was valued at £200,000) is slightly different to that of Mrs Tandara because the stay in this case has already been lifted, in March 2019. In ***Lyle*** the court was concerned with an application to lift the stay.

35. Mrs Lyle had been involved in a road traffic accident on 22nd August 2011. It is not clear from the judgment of HHJ Pearce exactly when proceedings were issued but it must have been before 22nd August 2014 (when limitation expired) and, because Mrs Lyle's solicitors had apparently valued the claim not more than £10,000, they availed themselves of the procedure under paragraphs 16.1-2 PD8B.

36. Subsequently, on 28th February 2017 Mrs Lyle's solicitors wrote to those representing the defendants in that case to say that they were exiting the Protocol because they believed that the claim was going to exceed the upper limit and an application to lift the stay was made shortly afterwards.

37. There was a distracting, albeit important, point taken with regard to paragraph 16.7 and whether the words "wishes to start proceedings under Part 7" meant that Mrs Lyle had to commence fresh proceedings (in which case the defendant insurers would be able to plead a limitation defence) or that the Court was able to, simply by virtue of CPR 8.1(3), transfer the proceedings to Part 7 (which would deprive the insurers of the limitation argument). Sensibly, for a number of reasons, the Court concluded the latter course was appropriate.

38. This then led to the central issue as to whether, in the circumstances of Mrs Lyle's case, the Court should exercise its discretion to actually lift the stay which, in turn, required an assessment of the medical evidence and how matters had progressed.

39. Initially, in September 2011, only a matter of weeks after the accident, Mrs Lyle saw a Dr Glasby who reported upon lower back pain, right shoulder pain and stiffness with paraesthesia in the right arm. The former had resolved within two weeks and Dr Glasby's prognosis for the shoulder was for a resolution about three months post accident.

40. However, by May 2012, Mrs Lyle had seen an orthopaedic surgeon, a Mr McMurty, who noted that her pain was continuing and he thought that a resolution might in fact take some two years.

41. Almost 3 years later, in February 2015 (and so obviously after Mrs Lyle had issued proceedings) she saw Mr McMurty again. This time he noted that her symptoms persisted and that she had been diagnosed with fibromyalgia. Mr McMurty recommended that a report be obtained from an expert in fibromyalgia and possibly psychiatric/psychology.

42. A Consultant Rheumatologist, Dr McKenna was instructed. He reported in March 2016, and considered that Mrs Lyle had suffered chronic pain caused by the accident which had led to the fibromyalgia, and identified, from her medical records, that the initial diagnosis in this regard had been given in March 2014.

43. In October 2016 a Dr Vincenti, a Psychiatrist, concluded that Mrs Lyle was suffering from a persistent somatic symptoms disorder which was unlikely to fully resolve and, in addition, noted a diagnosis of fibromyalgia in her GP records as far back as August 2013.

44. At the time Mrs Lyle's solicitors had issued protective proceedings only the report of Dr Glasby and the first report of Mr McMurty were available. Her Solicitors subsequently contended that given those reports the assessment of a value of no more than £10,000 (the upper limit) was appropriate as was their use of the Protocol.

45. The defendant's insurers drew attention to the diagnosis of fibromyalgia in August 2013 and March 2014, noted that this diagnosis had in fact been confirmed in September 2015 and pointed to an email of January 2016 from Mrs Lyle's solicitors in which they accepted that the case was no longer suitable for the Protocol.

46. On appeal from the District Judge (who refused to lift the stay) HHJ Pearce observed against this background at paragraphs 28 to 30 of his judgment that:

> "28. As noted above, paragraph 4.2 of the RTA protocol provides a mechanism for the protocol to cease to apply where the Claimant notifies the Defendant that the claim has been revalued at more than the upper limit. It does not provide any express obligation on the Claimant to give the relevant notification. However, in my judgment, it is incumbent on a Claimant and their legal representative to review the potential value of the claim on a regular basis and to give notice under paragraph 4.2 when it appears that the value exceeds the upper limit.
>
> 29. If this were not the case, the Claimant would be enabled to take all of the advantages of the RTA protocol, particularly the right to obtain medical evidence without consultation with the Defendant and the ability to hold such evidence without disclosure to the Defendant, whilst avoiding the damages and costs limits that would apply if the case remained in the RTA protocol through to trial or settlement. This would be entirely at odds with the spirit of the protocols which provide on the one hand a streamlined and cheap procedure for low value cases and

> on the other a more case-specific but potentially more expensive procedure for higher value cases.
>
> 30. Where, as in this case, the Claimant has taken advantage of the procedure provided by paragraph 16.2 of PD8B to obtain a stay of proceedings so as to avoid the operation of a limitation defence, the result of the failure to give notice of the revaluation of the claim is that the Claimant has the benefit of a limitation defence to which she otherwise would not be entitled. In my judgment, the failure to give such notice is therefore capable of amounting to an abuse of the process of the court in depriving the Defendant of a potential Defence to the claim and preventing the court from carrying out proper case management, by ensuring that the case is pursued in an efficient and proportionate manner."

47. The judge refused to overturn the decision below. He noted that until March 2017 the defendants insurers believed the case valued not much more than £10,000, that they had had no opportunity to contribute to the medical evidence they now faced (or object to the instruction in the first place) and had not been able to assist or participate in a rehabilitation programme for Mrs Lyle which had been suggested. He also noted that the case could have been concluded by late 2017 had it been taken out of the Protocol earlier which would have had a beneficial effect upon Mrs Lyle's injuries for which she was claiming damages because matters had not been resolved.

48. The judge was also very critical of the fact that almost 6 years post-accident Mrs Lyle had still not been able to formulate a definitive schedule of loss, the schedule produced being termed "Provisional". He concluded at paragraphs 47 and 48 of the judgment that:

> "47. I bear in mind the draconian consequences of striking out a case which may be worth more than £200,000 to the Claimant. I accept, following paragraph 67 of the judgment of Barling J in Wearn v HNH International EWHC 3542 (Ch), that delay alone is not an abuse of the process of the court.
>
> 48 But in my judgment the Claimant's significant and persistent failures and the consequent delay, increased expense and prejudice to the Defendant, amply justified the District Judge's refusal to lift the stay and his consequent order striking out the claim. The prejudice to the Defendant through this manner of conducting the claim could simply not be properly compensated with a costs order because of the potential for the delays to have contributed to persistent symptomatology and/or a lack of rehabilitation, thereby increasing the value of the claim."

49. This stay was not lifted and Mrs Lyle's case was struck out.

The Cable Case

50. The road traffic accident in which Mr Cable was involved took place on 1st September 2014 when his vehicle was subject what is colloquially known as a "rear end shunt".

51. There are four matters to bear in mind with regard to this case, as follows:

    a. By this date the Protocol had been overhauled, the MOJ Portal had been introduced, and as from the 31st July 2013 the upper limit was now £25,000 instead £10,000 as in the case of Lyle and, indeed, the present case.

    b. The time between the accident and the decision of HHJ Wood QC to strike out the claim was shorter than it was in Lyle;

    c. The Judge was prepared to strike out Mr Cable's claim notwithstanding that it was said to have a potential value of £2.6 million; and,

    d. This was an application to set aside the order lifting the stay (and so differs from both Mrs Lyle and Mrs Tandara's case where, in the latter, the stay has already been lifted) in circumstances where the Court found Mr Cable's case should never have been within Protocol to start with (which is also different to that of Mrs Lyle's case).

52. Within weeks of his particular accident Mr Cable's Solicitors had submitted a CNF, which not only triggered the Stage 1 process within the Portal but indicated that he had sustained soft tissue injuries to his neck, back and shoulder. In November 2014 Mr Cable had been seen by a Dr Saeed who did not provide a prognosis but recommended that a report of a neurologist be obtained and in April 2015 a Dr Kidd did so report. He noted that Mr Cable was still unable to return to work and was experiencing hearing problems, headaches and light sensitivity. He considered a recovery period of a further 15 to 18 months to be appropriate. However, the report of Dr Kidd was not disclosed.

53. Despite the efforts of the defendants to chase matters their efforts fell on stony ground to such an extent that even when in December 2015 Mr Cable, who had been earning approximately £130,000 per annum (which would give rise to a substantial loss of earnings claim), lost his job they were not informed. The ignorance of the defendants' insurers might be discerned and

highlighted from the fact that in April 2016 they made a Part 36 offer to Mr Cable of just £10,000.

54. By January 2017 Dr Kidd had reported again and described Mr Cable as being in a "severe neurological state". It seems an amendment to that report was received in June 2017. Less than a week before the limitation period expired on 25 July 2017 Mr Cable's solicitors issued a Part 8 claim form and, in keeping with the Practice Direction, a stay of those proceedings was granted as a matter of course to 20th August 2018.

55. Only shortly before that deadline did Mr Cable's solicitors disclose Mr Kidd's two reports and indicate that Mr Cable had lost his well remunerated employment.

56. On 18th August 2018 Mr Cable's solicitors applied to lift the stay and, again as a matter of course, the Court did so on a without notice basis. The defendant's insurers then applied to set aside that order and strike out the claim. District Judge Campbell granted that application.

57. The matter then came before his HHJ Wood QC on appeal who, having heard full argument, upheld that decision. He found (at paragraph 75) that Mr Cable's solicitors conduct "was more significant and serious than that which was considered by HHJ Pearce in the Lyle case."

58. In paragraph 71 of his judgment he noted that:

> "71. Categories of abuse of process, which are not defined anywhere within the rules, are many and various and not closed. Whilst the reference to "obstruction of the just disposal of the proceedings" provides some pointer within CPR 3.4, in my judgment the essential question is whether or not the party which has been accused of the "abusive" conduct has acted in a way which is unfair to the other party. District Judge Campbell may not have sought to grapple with a precise definition, but it is plain to me that on several occasions throughout her judgment she has considered the effect which the claimant's conduct of the litigation has had in securing an advantage for the pursuit of his claim, and in particular had disadvantaged the defendant. It is not simply a question of prejudice, which implies a negative effect on another party, but also the way in which the claimant's advisers have been able to bypass the requirements of the PI protocol, which clearly applied, and of course to avoid the operation of the Limitation Act."

59. Likewise, the decision to strike out the claim was upheld.

The Facts of Mrs Tandara's Case

60. The accident in which Mrs Tandara was involved was somewhat more serious than perhaps the usual rear end shunt. Mrs Tandara was moving when Ms Palmer collided with her vehicle propelling it into the car in front and then colliding with it again. Consequently, three vehicles were involved, Mrs Tandara's car suffered about £4000 worth of damage and was written off.

61. On the evening of the accident Mrs Tandara attended at Barnet Hospital where soft tissue injury was noted. She was discharged with analgesics to have a follow up with her GP who she saw, in fact, on 15th March 2012. According to Mrs Tandara he prescribed Naproxen and Diazepam and she was referred for physiotherapy, eight sessions of which were subsequently arranged through her solicitors,.

62. Indeed, Mrs Tandara lost little time in instructing Camps to pursue her personal injury claim. By 23rd March 2012 they had submitted a CNF on her behalf. This recorded that:

> "Client hit her head on the steering wheel which has caused severe bruising/swelling to her nose and forehead. Client has soft tissue damage to her right arm, neck, lower back and top of the client's head"

63. EUI duly admitted liability on 27th March 2012 and Camps Stage 1 costs of £480 were paid. Indeed, in their open letter at that date EUI made an offer to Mrs Tandara in the global sum of £1500 for all heads of claim, excluding vehicle damage, hire and excess.

64. However, thereafter whilst there was evidently some communication between the parties it appears that it was exceptionally sparse. The reason for this might be found in EUI's letter to Camps of 21st July 2015 which was in these terms:

> "We refer to the above matter and, in particular, the CNF submitted via the RTA protocol on 23/03/12 following receipt of which (and the admission of liability) we paid the... Stage 1 costs.
>
> We note that since the admission of liability and the payment of those costs, your client's claim has not been pursued.
>
> You will appreciate that limitation of your client's claim has now expired and, in the circumstances, we require reimbursement of those sums....."

65. Whilst it appears evident from EUI's standpoint that nothing had appeared to happen in the previous 3¼ years this was far from the case so far as Mrs Tandara was concerned. As well as having arranged some physiotherapy sessions, Camps had also arranged for her to see a Dr Newman GP on 28th April 2012 although, for some reason, he did not apparently produce his report until several months later. I will deal with his findings, as I will in relation to all the medical experts relied upon by Mrs Tandara, a little later in this judgment. Suffice to say, however, that Dr Newman considered a prognosis period of up to 6 months was appropriate for her injuries.

66. In early May 2012 Mrs Tandara found it necessary to attend at her local Accident & Emergency Department once more. Later that year in August and September, when she went to visit her mother in Germany, she had bouts of headaches and back pain for which she sought medical attention both at an A&E Department and with a Dr Hilber.

67. Having returned home, on 9th October 2012 Mrs Tandara then saw a Mr Sabin, a Neurosurgeon, who referred her for an MRI scan which took place a week later.

68. By this time quite clearly the period within which Dr Newman had suggested that Mrs Tandara's injuries should have resolved had effectively expired and, far from getting better, Mrs Tandara had not improved and appeared to be getting worse. No doubt this was in the mind of Camps when they arranged a further medico-legal appointment, this time with an Orthopaedic Surgeon, Mr Kucheria, who Mrs Tandara saw on 7th February 2013.

69. Mr Kucheria reported on 17th March 2014 but, for reasons to which I will come, did not reach any definitive diagnosis or prognosis.

70. In January 2014, Mrs Tandara's saw yet another expert, this time a Mr Pickles, an ENT expert, because she had grown concerned that the blow sustained to her nose in the accident had disfigured it slightly and impaired both her breathing as well as her sense of smell.

71. However, notwithstanding the input of all these experts, Mrs Tandara symptoms did not resolve and she got steadily worse as documented in her witness statement of 21st May 2020 and the very helpful chronology which she exhibited to it.

72. It seems that in or about the Spring of 2014 Mrs Tandara moved to Germany with her family. It is unclear, on the documents I have seen, as to when this actually happened, which is a little unhelpful, in terms of the chronology. Both in May and August 2014 she had to attend at an

A&E Department for headaches (May) and high blood pressure and spinal pain (August). At paragraph 10 of her witness statement she said:

> "Camps were made aware of my circumstances, and of our move to Germany. Throughout April to September 2014 and throughout the rest of 2014 they had my written and telephone updates regarding my condition and replies to their queries. In 2014, I saw my GP, Dr Hilber over 20 times; also I saw a cardiologist and a pain specialist. I had numerous massage treatments and continued to take anti-hypertensives and pain relief medication and used a TENS machine".

73. Notwithstanding this passage of information to Camps they did not apparently see the need, or perhaps the sense, in seeking to obtain up-to-date medico-legal evidence. The ongoing condition of Mrs Tandara should have provoked some concern in two ways. Firstly, if her ailments had been caused by the accident one would have expected a degree of urgency to establish that link sooner rather than later or, alternatively, secondly, for the accident to be discounted as the cause of her problems in the first place.

74. This apparent inertia might also be reflected in the lack of information or progress being reported to EUI. The chronology prepared by EUI for the purpose of this application shows that between June and September 2012 they chased Camps for an update on three occasions without response. Between January to November 2014 this increased to eight occasions without any response. Mrs Tandara's solicitors did write in August and December 2013 to say that further details of her claim would be provided once available but without making any reference to any of the medical reports which, at the relevant time, had been prepared. Again, in 2014, Camps responded similarly on 2nd May 2014 set against six requests by EUI by then for information without response.

75. The expiry of the limitation period began to appear over the horizon and on 21st January 2015 EUI asked once more for an update and suggested that a stay of any proceedings would be inappropriate. However, just a few days later on 3rd February 2015 Mrs Tandara's solicitors issued these proceedings which she explained, at paragraphs 12 and 13 of her witness statement, in this way:

> "12. I do not recall the circumstances surrounding the Part 8 claim and stay of proceedings being issued. I don't know why Camps decided to issue my claim in the Portal of the Pre-action protocol of low value personal injury, of Part 8 proceedings. I know that Camps wrote:

> "The Claimant therefore reserves the right to adduce further medical evidence in support of their claim in due course. We request that the matter be stayed as the medical evidence is incomplete at present. The Claimant seeks an unspecified amount of damages currently estimated at more than £1000 but less than £10,000. This figure is subject to change in light of any additional evidence which may follow."

> 13. By Order of the Court made on 05.02.15, the matter was then stayed generally: "If a Stage 3 hearing is required claimant must apply to lift the stay". I understood that the stay allowed a "pause" in the proceedings to enable the parties to monitor my medical condition".

76. In March 2015 Mrs Tandara was asked whether she wished to be seen by a lower gastrointestinal surgeon and a neurologist to which she consented, indicating that she would be willing to travel back to the UK for that purpose. It does not appear however that any such examinations by either discipline ever materialised. Later that year, in September, Mrs Tandara was advised that Camps were waiting to receive an appointment with Mr Kucheria with a view to obtaining a final prognosis, but again it seems nothing then happened.

77. In the interim, the Part 8 proceedings had swung into action. On 5th February 2015, District Judge Campbell made the usual order in these terms:

> "The Claimant's claim be stayed. The Claimant must send the claim form and order imposing the stay to the Defendant. If a Stage 3 hearing is required claimant must apply to lift the stay".

78. There is a difference of opinion as to whether these documents were served straight away but given that EUI had been writing in July that year without any knowledge that the proceedings had been issued it seems more likely than not that they had not been.

79. By October 2015 still nothing material had occurred and EUI's solicitors chased again for an update on the 27th of that month. They were, at that point, told for the first time that Mrs Tandara was in Germany, that Mr Newman's report existed but that Mrs Tandara had not agreed to it being used and that an orthopaedic examination had taken place (not that Mr Kucheria's report existed or, even less, that of Mr Pickles, the ENT expert). It appears from Camps telephone note of that date that EUI were also advised, for the first time, that Mrs Tandara had a pre-existing condition.

80. This rather lamentable state of affairs persisted for another several months. According to EUI's chronology, between 23rd November 2015 and 27th July 2016, ten attempts were made by their solicitors, Messrs Horwich Farrelly, to obtain information and each time there was either no response or they were rebuffed in some way.

81. There were tantalising glimpses of what might happen. In December 2015 (and in mid January 2016 when he wrote in identical terms), Mr Rodgers, the fee earner at Camps, had replied to a chasing email that:

> "We are currently in the process of finalising medical evidence and will revert to you and will submit our settlement pack as soon as we are able to".

82. By May 2016, however, one can perhaps sense an element of frustration creeping into the exchanges. On 3rd May 2016 Horwich Farrelly wrote:

> "Can you please confirm whether medical evidence can now be served? If it cannot be served, is the medical evidence complete or simply not authorised by your client? We look forward to a brief update."

83. On 13th May 2006 Camps gave what appears to have been their stock reply to the effect that they had not yet completed the medical evidence and they would submit their settlement pack as soon as they were able to do so.

84. Such frustration clearly reached a crescendo by the height of the Summer 2016 and on 27th July 2016 EUI's solicitors wrote what I considered to be a material and important letter and one which therefore needs to be set out at length. It said this:

> "We have now been trying to obtain an update from you since 27th October 2015 and there has been nothing substantive forthcoming. There appears to be a string of requests for information from Admiral that have all been met with inadequate replies, where replies have been made at all.
>
> Paragraph 5.7 of the MOJ Protocol states:
>
> > *"Where compliance with this Protocol is not possible before the expiry of the limitation period the claimant may start proceedings*

and apply to the court for an order to stay (i.e. suspend) the proceedings while the parties take steps to follow this Protocol."

The Defendant is asking what steps have been taken to comply with the MOJ Protocol since the Order was made to grant a stay of proceedings and what the current position is. We have asked on more than one occasion for a copy of this court order and request that this is provided.

Paragraph 16.1 of PD 8B envisages the situation where there is a genuine reason why it is not possible to comply with the relevant Protocols before the limitation period expires. This provision certainly does not envisage Claimants 'stonewalling' Defendants and subverting limitation, contrary to the very nature in which the portal scheme was devised; to increase certainty and proportionality of cost as described by District Judge Baker in *Draper v Newport*.

There may be no explicit rule compelling regular updates by the Claimant where PD8B para 16.1 is utilised but it is clear that the overriding objective must be complied with. District Judge Baker noted:

> "..... the overriding objective clearly does apply to the portal. It requires the Court to deal with the case justly and at proportionate cost, which includes, so far as is practicable, ensuring that the parties are on an equal footing. Here we have a rules-based scheme which is prescriptive in terms of what is required from both parties and so both parties, experienced as they are dealing with the scheme, are on an equal footing."

The Defendant has no knowledge of the true potential value of the claim he faces at the current time and what steps are currently being taken. The parties are most certainly not on an equal footing at this time. The only information the Defendant has is that you await further medical evidence from an orthopaedic surgeon. You have denied requests for an update on your client symptoms or any medical evidence on file that the Claimant has mandated. Is your position that you have no medical evidence on file mandated for disclosure?

One of the purposes of the Limitation Act is to prevent Defendants facing claims from an indefinite time ago. The imposition of an indefinite stay contradicts and undermines this if the Claimant abuses the stay that has been granted and provides no substantive information for an unreasonable period of time after the stay is granted.

> If your client's claim valuation shows no prospect of reaching the upper protocol limit then it is inherently 'low value' (as defined by the Protocol) and non-complex. This clearly raises the question as to what has been happening since the Claimant Solicitors have had conduct of the claim, with the Claims Notification Form having been submitted in 2012 and why the MOJ Protocol still cannot be complied with at this late stage.
>
> If your client's claim valuation does show prospects of reaching the upper protocol limit at this stage then the MOJ Protocol clearly imposes an obligation on the Claimant to notify the Defendant as soon as the Claimant is aware of this.
>
> **The Defendant specifically asks the Claimant whether the valuation of the Claimant's claim, on the available evidence, shows any prospects of exceeding the upper protocol limit.**
>
> If the Claimant fails to respond with a comprehensive update on progress of this matter within 14 days of the date this letter, including the reason why the MOJ Protocol could not be complied with during the time the Claimants Solicitors have had conduct of the claim, the current position in terms of the Claimant symptoms and medical evidence, and a contemporaneous assessment as to whether the upper protocol limit of £10,000 could be reached on the current evidence, then the Defendant will make application to court to have the stay lifted and directions imposed."

85. The reply from Mr Rodgers, on 1st August 2016, which in my view is equally important said this:

> "..... I appreciate your frustration this matter however please rest assured that we are by no means attempting to 'stonewall' you.
>
> The sole purpose of our actions to date on this matter had been to minimise costs and keep this case in the low value personal injury claims protocol.
>
> Please note, it is extremely unlikely at this time that the value of this case will exceed the protocol limit. However, the claimant has not provided her agreement at the medical evidence and therefore I am not in a position to disclose it. Furthermore, the claimant is not legally obliged to disclose evidence until the finalised reports are agreed as per rule 7.33.

> The Defendant is not prejudiced at all as we do not intend to take any further action until you are in receipt of full evidence and have had an opportunity to settle this matter without the need any further action.
>
> Should any application be made to lift the stay, fast track directions will be put in place and costs will necessarily escalate massively. We are truly attempting to mitigate here and will disclose evidence to you as soon as we are able to."

86. On 16th August 2016 Horwich Farrelly followed up by essentially distilling what they had said before in these terms:

> "I write further to your email of 1st August 2016 and our telephone conversation. I note from our conversation that the Claimant has been examined and that you were due to speak to the Claimant to take instructions that day.
>
> I cannot trace receiving any further update since our conversation.
>
> Whilst I appreciate the comments you made regarding the medical evidence, the accident was over four years ago and the Defendant has not been provided with any medical evidence or detailed breakdown of the symptoms and injuries suffered. The Defendant's position is prejudiced and therefore if we do not receive a full update of injury suffered, progression of symptoms and prognosis along with evidence of special damages in the next seven days then I will have no option but to make an application to lift the stay without further notice".

87. Again Mr Rodgers replied, on 17th August 2060 to say that:

> "..... as per our conversation, the claimant does have ongoing symptoms but causation regarding the ongoing symptoms is questionable at present and we are awaiting a report in this respect.
>
> Although I appreciate your comments regarding the delay, rule 7.33 at the pre-action protocol applies here. Given that we intend to take no further action whatsoever until you have the medical evidence, nor are we looking to pursue additional costs, your position is not prejudiced at all.
>
> .....our conduct is not underhand here, it is also in our interest to conclude this matter as soon as possible.

> As discussed, I believe this matter will most likely fall within the protocol limit and we should be able to settle this case via the Portal without the need for Court intervention.....
>
> I am trying to mitigate here and I am fully abiding by the Protocol. Out of courtesy, I will provide you with an update as soon as there is any further development but I would strongly urge you not to take any action in this matter as you will only damage your own cost position and waste court time....."

88. The subsequent correspondence largely continued in the same vein, with Horwich Farrelly complaining of the delay, lack of medical evidence and lack of any indication of value and threatening an application to Court on the one hand, with Mr Rodgers saying effectively that all would be well, that he would submit the finalised evidence with the settlement pack as soon as he was able but that if EUI persisted the case would have to be transferred to the Fast Track, on the other hand.

89. On 5th September 2016 there was a telephone conversation between the relevant fee earners in which Mr Rogers stated (for the first time) that based on the current evidence the value of the claim was likely to be over £10,000. It was also apparent that Mr Rodgers was clearly of the view that Mrs Tandara would not disclose the report of Dr Newman or Mr Pickles and that this was not the first time, by any means, that he had made this point. I note that this is somewhat inconsistent with the assertion of Mrs Tandara at paragraph 8 of her witness statement to the effect that Camps had had her authority to disclose Dr Newman's report since the 1st February 2013 and that of Mr Pickles since 13th November 2014.

90. Nevertheless, it seems that on 8th September 2016 Mr Rodgers confirmed that he would disclose these reports which were then sent by an email the following day. There is a curious telephone attendance note of that date during which Mr Rodgers apparently said that Mrs Tandara was "due to be examined by orthopaedic today and so he will confirm when this appointment takes place. He hopes to have all the evidence finalised in the next month." Given that the next report of Mr Kucheria was not until May 2019 I have some doubt about the truth of that assertion.

91. Perhaps unsurprisingly in the circumstances EUI had made an offer to settle of £9,500 but, if this was ever put to Mrs Tandara, she did not reply to it one way or the other. It is evident that Mr Rodgers was experiencing problems. It is recorded in another telephone attendance note of 7th February 2017 that:

> ".... The client can be quite difficult and she does not agree with the Ortho evidence they have to date and so it cannot be disclosed.
>
> The client lives in Germany and so it is difficult to get instructions.....
>
> He said the client alleges to still be suffering but he does not know if the ongoing symptoms are accident related or not at present....."

92. However, there were more fundamental differences between Mrs Tandara and Mr Rodgers. Mrs Tandara put the matter somewhat neutrally in her witness statement at paragraphs 21 and 22 that when she said:

> "21.....He and I reached an impasse, and in the latter part of 2016 and the early part of 2017, my relationship with Camps Solicitors broke down. I explained to Camps that I was having ongoing symptoms and was concerned that this had not been properly addressed in the existing medical evidence.
>
> 22. I decided that I had no faith in them and that our relationship had irretrievably broken down. In the meantime, Camps applied to the Court come off record, and by Order of the County Court of 13.04.17 they ceased to be the solicitors acting on my behalf, in my personal injury proceedings."

93. Mr Rodgers was a little more direct about the "impasse" and was recorded in a telephone attendance dated 15th March 2017 as saying:

> "The client does not agree to the evidence and she also does not agree with Camps advice!"

94. The subsequent Order removing Camps from the record required them by 11th April 2017 to send to Mrs Tandara the medical and any other expert reports as well as copies of the relevant court documents (by which I assume was meant to the statements of case and orders etc) although it does not appear that they did so. Subsequently, on 16th May 2017, although I am not clear what precipitated it, there was a further order of District Judge Hennessy that by 19th June 2017 Mrs Tandara had to notify the Court and Horwich Farrelly of the details of her new solicitors or, alternatively, had to give notice of her intention to proceed.

95. On 19th June 2017 Mrs Tandara telephoned Horwich Farrelly and advised that she was acting in person. She confirmed that she was still suffering from her injuries and that her medical evidence was not yet complete. Indeed the chronology of medical treatment prepared by her discloses that throughout 2016 she had received a course of almost monthly injections of Medivitan in respect of a vitamin deficiency. By March 2017 a Neurologist had suggested that she be managed by a pain clinic.

96. On 3rd August 2017 Mrs Tandara wrote to Horwich Farrelly advising that she had now seen new solicitors who had advised that:

> ".....the value of the claim, because of the injury to my senses, should not have been within the Portal and that the claim would be best transferred to Part 7".

97. Horwich Farrelly were happy to indicate their consent to such transfer although reserved their rights on certain cost issues.

98. However, it was not until 14th November 2017, over three months later, that Messrs Taylor Rose, the new Solicitors, actually made contact with Horwich Farrelly. Their initial email was not encouraging because they had very little documentation (it appearing that Camps had not provided that which they were supposed to) and they asked if the formal documents such as the CNF, pleadings and orders could be copied to them. Horwich Farrelly did provide these documents together with the reports of Dr Newman and Mr Pickles. Their covering letter essentially made all the points that had already been made in the previous letter 27th July 2016 to (see: paragraph 84 above).

99. On 22nd January 2018 Taylor Rose wrote with greater definition. They set out that Mrs Tandara had suffered from travel anxiety and that in relation to the injury to her sense of smell there had been a notable change since the accident. She had "won a wine tasting competition some 10 years ago and she enjoyed the tasting and smelling of different aromatic coffees" which she was now unable to do. Having regard to the matters raised by Mr Pickles in his report they suggested that the claim, in relation to the loss of sense of smell alone, had a value of between £21,910 and £28,860 and that, accordingly, EUI's previous offer of £9500 was too low.

100. They also indicated that whilst further orthopaedic evidence might be helpful, a neurologist report would be of greater assistance. As regards the very relevant issues raised about Protocol they noted:

> "We have noted your comments regarding the Pre-action protocol and in particular Paragraph 16.1 but would point out that significant delays have been caused by our client's previous representatives. Our client and we agree that the overriding objective should be pursued, but it is also correct, that the evidence should be obtained to ensure Mrs Tandara's injuries are correctly assessed and that the settlement of her claim at the correct level is achievable..."

101. Although Mrs Tandara had, whilst acting as a litigant in person, noted that her claim should not have been in the Portal this, nevertheless, was the second indication that EUI had had from a legal representative that the value of the claim was in excess of the upper limit of £10,000 under the Protocol.

102. On 16th February 2018 in a telephone call between the fee earners Taylor Rose were suggesting that there might be a joint instruction in relation to a neurologist in order to keep costs to a minimum.

103. However, by March 2018 Taylor Rose were maintaining that the main injury appeared to be to Mrs Tandara's nose, although I consider that this is somewhat inconsistent with the long list of medical problems which Mrs Tandara has chronicled herself. However, Taylor Rose did note that her neck and back pain was ongoing and that Mrs Tandara was complaining of pins and needles in her hand.

104. In a telephone conversation between the fee earners of 7th March 2018 the issue of a neurologist report was discussed. The fee earner from Horwich Farrelly:

> ".....asked her to confirm which symptoms are continuing. She explained that the Claimant's neck and back pain is ongoing and that she has been complaining of pins and needles in her hand. She has been referred to a Neurologist in Germany and his records will form part of their disclosure. I said that I had not seen any recommendation for the Claimant to be seen by a Neurologist and asked to confirm how it came about. She said that it was referred to in the second paragraph of her GP's report. I said that I had gone through both reports disclosed in this case and have not seen any recommendations. In fact, I note that the Claimant has been examined by a Orthopaedic Surgeon who concluded that her ongoing symptoms are constitutional and I anticipated that if we were to obtain our own medical evidence this is where this case would eventually end up i.e. in the acceleration/exacerbation type bracket."

105. In that telephone conversation it was recorded that Taylor Rose advised:

> ".....that this matter is not proceeding in the Portal as it should never have been admitted in the process in the first place.
>
> Specials wise, she told me that her client had not required any time off from work. She has received some invoices from her relation to the treatment and travel which the Claimant has incurred and they are approximately £10,000. The only care and assistance she has received was from her husband however, she hasn't quantified it as of yet. She has explained to her client that the treatment which she has received may not be linked to the actual accident and that they need more evidence to support the same".

106. In any event, Horwich Farrelly considered that they would like to "see if we can knock it on the head before this matter is transferred to the Part 7 Procedure".

107. On 30th April 2018 Horwich Farrelly wrote again referring to the conversation the previous month and saying:

> "We do not seem to have received a copy of the medical report containing the recommendation that your client should be referred to a neurologist. We also note that we have not received any orthopaedic evidence which rules out your clients ongoing problems having orthopaedic origin. The Defendant is disadvantaged in that the Claimant is yet to set out a claim notwithstanding that the accident occurred more than 6 years ago."

108. However, it appears that nothing further in relation to the substantive claim was then heard. Horwich Farrelly chased in June and August 2018 and finally, on 22nd August 2018, there was a response from Taylor Rose which changed the position quite fundamentally. It said:

> "We would confirm that we have been liaising with our client who as you are aware is not presently located within the UK. She has confirmed to us that her treatment is continuing and that she has in fact now been diagnosed with having chronic pain fatigue, cervical Neuroalgia and Fibromyalgia.....
>
> .... Might we therefore suggest that the state continue to allow us to obtain independent evidence from a neurologist, but also either a pain specialist/rheumatologist? We consider that this evidence is crucial to consider any non-orthopaedic injuries that there may be."

109. Once more there was then a significant period of material silence only broken after a period of almost 2 months by Horwich Farrelly's letter of 12th October 2018. This noted that:

> ".... We are yet to receive our client's instructions but we do not anticipate that they will agree to the proposed stay where the accident occurred over six years ago.
>
> The onus is on the Claimant to ensure that her claim is transferred to the Part 7 Procedure as soon as the medical evidence supports the valuation exceeding the Portal limit (Lyle v Allianz insurance plc 2017). We note that it has been over a year since you have been instructed by the Claimant and notwithstanding you previously indicated the claim would exceed the upper MOJ Portal limit, the claim is still proceeding under Part 8 Procedure.
>
> Turning to the medical evidence, we were previously advised that Dr Newman recommended that your client is seen by a neurologist, however we have yet to see a copy of his report including such referral. In addition, we feel that it would be appropriate for an orthopaedic expert to comment upon the Claimant symptoms and rule out potential orthopaedic cause of the same before she is seen by other experts...."

110. It was not in fact until 7th December 2018 that Taylor Rose indicated that there had been a change of fee earner and that having "reviewed the matter in full [I] am in the process of obtaining instructions from the client with regard to my recommendations."

111. Having carefully read and followed the correspondence and communications available to me upon this application it seems that it was a measure of EUI's exasperation that on 19th February 2019 they issued a without notice application, which sought within 21 days either a requirement that Mrs Tandara served a Stage 2 Settlement Pack or, in the alternative, that she disclosed a Schedule of Loss, witness statement as quantum and her medical records and all medico-legal reports and, in both alternatives, that there should be an unless order attached with a strike out in default. The supporting witness statement from Ms Natalia Wolf noted that the accident giving rise to this action would shortly have its seventh anniversary and crystallised the problem facing EUI at paragraphs 13 to 16 of her witness statement in which she observed that:

> "13. The Defendant's principal submission is that the current stay is unfortunately operating to allow the Proceedings to become stale, and provides a smokescreen to

allow the Claimant to be under no obligation to disclose evidence that ordinarily she would be if the case were conducted under the Part 7 Procedure.

14. The stays suspends the normal CPR procedures that would follow up the issue of the Claim Form, in particular the procedures relating to service of the Claim Form and Particulars of Claim set out in CPR 7.4 and 7.5, allocation and the setting of directions to Trial, which would ordinarily allow the Defendant disclosure, the ability to pose questions to the experts, Witness Evidence and sight of a signed Schedule of Loss. None of that is possible under the current stay.

15. Whilst there has been suggestion from the Claimant that the case is unsuitable for the Portal procedure, no steps have been taken by the Claimant's representative to transfer this matter to the Part 7 Procedure notwithstanding their previous correspondence and the fact that the accident occurred almost 7 years ago.

16. The onus is on the Claimant to ensure that the matter be removed from the MOJ Process as soon as she became aware of the potential value of her claim as illustrated in Lyle v Allianz Insurance plc [2017]."

112. Notwithstanding the request for a without notice order, the Court went ahead and listed it for hearing on 26th March 2019. This seemed to galvanise Taylor Rose and on 22nd March 2019 they wrote to Horwich Farrelly in these terms:

"It is the Claimant's position that the value of this claim exceeds the MOJ portal limit. However, we cannot exit the matter from the Portal as we do not have access to the same as it was submitted by Camps.

We will be asking the Court at the hearing on 26th March 2019 to make an order that the claim the transfer to Part 7. We should also ask that the matter to be allocated to the multi-track and for a CMC to be listed the first available date after 26th June 2019.

Attached is correspondence from the Claimants treating psychotherapist. You will note that she is suffering with ongoing symptoms following this incident including chronic pain and fibromyalgia.

It is important that these issues are addressed by appropriate experts and we intend to instruct a psychiatrist, neurologist and rheumatologist. Details of proposed experts will be provided in advance of the suggested CMC.

> In the meantime we are happy to provide a draft schedule of loss and confirm that the relevant medical records will be disclosed to the experts accordingly."

113. Counsel attended at the hearing on 26th March 2019 before Deputy District Judge Travers. Counsel for EUI indicated that she would be applying to strike out the claim based on the authority of ***Lyle*** but the Deputy agreed that no application had been made in that regard. However, rather than making an unless order he simply lifted the stay, transferred the proceedings to Part 7 and ordered Mrs Tandara to file and serve an amended Claim Form and her Particulars of Claim by 7th May 2019 with the Defence to follow on 4th June 2019.

114. It is relevant that this Order was not challenged because at the time at that hearing the indication of valuation was that the claim was worth little more than £30,000, and it has been apparent from reading the various telephone attendance notes and correspondence that Horwich Farrelly had considerable difficulty in even reaching that figure on the evidence with which they had been presented. This Order, however, with its resonance with both ***Lyle*** and ***Cable***, has become a point of contention between the parties.

115. On 3rd May 2019 Mrs Tandara served her Particulars of Claim. It contained a claim for:

> "Damages exceeding £500,000, including personal injury in excess of £40,000 (to include a periodical payments order and/or a lump sum payment if so advised)."

116. Under the heading "Particulars of Injury" it was stated that:

> "The accident caused a forceful hyperextension-hyper flexion impact on her cervical spine and she struck her head on the steering wheel sustaining an injury to the nose and forehead. She also suffered with soft tissue symptoms, arterial hypertension, psychological injury, chronic pain disorder, cervical neuralgia and fibromyalgia syndrome..."

117. Paragraph 8 of the Particulars of Claim summarised the diagnosis of Mrs Tandara's treating doctors in Germany as:

> "... Chronic pain disorder with somatic and psychological factors, fibromyalgia syndrome, arterial hypertension, cervical neuralgia and depression..."

118. The claim set out that it relied upon the medical reports of Dr Newman and Mr Pickles as well as Mr Kucheria who, in addition to his February 2013 report, had now produced another Report on the 2nd May 2019 in the form of a supplementary letter.

119. The accompanying Preliminary Schedule of Loss contained three notable features. Firstly, notwithstanding the considerable passage of time, it was nonetheless described as only being "Preliminary"; secondly, it set out a claim for special damages of some £720,000 (plus general damages assessed £40,000) of which, thirdly, and particularly surprising given the previous indication, past and future loss of earnings were said to be in the order of £563,000.

120. The level of damages now contended for was therefore fundamentally and alarmingly different to anything previously indicated to EUI. The Defence set out in its Preamble, which in itself was an exercise in restraint, all that was wrong with Mrs Tandara's approach where she had pursued matters at a "glacial pace". The Preamble specifically pleaded that the claim offended against the Overriding Objective and that EUI had been caused irreversible prejudice in the following ways:

a. The medical reports had been obtained without EUI's knowledge and they had had no opportunity to agree the experts or to contribute to their instruction;

b. The medical reports that Mrs Tandara had obtained might have recommended treatment which she had not had and therefore her prognosis period may have been worsened. In addition, EUI had had no opportunity to fund rehabilitation treatment or to make any interim payment to reduce its own liability;

c. Subsequent experts, or any expert evidence which had not yet been disclosed, might suggest that the ongoing litigation was deleterious to Mrs Tandara's health;

d. No substantive updates, despite requests, had been provided until now;

e. The limitation period had passed, there had been no costs or case management to date and that the situation offended against every aspect of the Overriding Objective to deal with cases justly at a proportionate cost;

f. EUI had been compromised in its ability to assess quantum or place a realistic reserve on the case;

g. They had also been denied the opportunity to investigate the claimant to obtain their own medico-legal evidence at the appropriate time;

h. That Mrs Tandara had obtained a tactical advantage; and,

i. Over six years post accident EUI had been unaware that the claim would be pleaded in the terms that it had been and invited Mrs Tandara to serve a Reply setting out what had changed between the present circumstances and the time that the case had remained in the Portal process.

121. No Reply has ever been served. However, in September 2019 Mrs Tandara was examined by a Mr O'Dowd, a Spinal Surgeon, who reported on 21st October 2019.

122. In early December 2019 the parties filed their respective Direction Questionnaires with Mrs Tandara indicating that she required five experts. Mr Kucheria had by this time been jettisoned but she nonetheless relied upon Dr Newman, Mr Pickles and Mr O'Dowd and, in addition, a Mr Morgan (Consultant Neurologist) and a Miss Griffiths (Consultant Neuropsychologist). The claim was transferred to this Court and on 17th December 2019 EUI issued the current application supported by a witness statement from a Mr Anthony McLoughlin. Upon receipt of the court file from the County Court at Birkenhead it came before me for the first time to consider allocation.

123. However, in my experience, this case had a number of the hallmarks of delay and a late rush to obtain expert evidence in the hope that Mrs Tandara's position might thereby, in some way, be improved. This was particularly unattractive given that (a) it did not appear that EUI had yet apparently obtained any expert evidence at all (b) it was by no means clear that further expert evidence under CPR 35(1) was reasonably required and (c) costs were obviously mounting and there had, as yet, been no cost budgeting. Therefore, at paragraph 5 of my Order allocating this matter to the multi-track and listing it for a costs and case management conference, I provided that:

> "No further costs fees or expenses shall be incurred in relation to any expert by either party pending costs management".

124. Mrs Tandara was obviously not content with this provision and, as she was quite entitled to do, she issued an application dated 2nd January 2020 to vary my Order to allow for the further

outlay of costs, expenses and fees in relation to expert evidence. I dismissed that application on paper by order of 15th January 2020 and gave the following reasoning:

> "a. The Claimant appears to be incurring significant costs in relation to experts when it is not clear that such experts are reasonably required for the purpose of CPR 35.1.
>
> b. Once incurred such costs cannot be cost budgeted (CPR 3.15)."

125. Unbeknown to the Court however Mrs Tandara had already been examined on 2nd December 2019 by a Dr Simon Law, a Consultant in Pain Management, and despite the terms of my Order he was nevertheless asked to complete his report so that it was available for the purpose of this application.

126. On 9th March 2020 notice was given that EUI's application would be heard by me on 3rd June 2020 and on 21st May 2020 both Mrs Tandara and her Solicitor, Mr David Webb, signed their witness statements.

The Medical Evidence

127. At the fourth exhibit to her witness statement Mrs Tandara set out a very detailed and thorough chronology of the medical treatment she has received. This dates from the accident on 12th March 2012 through to May 2020 and is carefully set out over 17 pages. The only time during this period when she appears to have been (relatively) well was the nine-month period between January and September 2016 when undergoing the course of monthly Medivitin injections. Otherwise, she catalogues a long list of ailments and problems occurring on a regular and repetitive basis together with the various treatments which she has undergone and the doctors whom she has consulted. As her Particulars of Claim make clear, during this eight-year period she has tried a number of medications as well as alternative treatments such as herbal remedies and nutritional supplements. In addition, she has undergone physiotherapy, heat therapy, acupuncture, Chinese herbal medicine, facet infiltrations, infrared pain relief, use of a TENS machine and Platelet Rich Plasma treatment.

128. Whilst this history of treatment is important (and I will return to it) the material medical evidence is that provided by those experts who have been prepared to give medico-legal reports since it is largely these reports which will have guided and have informed Mrs

Tandara and her advisers as to how to proceed and also the likely value of the claim. It is therefore necessary to consider it.

Dr Newman – GP

129. The first such report was from Dr Newman, a GP. It is remarkable for the fact that although he saw Mrs Tandara on 28th April 2012, just weeks after the accident, he did not in fact apparently write his report (or finalise it) until 2nd December 2012, over seven months later. In my experience these reports, often arranged via a medical agency, are written at the time or very shortly afterwards, within days not months. It rather suggests, in the absence of explanation, that Mrs Tandara was not content with what Dr Newman had to say originally and that this report is the final one of others which may have been amended.

130. Notably, to my mind, the report is rather more comprehensive and full than that which is normally seen. Certainly, Dr Newman gives a thorough description of his examination of Mrs Tandara and, based on this, he gives his diagnosis and quite a careful prognosis which distinguished Mrs Tandara's individual injuries and attributed different recovery times to each.

131. His findings were that Mrs Tandara had sustained:

a. A hyperextension of her cervical spine (from which she could expect a full recovery within 6 months of the accident);
b. A jolting force to her thoracic spine (4 months)
c. A jolting force to her lower back (5 months);
d. Bruising to her nose (2 to 3 months); and,
e. Travel anxiety (3 to 4 months).

132. He recommended 4 to 6 sessions of physiotherapy and anti-inflammatory tablets. He also considered that regular swimming sessions for three months would assist Mrs Tandara as well.

133. Dr Newman did not have sight of her GP medical records but he considered that unnecessary. He noted that Mrs Tandara admitted to a pre-existing disorder in that she had suffered from headaches in the past but these were resolved at the time of the accident and, further, that she was, at examination, on medication for reflux.

Mr R Kucheria - Consultant Orthopaedic Surgeon

134. Mrs Tandara was examined by Mr Kucheria on the 7th February 2013 and he reported on 12th February 2013 (although the statement of truth appears erroneously to be dated 17th March 2014).

135. The history which Mr Kucheria set out recorded that by the time Mrs Tandara saw him she had had 27 physiotherapy sessions and had also seen Mr Sabin, the neurosurgeon, on 9th October 2012 and had had an MRI scan. He noted that she presently had "quite severe neck symptoms", had pain and stiffness in her lower back and that Mrs Tandara felt that her nose had been injured which had given rise to some breathing problems. In addition, he noted that psychologically "she has been affected badly by the accident".

136. Mr Kucheria also did not have the benefit of Mrs Tandara's GP records but he recorded that "she had had a neck problem for these five years" and had received facet joint injections previously. He also noted that she had previously been seen by a pain specialist, Mr Foster.

137. As regards the MRI scan of 18th October 2012 this:

> "..... showed she had degenerative changes at C6/7 with extruded mid line disc bulge that extends inferiorly behind the C7 vertebral body almost to the level of C7/T1. Also C3/4 mid line focal disc. No facet joint degeneration.
>
> .... The MRI scan showed a free fragment that had migrated behind the body of C7. This was not compressing the exiting nerve roots and does not explain the right-hand numbness...."

138. Upon examination, Mr Kucheria noted Mrs Tandara had a gross restriction of some 30 to 40% in the range of motion in her neck in all directions and that she was tender around the lower end of the lumbar spine.

139. Although Mr Kucheria recommended further physiotherapy sessions for the lumbar spine he declined to give any firm diagnosis and certainly no prognosis in relation to Mrs Tandara's neck until such time as he had been able to see all her records and assess her pre-existing problems and to compare the recent MRI scan with any done previously to see what, if any, aggravation had been caused by the accident. He suggested a report from an ENT surgeon regarding her nasal injury.

140. The subsequent report of Mr Kucheria was more than six years later, on 2nd May 2019 and is a source of contention. For that reason, it is appropriate to set it out in full, as follows:

> "Mrs Tandara as you know sustained an injury on 12th March 2012, which is over seven years ago. She was seen by me on 12th March 2013 one year after the injury. I have not seen the Claimant since then.
>
> As noted, I have not examined Mrs Tandara now after six years. I gather from you that she has moved to Germany and has multiple medical issues i.e. chronic pain and now a diagnosis of fibromyalgia as well is mild depressive disorder has been diagnosed.
>
> In response to your question below:
>
> What would the trajectory of her pre-accident long-standing nuisance level symptoms of mechanical neck pain have been in the absence of the index accident, or any equivalent [comparable] traumatic event?
>
> In my opinion the trajectory of symptoms would have been of increasing frequency of acute attacks getting slowly worse over the next 10 years, on the balance of probabilities her symptoms would have deteriorated by 5-10% every year.
>
> At the same time if she did not have pre-existing problems with her neck she would have recovered within 12 months of the accident.
>
> **Opinion**
> At this stage I have not examined Mrs Tandara for over six years and not being a spinal consultant, in my opinion, I feel that she should be re-examined by a spinal consultant and also by a psychologist/psychiatrist and pain specialist as her symptoms are multimodal and outside the remit I can comment on due to the nature of her symptoms".

Mr J Pickles - Consultant Otolaryngologist, Head and Neck Surgeon

141. The next report dated 4th April 2014 was that of Mr Pickles, the scope of his instruction being provided medical report only with respect to Mrs Tandara's facial injuries. Mr Pickles did have the benefit considering her GP records and also examined her. It seems that the need for the consultation was driven by Mrs Tandara's belief that she had a slight deformity of the

nasal bridge and a minor impairment of her left nasal airway together with the fact that her sense of smell been moderately impaired since the accident. She had also been suffering from headaches.

142. Mr Pickles concluded that there was no significant deformity to Mrs Tandara's nose or forehead and that her nasal airways had not been significantly impaired in consequence of the accident. He considered that an impairment of her sense of smell (without a complete loss of smell) was difficult to quantify but, as her sense of taste was not affected, he considered that any impairment would be mild. He did not recommend any treatment.

143. Mrs Tandara sought to rectify one aspect of his Report. He had recorded that she had not been caused undue anxiety but was content to accept, in an addendum Report of 10th October 2014, that she had been upset after the accident and was anxious when she had restarted driving.

Mr John O'Dowd - Consultant Spinal Surgeon

144. After essentially a gap of some 5½ years in the medico-legal evidence the next substantive report was that of Mr O'Dowd on 21st October 2019 following his examination of Mrs Tandara on 19th September that year. During those years Mrs Tandara's condition had obviously moved on and deteriorated. Mr O'Dowd was provided not only with her GP records but "specialist records and correspondence", "two CD-ROMs containing radiology information", the previous medical reports and the statement of case including the Preliminary Schedule of Loss.

145. He compiled a 23 page report that dealt with matters quite comprehensively. In particular, he set out a detailed review of Mrs Tandara's pre-existing medical problems particularly with regard to her neck and headaches.

146. For the first time, Mrs Tandara was reporting that her memory and concentration had progressively deteriorated over the last five years, her pre-existing gastric pains and become worse and that she has sustained a right shoulder injury which had given rise to pain.

147. Moreover, Mr O'Dowd noted that after 26th July 2013 "there are no subsequent UK medical records" before stating at paragraph 58 of his Report:

> "We have been provided with various German medical records. Between 2013 and 2017 there were no detailed medical records. There is translation of some records

> from Dr Hilber and the translation has been annotated "Not easy to read. I just randomly translated what I could read and think is relevant". There is a suggestion of ongoing symptoms including headache and neck symptoms in October 2013, May 2014, February 2015, August 2016 and May 2017. She saw a neurologist on 29th March 2017 with neck pain radiating into the right arm and he was organising an MRI scan. This occurred on 4th May 2017 we have a translation from the German but the conclusions were: "Spondylo-osteochrondrosis C6-C7 with disc height loss and medially accentuated protrusion with low impression of the dural sac at the disc level." Thereafter she was recommended to wear a cervical support and to undergo physiotherapy treatment".

148. However, there was evidence (recorded at paragraph 59 of his Report) that by 17th May 2018 Mrs Tandara had been seen at a clinic in Munich and had the following working diagnosis:

a. Chronic pain disorder with somatic and psychological factors
b. Fibromyalgia syndrome
c. Spondylo-osteochrondritis C6-C7
d. Condition after whiplash of the cervical spine 2012
e. Secondary diagnosis: arterial hypertension

149. Before turning to his conclusions in relation Mrs Tandara's neck and back he suggested that, in relation to her other injuries, she ought to consider obtaining a neuropsychology report with respect to her frontal head injury, a psychiatric report and a report from a chronic pain specialist or rheumatologist regarding the fibromyalgia.

150. In relation to Mrs Tandara's neck Mr O'Dowd considered that she had significant mild underlying degenerative change prior to the accident which was responsible for an exacerbation of 2 to 3 years.

151. Turning to the low back pain, Mr O'Dowd placed reliance upon Mrs Tandara's physiotherapy discharge summary on 28th June 2013 which, he said:

> "..... fairly unequivocably seems to read "She no longer complains of low back pain". In my opinion therefore the low back injury sustained in the index accident had settled within 15 months of the index accident. I believe that the subsequent low back pain partly represents ongoing pain from her pre-existing underlying condition but also as part of her more widespread

> chronic pain condition. In relation to the low back therefore I do not believe that there is significant ongoing low back pain from mid-2013".

Dr Simon Law - Consultant in Pain Medicine

152. The last Report dated 17th February 2020, contrary to my order of 18th December 2019, was based upon instructions by Taylor Rose to prepare a detailed medical report. Dr Law had seen Mrs Tandara on 2nd December 2019.

153. He examined Mrs Tandara and concluded at paragraph 123 of his report that:

> ".... It is my view, that on balance, Ms Tandara had a predisposition to developing fibromyalgia and possessed risk factors for it. The index event then happened on this background [and] was sufficient enough to trigger fibromyalgia or a chronically painful condition. Therefore, but for the index event and on the balance of probabilities, Ms Tandara would not have had the persistently painful pain condition of fibromyalgia."

154. However, it is also clear that there are large gaps in his medical chronology notably from about 2013/early 2014 until 2018 when Mrs Tandara has been in Germany. Dr Law noted at paragraph 204(d) that amongst other documents he had received with his instructions were:

> "Extensive records from Germany in the Munich and Starnberg area. These include investigations and clinicians records. There is no direct translation and where cited, the records reflect my interpretation, but I cannot be certain of this authenticity."

The Submissions

155. Both Mr Grant and Mr Arney provided me with thorough, careful, thoughtful and, in consequence, helpful Skeleton Arguments. Both dealt with the history of this matter which, in large part, I have already covered, emphasising the points or aspects they considered important as they went. Both also dealt with the cases of ***Lyle*** and ***Cable***, in their Skeleton Arguments and oral submissions, either to distinguish them or to highlight favourable comparisons. In addition, Mr Grant took me through a number of authorities which accentuated not only the sort of threshold which might justify striking out but that it should be

used only as a last resort and, where other options are not feasible in the circumstances, to allow the case to proceed.

156. I am not certain what, if anything, is to be gained by dissecting ***Lyle*** and ***Cable*** almost line by line in comparison to the case of Mrs Tandara. It can certainly be distinguished in certain respects but then it bears striking similarities in others. The point is that whilst those cases and that of Mrs Tandara are broadly factually similar and concern the same legal considerations; they do not warrant a blow by blow account.

157. Mr Arney commenced his submissions with a synopsis of the position. As a starting point he noted that it was more than eight years since Mrs Tandara's accident, proceedings had been issued about 5½ years ago and yet a first cost and case management conference ("CCMC") had still to take place.

158. This delay had arisen because Mrs Tandara, in his view, had been able to commence the claim within the Protocol and keep it there in order to gain time and to obtain medical evidence without being troubled by matters of limitation or, seemingly, that if it was not at first, it did become apparent, that the claim was worth more than £10,000 and should have been taken out of the Protocol

159. He observed that between Mr Pickles report in April 2014 and Mr Kucheria's second report in May 2090, Mrs Tandara had obtained no medico-legal evidence at all and that the reports of Dr Newman and Mr Pickles had only been served in September 2016 (4½ years post accident) and that of Mr Kucheria over 2½ years later in May 2019. When the earlier reports had been served there had been no hint or indication that Mrs Tandara intended to make a subsequent claim for loss of earnings notwithstanding that it was at about that time that she had apparently intended to go back to work.

160. Expanding upon these various points Mr Arney noted that the delay in ***Lyle*** (six years) and ***Cable*** (five years) had been substantially shorter than in Mrs Tandara's case. Because of the current application the CCMC which had originally been listed for 12th June 2020 had had to be adjourned and it was now unlikely to take place much before next year. With the potential need for further expert evidence (if only for the benefit of EUI) he could envisage that a further period of 18 months of litigation would not be unrealistic which would then make the case 10 years old. He submitted that there could be no legitimate excuse for such a lack of progression over more than eight years to date.

161. As regards value, Mr Arney submitted that the report of Mr Pickles alone in April 2014 had been sufficient to take this matter out of the Protocol but, nevertheless, proceedings had commenced on 3rd February 2015 coupled with a statement that its value was suitable for the Protocol and procedure. That then gave rise to the indefinite stay.

162. However, some 18 months later, on 5th September 2016 without there having been any change or improvement in Mrs Tandara's medical evidence, the same solicitors were asserting that the claim was likely to exceed the £10,000 upper limit. On 3rd August 2017 Mrs Tandara herself said the claim should not have been issued in the Protocol and, finally, the email of Taylor Rose on 14th November 2017, valuing Mrs Tandara's reduced sense of smell at up to about £29,000, plainly put her case outside of the Protocol. All these ought to have triggered an application to the Court to lift the stay.

163. All this, in Mr Arney's submission, had to be viewed against the backdrop not only of EUI having persistently chased Mrs Tandara's solicitors for information as to progress from the very beginning but, even now, the paucity and complete lack of transparency in the provision of information which had been reasonably requested. Quite apart from the numerous chasing email and telephone calls Mr Arney pointed to straightforward omissions which he said should have been provided as a matter of course. What responses were forthcoming consistently failed to:

a. make reference to what steps were being taken;
b. provide any details of Mrs Tandara having attended at any medico-legal appointment;
c. make any reference at all to any loss of earnings. On the contrary the telephone conversation of 7th March 2018 had stated the complete opposite; or,
d. respond to EUI's overtures of the duty to keep the value of the claim under review.

164. Mr Arney was particularly critical of certain matters. Firstly, in relation to the loss of earnings, the first EUI knew about this was upon service of the Preliminary Schedule. It was not known when it might be decided that Mrs Tandara had suffered such a loss or that she would continue to do so. Importantly, there was no information forthcoming from Mrs Tandara or her advisors as to whether this had been known in March 2019 when the stay was lifted. The Defence had called for further information in this regard together with a Reply but neither had been forthcoming, and the position had not been improved by the contents of Mr Webb's witness statement or, indeed, Mr Grants Skeleton Argument which were both silent on this point.

165. Secondly, he expressed considerable concern in relation to Mr Kucheria's second medical report which had been used to open the door and to justify further medical reports from other disciplines. Mr Kucheria had not examined Mrs Tandara since 2013 and there had been no new examination by him for the purpose of this report. The Defence had called for the disclosure of his letter of instruction (which Mr Grant during the course of his submissions said was 10 pages long) but this had only been provided at a late stage to EUI's solicitors and, indeed, emailed to Mr Arney by Mr Grant during the hearing of this application. Accordingly, it was only known at a very late stage what Mr Kucheria had been asked to report upon but Mr Arney observed that his further report could not have been the catalyst for Mrs Tandara and her advisers to have known the claim was worth more than £10,000 because the proceedings had already been transferred to Part 7 for that very reason two months earlier.

166. Thirdly, he referred to the fact that the Preliminary Schedule of Loss is still not finalised. Mrs Tandara is now asserting in that Schedule that she has a cognitive deficit and for this reason (for the first time in more than eight years) wishes to instruct a neuropsychologist, the implication being that she may have suffered a mild brain injury.

167. Fourthly, he was concerned that notwithstanding my order of 18th December 2019 Dr Law had clearly been instructed to complete his report and therefore time and cost had been incurred which should not have been.

168. Overall Mr Arney submitted that it was clear that EUI had been prejudiced in a number of ways, as alluded to in the witness statements of both Ms Wolf and Mr McLoughlin as well as set out in the Defence. For all those reasons he considered that the only viable outcome would be to strike out Mrs Tandara's claim in its entirety.

169. Mr Grant's approach was, perhaps unsurprisingly, to invite me to take a less jaundiced and nuanced approach than that advanced by Mr Arney although he conceded that this matter had had an unhappy history. He also acknowledged that the first time that EUI had had any knowledge of Mrs Tandara's loss of earnings claim, quite apart from its magnitude, was when the Preliminary Schedule of Loss had been served and he conceded that EUI had suffered prejudice from the delay in issuing the Part 7 claim.

170. There were three threads which Mr Grant visited from time to time throughout his submissions and it is convenient to set them out here. The first related to the hearing in March 2019 when the stay was lifted. Details of what occurred at that hearing had been set out in an email to Mr Webb, Mrs Tandara's solicitor, from her Counsel on that occasion which is

exhibited to his witness statement. This indicated that at the outset of the application EUI's Counsel had made an impromptu application to strike out the claim based upon ***Lyle***. It does appear from the email that, indeed, EUI's Counsel made this point forcibly at the hearing. Indeed Mr Webb said at paragraph 16 and 17 of his witness statement that:

> "16.....she [Counsel] informed me that DDJ Travers commented that this was a "disguised application to strike out".
>
> 17. It is the Claimant's position that the Defendant has already made an application to strike out this claim on the same grounds it seeks to strike the claim out now, that being delay, lack of information and the case of *Lyle*. Submissions were made and considered by the Court, however this application/disguised application was unsuccessful and the Defendant did not appeal this judgment."

171. That was taken up by Mr Grant who submitted that the Court had therefore already considered a strike out application which had not only failed but which decision had not been challenged. Accordingly, another Court had already applied its mind to the issues of delay and lack of information but, nevertheless, had allowed the matter to proceed. In order to seek to anchor that point he referred to paragraph 15 Mr McLoughlin's statement where he seemingly acknowledged that:

> "It would be wrong for the Claimant to argue that this application is "*another bite of the cherry*". The Defendant could not have appealed the Order of Judge Travers, as the Schedule was served significantly after an appeal could have been lodged. Nor did the Defendant at that point, have good or economic reason to incur the significant cost of an appeal; the Defendant only wished for clarity, and remained of the view the claim would remain not too far outside the limit of the protocol limit."

172. Mr Grant submitted accordingly, that this current application is misguided because it has already been considered and rejected. Accordingly, the Court should be slow to interfere with the exercise of discretion by the Deputy and substitute a different exercise of the same discretion in the absence of any appeal. Mr Grant submitted that EUI had not suggested that the Deputy had overlooked any relevant fact or rule, or had taken into account any irrelevant factors or, indeed, that he had mis-directed himself in law. He drew my attention to the comments of Lewison LJ in *The Commissioner of Police for the Metropolis v Abdulle 2015 EWCA CI V1260* at paragraphs 27 to 28, as follows:

> "27. The first instance judge's decision in that case was to refuse relief against sanctions and her refusal was upheld by this court. But the same approach applies equally to decisions by first instance judges to grant relief against sanctions. In Chartwell Estate Agents Ltd v Fergies Properties SA [2014] EWCA Civ 506, [2014] 3 Costs LR 588 Davis LJ said at [63]:
>
> "… the enjoinder that the Court of Appeal will not lightly interfere with a case management decision and will support robust and fair case management decisions should not be taken as applying, when CPR 3.9 is in point, only to decisions where relief from sanction has been refused. It does not. It likewise applies to robust and fair case management decisions where relief from sanction has been granted."
>
> 28. In my judgment the same approach applies to decisions by first instance judges to strike out, or to decline to strike out, claims under CPR 3.4 (2) (c)....."

173. The next point which Mr Grant was keen to emphasise was that a great deal, if not all, of Mrs Tandara's problems arose from the failure of Camps to have dealt with matters properly and to have set out the clinical and mathematical basis of her claim. Indeed, he noted that Mrs Tandara's rather detailed medical chronology supplemented by her witness statement made it clear that those who dealt with the claim at Camps were not on top of the clinical complexity of the claim. That, in his view, should not be surprising given that low value claims would generally be handled by junior and moderately paid fee earners within the strictures of the Protocol in order to save costs.

174. He submitted, effectively, that Camps were not up to the task and that the nuances of a possible nexus between delayed onset of debilitating chronic pain and soft tissue trauma were not heeded by the relatively junior fee earner at Camps entrusted to administer the low value Portal whiplash claims where the whole ethos of the protocol is on saving expense for compensators. He drew my attention to the comments of Jackson LJ in the case of ***Phillips v Willis 2016 EWCA Civ 401*** which was an appeal against a case management decision of a case within the Portal. At paragraph 9, his Lordship commented:

> ".....The practice direction substantially modifies the Part 8 procedure so as to make it suitable for low value RTA claims where only quantum is in dispute. This modified procedure is designed to minimise the expenditure of further costs and in the process to deliver fairly rough justice. This is justified because the sums in issue are usually small, and it is not appropriate to hold a full blown trial....."

175. Turning to the loss of earnings suffered by Mrs Tandara and as to why this had not been picked up earlier Mr Grant observed that this would not necessarily be the case where her claim had been dealt with by inexperienced Portal claim handlers.

176. Next, Mr Grant criticised the stance that EUI had now adopted upon this application which was to suggest that Mrs Tandara's claim should have exited the Part 8 procedure many years before it did. Indeed, he went further and said that they had waived the right to criticise.

177. This was because EUI had been more than content, even acquiescent, for the matter to remain in the Protocol. It suited them, he submitted, for it to remain there. Mr Grant noted that the rationale behind PD8B was that it afforded both parties more time to monitor injury claims that might be difficult to value for a multitude of reasons and it gave the compensators the peace of mind that the strict fixed cost regime of the Protocol was in play. The alternative was for a claim to come out of the Portal, for proceedings to be issued under Part 7 to safeguard limitation, and then a stay requested in which event higher costs would be triggered. That was one of the reasons why PD8B was so attractive to compensators.

178. He pointed out that it was obvious that Mr Rodgers firmly believed the case to be worth no more than £10,000 and that he had always been hopeful of securing an acceptance to the offer which had been made by EUI. It was not, he said, uncommon for cases to settle in excess of the Protocol upper limit but, nonetheless, remain within the Portal. Mr Grant went so far to say that even once the diagnosis of fibromyalgia had been disclosed to EUI, unless and until there was any evidence of chronic pain attributable to the accident it would necessarily remain a Portal claim (although I was less clear how he reconciled this with the quantum previously attributed by Taylor Rose to Mrs Tandara's loss of sense of smell).

179. Mr Grant accepted that Mrs Tandara's recovery did not follow the usual expected trajectory. He noted that her claim was complicated, firstly, by the fact that she suffered from chronic neck and thoracic pain for the best part of the decade before the accident which was generally well controlled and nondisabling. Secondly, her claim was complicated by the fact that her condition deteriorated over time into a more widespread pain condition with a neuropsychological flavour, not limited to the original areas of injury. However, given this acknowledgement, he did not seek to satisfactorily explain why her case had not exited the Protocol earlier than it did. It was suggested by him that this was because Camps were unable to value the claim at that time the proceedings were issued and had no evidence to inform them that the case was likely to be worth more than £10,000.

180. In contrast to the position of Camps, Mr Grant submitted that there was an obvious and immediate improvement once Taylor Rose were instructed. He pointed to their letter of 22nd January 2018 (see paragraph 99 above *et seq*) asking EUI to consent to a neurologist report and the suggestion of 16th February 2018 that this might perhaps be on a joint basis. He also noted that in the telephone conversation of 7th March 2018 it had suited EUI to try to "knock it on the head" and that Taylor Rose had suggested in their letter 22nd August 2018 that the stay should continue to allow Mrs Tandara to obtain independent evidence from a neurologist and also a pain specialist/rheumatologist. In Mr Grant's view this was all done in a spirit of collaboration, with constructive communication and consensual litigation. Indeed, as regards the Provisional Schedule of Loss, Mr Grant said this represented a detailed, careful and open analysis in line with the spirit of what was required for which Mrs Tandara should be given credit.

181. Mr Grant made the standalone point that Mrs Tandara had never been in breach of any order, let alone a peremptory order.

182. Turning to Mr Kucheria's second report, Mr Grant explained why this had been necessary, namely, that Mrs Tandara needed clarification from Mr Kucheria as to what her condition would have been as to the trajectory of her pre-existing condition but for the accident. I have set out his answer at paragraph 140 above. On this basis, Mr Grant said, Mrs Tandara was then able to attribute to the consequences of the accident the balance of her heightened level of spinal pain that was the precursor to her descent into a chronic widespread pain syndrome. He further submitted that without Mr Kucheria's evidence neither Mrs Tandara nor Camps could properly have claimed of loss of earnings capacity or made a claim for care.

183. As for the issue of rehabilitation, the submission in this regard was that Mrs Tandara would not have fared any better if she had received treatment arranged by EUI than she had in fact received from the German healthcare system. Further, Mr Grant submitted that UK insurers are generally more reticent to engage in rehabilitation for soft tissue injuries beyond an early short course of physiotherapy.

184. Mr Grant noted that the court has an extensive discretion when it comes to costs and on that basis he submitted that any prejudice that EUI might demonstrate could be addressed in this way without resorting to the Draconian sanction of a strike out. As to costs generally he noted that any Part 8/Protocol costs would be minimal.

185. The next issue which he addressed briefly was that of EUI's assertion that it was unable to fix a reserve at an early stage of this matter. He referred me to the decision in *Cain v Francis [2009] QB 754* and submitted that very little weight ought to be attached to this issue.

186. Mr Grant then took me through a number of authorities which he submitted demonstrated why this matter should not be struck out. His starting point was the judgment of Lord Diplock in *Birkett v James* to which I have already referred above at paragraph 2.

187. Mr Grant referred me to paragraph 49 of Lord Clarke's speech in the Supreme Court case of *Summers v Fairclough Homes [2012] 1 WLR 2004* in which he stated:

> "The draconian step of striking a claim out is always a last resort, a fortiori where to do so would deprive the claimant of a substantive right to which the court had held that he was entitled after a fair trial. It is very difficult indeed to think of circumstances in which such a conclusion would be proportionate. Such circumstances might, however, include a case where there had been a massive attempt to deceive the court but the award of damages would be very small."

188. There was then the observation of Laddie J regarding a strikeout sanction in the case of *Reckitt Benkiser UK v Home Pairfum Ltd 2004 EWHC 302* where he had observed that:

> "... The striking out a valid claim should be the last option. If the abuse can be addressed by a less Draconian course, it should be.."

189. In *Lewis v Ward Hadaway 2015 EWHC 3503 (CH)*, Male J when considering his options upon a strikeout application, at paragraph 84, noted that:

> "In Masood v. Zahoor the Court of Appeal held, relying on Arrow Nominees Inc. v. Blackledge [2000] 2 BCLC 167, that "where a claimant [was] guilty of misconduct in relation to proceedings which is so serious that it would be an affront to the Court to permit him to continue to prosecute the claim then the claim may be struck out for that reason." However, I must bear in mind that, as Vos LJ said in Alpha Rocks Solicitors v. Alade [2015] EWCA Civ 685 at para. 22, "the Court is not easily affronted"."

190. Finally, Mr Grant referred me to a short passage at paragraph 51 of Clarke LJ's judgment in the Court of Appeal decision of *Asiansky Television v Bayer-Rosin [2001] EWCA Civ 1792*, where he said:

> "Finally, I revert to the view of Brooke LJ in paragraph 69 of Walsh v Misseldine that the power to strike out for abuse of process is a long-stop. The power was exercised by this court in Arrow Nominees Inc v Blackledge [2000] 2 BCLC 187. That was a case of flagrant abuse: see per Chadwick LJ at paragraphs 54-55 and Ward LJ at paragraphs 71-75. I accept Mr Moger's submission that only in such a case would the court be likely to strike out an action on the ground of abuse where a fair trial is still possible."

191. Mr Grant concluded his submissions by noting that Mrs Tandara had grasped with both hands the opportunity provided to her by Deputy District Judge Travers and she had complied with the court orders that he had made. But for the order I made on 18th December 2019 he submitted that Mrs Tandara would now have had psychiatric and neuropsychological evidence and would have been in a position to therefore set out her claim substantiated by evidence from the correct clinical disciplines. He noted that both parties have served their costs budgets and that Mrs Tandara was in a position to move this claim forward swiftly to a conclusion. He submitted that the quality of the contemporaneous treating documentation available was such that EUI would not suffer any significant prejudice but that any prejudice which had been suffered was modest and *de minimis* when contrasted with the position should Mrs Tandara have her claim struck out.

Analysis & Conclusions

192. Before turning to the specific issues of Mrs Tandara's case there are some general observations and comments which I need to make.

193. Firstly, I have set out the history of this matter at some length. I have done so not only to set out the chronology but to demonstrate and highlight the vast tracts of inactivity and the almost absolute futility of this litigation to date so far as Mrs Tandara is concerned set against the almost active and implacable lack of cooperation faced by EUI virtually throughout.

194. Mrs Tandara's accident now took place almost 8½ years ago, these proceedings have been afoot for almost 5½ years and yet the Court, to date, has not been able to give any case management directions or, perhaps more importantly, apply any cost budgeting. Considered objectively by the reasonable person with knowledge of how Mrs Tandara's case ought to have progressed, that is completely unacceptable by any measure. This has been a case which has been out of control for long periods of time, in the early years by a lack of purpose and activity, coupled perhaps with incompetence, and latterly by a headlong rush to try and rectify

matters and obtain new medical evidence with little, if any, consideration it seems being given to cost, reasonableness or proportionality. When Mr Arney observed that this case was "almost at square one" and that it "should not be here after eight years" he was not only correct, but stating what must be perfectly obvious to any practitioner in this area.

195. Secondly, there has been a considerable emphasis by Mr Grant at various points throughout his submissions to remind me of the alleged poor quality of service and competence that Mrs Tandara received from Camps and to lay a large proportion of blame (if not all of it) at their feet for the predicament in which she now finds herself.

196. It is not my task, upon this application, to make any determination in this regard not least because Camps have had no opportunity to comment upon such allegations or otherwise defend themselves.

197. However superficially attractive and helpful such sweeping allegations of poor service may be for Mrs Tandara so that they act in some way as a lightening conductor to discharge and deflect criticism away from herself and enables her case to proceed, they do not work for several reasons.

198. Firstly, pursuant to CPR 1.3 it is the duty of the parties to help the Court to further the overriding objective. It is not the duty of a legal representative (except insofar as they are extension of the party) and therefore it cannot be assigned to, or abdicated in favour of, such a person.

199. Secondly, the Supreme Court decision in *Barton v Wright Hassall [2018] UKSC 12* determined that a litigant in person should be afforded no special treatment or latitude by virtue of the fact that they were acting in person and did not have a detailed knowledge or understanding of the law and/or the CPR. It would therefore be contrary to that decision, and indeed illogical, to then extend any such latitude or allowance to legal advisers who were alleged to be even more incompetent or lacking in knowledge than the client whom they represented. Mr Grant was keen to draw a parallel between low value personal injury claim work and low calibre advisers. This rather ignores the fact that there are still, of course, minimum professional standards as well as legal duties to be upheld in this area of work and it is a somewhat insulting submission to the many hundreds of practitioners who in fact are able to undertake this type of work perfectly well, efficiently and without any problems at all.

200. Thirdly, whilst Mrs Tandara may wish to disassociate herself from the alleged failures of her advisers and put clear water between them and her the fact is that not only did she instruct these solicitors but she continued to do so, for a period of five years in the case of Camps and three years, and continuing, as regards Taylor Rose. Mrs Tandara is a law graduate with a 2:1 Degree, and worked as a trainee legal assistant and acted as a company secretary to her husband's business. She is not therefore a woman without a degree of intellect and sophistication and will be versed to an extent in legal matters and, no doubt, will have developed a lawyer's instinct. Mrs Tandara could have dis-instructed Camps at any time before the "impasse" arose but for whatever reason she decided not to, or failed to do so.

201. Fourthly, when a person retains a solicitor they are, from that moment, linked by an unseen umbilical cord which means that, to the outside world, they are as one. It is not necessary for me to decide whether there has been negligence by Mrs Tandara's solicitors which, if need be, will need to be determined elsewhere. As Mr McLaughlin noted, at paragraph 54 of his witness statement, the authority of ***Paxton v Allsop [1971] 1 WLR 1310*** decided that whatever remedy a claimant might have against his solicitors, on an application of this nature it is an irrelevant consideration. Accordingly, Mrs Tandara is bound inextricably to the actions or inactions of her solicitors just as if she had taken, or not taken, those steps herself. She cannot subsequently disclaim or abdicate acts or omissions taken in her name and then, it follows, be able to use that argument to escape the consequences of them.

202. The next matter I need to address is Mr Grant's contention that this application has already been dealt with by the order of Deputy District Judge Travers and, I assume, he contends that the Court is therefore bound by some issue estoppel.

203. Applications to Courts generally speaking have to be properly formulated. That is, under CPR 23 there has to be a formal application on Form N244 which is supported by evidence which (except on a without notice basis) then has to be served. It is not open to, or sensible of, the parties to seek to introduce or proceed with applications against another party with no notice or warning having been given so that they are wrong footed or ambushed. This is contrary to the overriding objective. It is even less sensible for the Court to proceed on that basis: it tends to end in a muddle.

204. The application made by EUI in February 2019 was first and foremost an application for an unless order (see paragraph 111 above). Importantly it did not seek a strike out *per se* but only as a consequence of a breach of any unless order which the Court was minded to make which, in the event, it did not. The note of the hearing made clear that the Deputy was not prepared to

deviate from the application being made. However, given the nature of the application it was not unexpected for EUI's Counsel to address the Court on matters of delay and a lack of information and nor was it inappropriate in the circumstances to raise the case of ***Lyle***.

205. However, I am satisfied that no decision in relation to striking out this claim was made at the March 2019 hearing. Indeed, the order is silent in relation to that issue and one would consider that if the Deputy had actively dealt with it then that would have been clear on the face of the order. I am also satisfied that even if the Deputy had dealt with matters at the time it would have been perfectly permissible to revisit that decision pursuant to CPR 3.1(7) in the light of subsequent events.

206. I would now turn briefly to the most recent medical evidence obtained by Mrs Tandara from Mr O'Dowd and Mr Law. This was obtained in my view not so much as part of the litigation process (because certainly there was no collaboration with EUI or, indeed, any indication of who was being instructed before these reports were actually obtained) but in an attempt to demonstrate that Mrs Tandara suffered serious injury and to be able to say that because she now apparently suffers from fibromyalgia or might have suffered a mild brain injury that, in some way, this should justify or excuse all that has gone before and that her case should proceed. This, in my judgment, is to misunderstand the correct position for two reasons.

207. Firstly, it is the unfairness and abuse arising out of the failure to follow the Protocol upon which EUI rely in relation to this application not the severity or otherwise of Mrs Tandara's medical condition. Secondly, on an application for relief from sanctions (which effectively this is) the merits of the case are not to be given precedence (see: Lord Neuberger in ***HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd [2014] UKSC64***). Accordingly, whilst such medical reports might inform, they cannot determine.

208. The obtaining of this further medical evidence was, in any event, overshadowed in two ways. The first concerns the report of Mr Kucheria dated 2nd May 2019. CPR 35 PD 2.1 and 3.2(3) requires that:

> "Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation....."

and that any report should:

> "contain a statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report or upon which those opinions are based"

209. Patently Mr Kucheria failed to do this (see: paragraph 140 above) and of more concern has been the abject failure of Mrs Tandara's solicitors to provide a copy of, or any explanation of, those instructions provided to him until very late in the day. Given the opinion that he reached those instructions were of crucial importance because it was this report that opened the door to other expert evidence. EUI were entitled to an answer.

210. These instructions, which are only now recently available, were also required to understand how Mr Kucheria could have ever reached the opinion that he did. He acknowledged that he had not seen or examined Mrs Tandara for over six years which, in medico-legal terms is an incredible period of time, and yet, somehow, he felt able, without apparently surrendering his professional integrity, not only to opine upon the trajectory of her injuries but to state that she now needed to be seen by three further experts, one of which was Mr O'Dowd and another, Dr Law.

211. I am not certain that Mr O'Dowd particularly advances Mrs Tandara's cause by a great deal. He considered that her low back pain had resolved by the end of June 2013 and that there was an exacerbation of her neck injury by 2 to 3 years given her pre-existing condition.

212. Turning to the report of Dr Law I consider that I would be entirely justified in not taking this into account at all. It was completed in contravention of my order of 18th December 2019. That it was so completed at the direction of Mr Grant, for which he took responsibility at the hearing before me, is perhaps more extraordinary given his duties as Counsel towards the Court. Not only was my order quite clear, but it was aimed at the very mischief which then occurred and as Mr Grant indicated it would have got worse because, save for my order, it had been hoped that Mrs Tandara would also have obtained a neuropsychological report. It is no answer to say that Mrs Tandara was examined on 2nd December 2019 before my order was made. Those advising her new full well what the order meant, not least because they then sought to attack that specific provision regarding experts by having it set aside, which I refused and from which there was no appeal. There was therefore a deliberate defiance in breach of that order.

213. Next, as an overarching consideration, it needs to be borne in mind not only that ***Denton*** "defines modern litigation" (as Mr Arney noted) but that the process of the CPR requires

parties to cooperate in order to give effect to the overriding objective. It is, of course, still an adversarial system in which no direct legal duties are owed by one party to another but the way in which civil litigation is now conducted and, importantly, is expected to be conducted, has changed beyond recognition from that pertaining when ***Birkett v James*** was decided 42 years ago.

214. It now demonstrably requires a 'cards on the table' approach and seeks and encourages a participatory and collaborative approach which is perhaps best exemplified by the multiplicity of Pre-Action Protocols and how they are structured and designed to work. Collectively the process weeds out the weak, the inefficient, the lazy and the incompetent. Parties and their advisers are, of course, quite entitled to behave or act in any way they like within reason but what they must understand is that once the CPR is engaged, either through the operation and application of the various Pre-Action Protocols or by the issue of proceedings, they become subject to the rigours and requirements of the CPR and the jurisprudence which stems from it.

215. This is not an unreasonable framework and nor do the rules or Court orders "impose impossibly tough timetables" (as Jackson LJ put it). The rules provide for the parties to allow for extensions of time between themselves in certain circumstances (see: CPR 3.8(4)) and the Court is often asked for, and will grant, extensions of time. All this is to facilitate the overriding objective so that cases are then dealt with justly and at proportionate cost which, in part, means that parties are then on an equal footing, cases are dealt with expeditiously and fairly and there is the enforcement, where necessary and appropriate, of complying with rules, practice directions and orders.

216. If parties abide by the rules there should rarely be any problem. If, however, they step outside the parameters they cannot now expect the largesse and latitude which might have been afforded to them some years ago.. More often than not there will be some sort of sanction attached for which relief under CPR 3.9 will need to be sought. It is no coincidence that this rule borrows from the overriding objective and recognises "the need for litigation to be conducted efficiently and at proportionate cost".

217. Whilst it may be difficult to stipulate in advance specific examples of transgression from the overriding objective simply because of the myriad circumstances in which that might arise it is, nevertheless, fairly easy to recognise such transgressions when they do arise if only because it is often clear that no reasonable person would litigate in that way and/or the facts of the particular case are outside the limits of any reasonable bounds. I have no doubt that this was the sense that District Judge Sanderson had in *Lyle* (see: paragraph 45 of the judgment)

when he concluded that "this state of affairs offends against every aspect of the CPR and the overriding objective".

218. Accordingly, at an overarching level it is possible to apprehend whether a case is proceeding, or has proceeded, in accordance with the overriding objective or not. At that level, this case falls into the latter category.

219. Considering the specific aspects of Mrs Tandara's case, the starting point is to ask whether it should ever have been in the Protocol in the first place and, if so, whether it should subsequently have continued or exited?

220. That consideration is regulated entirely by the valuation of the claim or the "upper limit". In the case of Mrs Tandara, because of the date of her accident and that upon which the CNF was submitted, the case was always subject to the 2010 Protocol and an upper limit of £10,000. That this was not a terribly high threshold might be evidenced by the fact that in 2013 the upper limit was increased £25,000 where it has remained ever since.

221. As Horwich Farrelly rightly and obviously pointed out in their letter 27th July 2016 (see: paragraph 84 above) if a case does not exceed the upper limit then it is inherently "low value". Perhaps less obviously, but equally important, was their observation that this meant that the claim was "non-complex". Indeed, that is generally the pattern in such cases where a minor whiplash or soft tissue injuries resolve within some months and they can be dealt with by agreement, or through a Stage 3 Hearing.

222. Mrs Tandara's case at its inception and in its embryonic stages followed that rather typical path. Ostensibly, there does not appear to be anything in its initial stages that would have marked it as being out of the ordinary. There was the accident; nothing of concern had been picked up by Barnet Hospital; Mrs Tandara consulted Camps; they submitted a CNF; she was examined by Dr Newman who (I presume) at least gave a preliminary indication to Camps of the relative lack of seriousness of her injuries which would all resolve within six months.

223. On its face therefore it was an obvious candidate for the Protocol. The one factor which might have resulted in a marker being put down was Mrs Tandara's pre-existing condition which Dr Newman rather skipped over by simply saying that her headaches suffered in the past had resolved by the time of the accident. He did not deal with it in the detail that Mr O'Dowd addressed from which it is clear that this went back to 2002, had endured for several years and had involved Mrs Tandara being seen by Mr Foster, a pain expert. Indeed, I am unclear as to

what extent Mrs Tandara disclosed her history of a pre-existing condition to either Camps or Dr Newman.

224. The report of Dr Newman, on its face, supported a low value personal injury claim. However, there were problems with this in several ways. His report was not completed until December 2012 and I have already surmised (see paragraph 129 above) why this might have been. If Mrs Tandara was unhappy with his opinion this should have alerted Camps to make further enquiries. In any event, by December 2012 not only had Dr Newman's prognosis period long passed, but Mrs Tandara had by then seen Mr Sabin, the neurosurgeon, and undergone an MRI scan. There is no evidence or suggestion that these developments were not inextricably linked to her accident and I must work on the basis that Mrs Tandara conveyed all this to Camps together with a concern that this was somewhat more than a minor whiplash or soft tissue injury. I am supported in that approach by virtue of the fact that Camps then, very shortly, arranged for her examination with Mr Kucheria which is unlikely to have occurred had all been well.

225. Mr Kucheria of course noted, a year after her accident, "quite severe neck symptoms" and a gross restriction in Mrs Tandara's range of movement of her neck to only 30 - 40%. Moreover, he declined to provide a diagnosis or prognosis regarding the neck until he had seen all her records and scans and had been able to assess her pre-existing problems. His obvious caution and measured approach in 2013 was in stark contrast to what appears to be his more hasty approach six years later.

226. I do not however understand why his request in his 2013 report, for these documents and records, was not followed up because a definitive report from Mr Kucheria in 2013 would now have been very helpful indeed. As it was, the idea that Mrs Tandara's case, one year on, remained a low value claim was wearing very thin. Her injuries had obviously not resolved and Mr Kucheria had now flagged up her pre-existing condition as being somewhat crucial. Given the extent of restriction in her neck this ought naturally to have raised numerous questions as to her loss of amenity and given, at the time, she had two young children, issues over care and assistance.

227. Whilst in the absence of a definitive report from Mr Kucheria it could not be said at this stage that Mrs Tandara's damages for her neck injury alone had necessarily moved from being minor to moderate for the purpose of using the 11th Edition of the JSB Guidelines, nonetheless, a proper assessment of damages at that time, including any special damages, would not have put it far short of £10,000. In my mind, this is more likely so having regard to

the fact that in the previous year the decision in *Simmons v Castle [2012] EWCA Civ 1288* had determined that awards for general damages should generally be increased by 10%.

228. The subsequent failure to improve upon Mr Kucheria's report is entirely unexplained. I must take it that Mrs Tandara was provided with a copy of his report in which case she should have been interested in the completion of his findings, but there is no evidence that she pressed the point in any way. This failure was important for the fact that neither Camps or Mrs Tandara could then say or assert that the value of her claim did not exceed the upper limit because they simply did not know and were taking no steps to find out the correct position.

229. If the position as to value might have been questionable or ambiguous in 2013 it should have been dispelled by the report of Mr Pickles in the spring of 2014. Although he was not particularly supportive of Mrs Tandara's belief that her nose had been deformed in the accident or of any breathing difficulty, he did concede that she may have sustained a mild loss of her sense of smell. Importantly though he noted that Mrs Tandara was still suffering from headaches and, if Mrs Tandara's evidence is accepted, she was keeping Camps informed (from Germany) of all that was happening to her on the treatment front.

230. Thus, by the late Summer/early Autumn of 2014, Camps and Mrs Tandara knew that:

a. her injuries had not resolved in line with Dr Newman's prognosis;
b. on the contrary, her condition was not only continuing but appeared not be improving;
c. Mr Kucheria had identified "quite severe neck symptoms" and quite marked restriction of the neck;
d. Mrs Tandara had been seen by a neurosurgeon;
e. Mrs Tandara was continuing to receive treatment in Germany;
f. She had been seen by both a cardiologist and a pain specialist (see paragraph 72 above);
g. Mr Pickles had noted a mild loss of sense of smell; and,
h. Mrs Tandara had previously had a long-standing pre-existing condition over about the course of a decade.

231. All those factors pointed, in my judgment, quite clearly to the fact that not only was this potentially a medically complicated case but, equally clearly, to the fact that this was no longer a low value case and that the likely damages would exceed the £10,000 upper limits by some margin. That this was so can be taken from the subsequent assertion of Taylor Rose that this matter should never have been in Portal in the first place, that assertion having been based on the injury to Mrs Tandara's sense of smell alone notwithstanding that when this view was

conveyed they had no more medical evidence in 2017 (see paragraph 99 above) than that which been available to Camps in 2014.

232. The position did not improve because by March 2015 the evidence is that Mrs Tandara had indicated that she was willing to be seen by a lower gastrointestinal surgeon as well as a neurologist (see paragraph 76 above).

233. There appears to have been a 'disconnect' between Camps and Mrs Tandara at some point by which Camps seemingly took it upon themselves to decide that the accident was not causative of Mrs Tandara's ongoing condition and therefore consistently asserted that the value of her claim fell within the upper limit. The problem with this, even if they were correct to take that view, is that there was never any medico-legal evidence to support it and no steps were taken to obtain any. In fact, when Mrs Tandara's claim exited the Portal and was transferred to a Part 7 claim in March 2019 (which expressly meant that the upper limit had been breached) the only medical evidence available was that which had already existed in the Summer of 2014.

234. Viewed objectively, a revaluation at the latest by the autumn of 2014 should have resulted in this case leaving the Protocol prior to issues of limitation arising. EUI however had not been provided with any medical reports or, indeed, any other information, at this point and so could not have argued against the course subsequently adopted by Camps which was to issue proceedings within the Protocol.

235. A valuation of any claim is a work in progress to be assessed on a regular basis against the known facts. Within the Protocol there is almost a symbiotic relationship between the parties who utilise it to their mutual benefit in evaluating claims, settling them or enabling them to move on to be dealt with as bigger value claims if need be. District Judge Baker was quite correct to describe it as a "rules-based system" and one to which the overriding objective applies. What is clear is that there is an unspoken understanding that both parties will adhere by the rules and the framework of the Protocol which, in turn, requires defendants to trust that claimants will not only revalue their claims on a regular basis but notify them if they then exceed the upper limit. Paragraph 4.2 of the Protocol (see paragraph 26 above) expressly places this onus on the claimant alone.

236. There is also a recognition that such trust should not be abused. Paragraph 4.1 of the current Practice Direction - Pre-Action Conduct & Protocols, approved by the Master of the Rolls, and which reflects the spirit in which protocols were always meant work, makes it clear that:

> "A pre-action protocol or this Practice Direction must not be used by a party as a tactical device to secure an unfair advantage over another party. Only reasonable and proportionate steps should be taken by the parties to identify, narrow and resolve the legal, factual or expert issues."

237. In my view that does not mean that there has to have been any deliberate or intentional behaviour or any bad faith, as such to bring about an unfair advantage, only that the way in which a pre-action protocol is used has, or results in, that effect.

238. That is what EUI are really complaining about in this instance: that through her use, or misuse, of the Protocol Mrs Tandara has gained an unfair advantage and therefore it is necessary to consider whether that had occurred and is sufficient to amount to an abuse.

239. The starting point again has to be the valuation of the claim which is determinative of whether the case remained in the Protocol or not. Here, for the reasons I have given, if it was acceptable to start in the Protocol, objectively, by the Autumn of 2014 it should certainly have come out. If that had been the case then the PI Protocol would have been triggered, Mrs Tandara would have had to issue proceedings within the limitation period, there would have been no possibility of any stay and, more likely than not in my view, the case would have been concluded by mid-2017 at the latest.

240. But, of course, Camps did not notify EUI of the position, either then or for the next two years. Only on 5th September 2016 (see paragraph 89 above) did Camps indicate, in a telephone conversation, for the first time that the claim was likely be over £10,000. I am of the view that that amounted to a notification for the purposes of paragraph 4.2 of the Protocol. That paragraph is not prescriptive as to how notification needs to be given and Mr Rodgers indication by telephone was quite sufficient.

241. The effect of that was immediate: "the Protocol ceases to apply". It did not require anything else to happen save for Camps to notify Horwich Farrelly that the claim had been revalued at more than the Protocol upper limit. Therefore, on 5th September 2016 the Protocol ceased to apply.

242. This gave rise to a rather strange state of affairs. Mr Arney went to some lengths to point out how, by not lifting the stay of proceedings, Mrs Tandara had thereby avoided most of, if not all, the steps she would otherwise have needed to take. But by 5th September 2016, the

proceedings had already been issued and therefore any 'pre-action' considerations, by definition, ceased to apply. Accordingly, it seems to me that whilst, by operation of Paragraph 4.2, Mrs Tandara's case had ceased to be in Protocol it could not then specifically become subject to the PI protocol. The answer lay in PD8B paragraph 16.7, namely, that Mrs Tandara should have made an application to Court to start Part 7 proceedings. That requirement is mandatory but it introduces the conundrum that I have highlighted at paragraph 32 above, and that is that there is an absence of any provision to make such an application within any specified time.

243. There has to be a little leeway here. If, as was indicated to EUI, the upper limit had been exceeded on valuation but not by much it is understandable that parties will not immediately want to rush to involve themselves in the time and expense of a Part 7 claim. However, the burden to make the application rests upon and remains with a claimant and the longer it is left the greater the risk that it will be said they are avoiding the requirements of a Part 7 claim. There must be an implication therefore that such an application has to be made within a reasonable time which I would consider to be three months from the notification under Paragraph 4.2. If a case is intrinsically low value it ought to be settled in that time; if not, it needs case managing.

244. In this case no application was ever made. It was EUI's application of 19th February 2019 which led to the lifting of the stay. I note in passing that whilst a deal of criticism has been made of Camps conduct of Mrs Tandara's case, by August/September 2017 Taylor Rose had been instructed and yet, notwithstanding that they evidently understood the claim to valued at more than £10,000 (see paragraphs 96 and 99 above example), they too failed to apply to the Court when it ought to have been clear that they should have done so. They recognised "that significant delays been caused by our client's previous representatives" but then did very little if anything about it themselves.

245. Accordingly, I am perfectly satisfied that there was a breach of not only the letter, but also the spirit, of the Protocol by Mrs Tandara, the culpability for which must rest squarely with herself and her advisers.

246. There has been some criticism of EUI that after the issue of proceedings and until the stay was lifted that this was something which suited them and, indeed, in which they acquiesced. I do not accept such criticism at all. It was always Mrs Tandara's responsibility to make the appropriate application to lift the stay which she did not do and it is perfectly obvious, looking at the correspondence, that EUI were minded to lift the stay but did not do so, firstly, because

of the overtures of Mrs Tandara's solicitors and, secondly, that they saw the disproportionality in doing so given their belief and understanding as to the value of the claim.

247. In that regard, whilst there had been a breach of the Protocol, nevertheless, one has to consider what EUI actually knew about matters at the time that the stay was lifted. This was that the claim might be worth up to £30,000 but the correspondence demonstrates that Horwich Farrelly were having some difficulty in getting anywhere near that figure on the available medical and considered it to be somewhat less. At that time of course EUI had no knowledge of Mrs Tandara's loss of earnings. It was therefore, as Mr Arney pointed out, not proportionate to challenge the order of Deputy District Judge Travers. The idea, advanced tentatively by Mr Grant, that because the stay had already been lifted (and therefore this case could be distinguished from ***Lyle*** and ***Cable***) that such decision could not be revisited is unattractive. If EUI had been advised of the current magnitude of the claim when they should have been the application I now have to deal with would obviously have been before the Deputy when he made his decision.

248. What Mrs Tandara has managed to achieve is an almost classic ***Birkett v James*** type situation where proceedings have been issued and then subject to inaction for many years. The decisions in ***Lyle*** and ***Cable***, both decided by experienced and seasoned Judges, demonstrated that this approach is not now acceptable. I endorse and adopt the observations made by both HHJ's Pearce and Wood QC. That is because it is unfair and prejudicial which, in this case, comes in two forms. The first is the almost complete lack of any flow of information and co-operation by Mrs Tandara's advisers which prevented EUI taking relevant steps at the relevant times, and the second is the magnitude of the claim they now face and the consequences of that set against the claim which they thought, and had actively been led to believe, that they faced.

249. In the first instance there was a persistent and repeated failure by Camps to provide any meaningful information to EUI throughout their retainer. EUI made perfectly reasonable and timely requests for progress reports and they were met effectively with silence. I do not accept that EUI were not "stonewalled". This was not just one or two requests which went unanswered. By my calculation there were at least 27 requests (and probably more) between the Spring of 2012 until the Autumn of 2016, a period of some 4½ years. This was not only professionally discourteous but completely emasculated the very purpose of the Protocol. It was certainly not two-way traffic and the parties could not be said, on any approach or in any sense, to be on an equal footing because there was a disparity and imbalance of knowledge. It

might have been partially rectified by the timely provision of the medical reports but Camps did not provide those of Dr Newman and Mr Pickles until September 2016.

250. As far as I can see the situation did not particularly improve under Taylor Rose. Other than indicating what they considered the quantum of Mrs Tandara's lost sense of smell to be, and notifying EUI in August 2018 that she now had fibromyalgia, they provided very little information and failed to act in the spirit of what was required. So, for example, when Horwich Farrelly made it clear (see paragraph 109 above) in October 2018 that they considered an orthopaedic expert should be obtained before Mrs Tandara was seen by other experts this was effectively ignored notwithstanding that 6½ years after the accident EUI had no medical evidence of their own. It was a perfectly reasonable, and sensible, request to have made in the circumstances.

251. Moreover, having said that they would provide the names of expert for the purpose of the CMC (see paragraph 112), to compound matters, Taylor Rose proceeded subsequently to instruct Mr Kucheria, Mr O'Dowd and Dr Law without any reference to EUI whatsoever.

252. Whilst pinpointing individual elements or episodes of unfairness might be difficult and, on their own, those instances might not appear to amount to much, if one stands back and looks at the matter objectively, as a collective and cumulative whole, it is perfectly obvious that this withholding of information was intrinsically and inherently unfair. It left EUI completely in the dark and unable to take any steps to redress the balance.

253. This is particularly true with regard to Mrs Tandara's alleged loss of earnings and quantum generally. It is disingenuous of Mrs Tandara and her advisers not to have specifically addressed this in their evidence when they have known that it is in issue. EUI had been told in March 2018 that Mrs Tandara "had not required any time off work" so it was entirely legitimate to ask as to when it was decided that she did in fact, or was likely to have, a claim in excess of £½ million. In the absence of evidence to the contrary Mrs Tandara cannot complain that the Court concludes that it was more likely than not before the hearing in March 2019. All the elements for a loss of earnings claim, both past and future, were in place and it was not only a clear and obvious question and consideration to have raised with her but one of the first questions. That being the case it was relevant and material information which ought to have been disclosed both to EUI and the Court in March 2019 because, by analogy with *Lyle* (*Cable* not having been decided at that point) it is likely to have made a material difference to the outcome.

254. EUI only became aware of the extent of the claim they faced in May 2019 just over seven years after the accident and four years on since the issue of proceedings. Had they known or had it been intimated that Mrs Tandara's claim would be valued at about £¾ million there is no doubt that matters would have taken a fundamentally different course. Even now it cannot be known whether that is the full extent of the special damage claim that they have to meet because the schedule is only Provisional.

255. As it is EUI now face an entrenched claim of fibromyalgia which is said to be permanent and yet, almost 8½ years post-accident, have not obtained any medical evidence themselves. More germanely they have been deprived (by virtue of the misuse of the Protocol and then the stay) of obtaining such evidence during the period when Mrs Tandara's symptoms were escalating. They are in considerable difficulties in my judgment of now being able to challenge the early reports of Dr Newman and Mr Kucheria (perhaps less so Mr Pickles) and are unable to challenge the treating experts upon whom Mrs Tandara so clearly relies. As Mr Arney pointed out, the paper trail produced is incomplete (there appear to be some missing documents) and it is not sufficient in any event because whilst it may be an easy task for Mrs Tandara's experts to simply to endorse the records of her treating doctors it is very difficult, if not impossible, for EUI now to test, confront and challenge their content.

256. I would add that, in my view, there must also be some question marks over Mrs Tandara's medical evidence generally given that both Mr O'Dowd and Dr Law have commented upon the lack of records between about 2013/14 to 2018 when Mrs Tandara has been in Germany. In my view, all such records would need to be collated and translated and then put to Mrs Tandara's experts again to ascertain whether their opinions remain the same.

257. That apparent deficiency in the paper trail will also in my view hinder EUI who, in any event, critically have lost the opportunity to contemporaneously consider the seismic changes in Mrs Tandara's condition. I cannot see that such loss can be made good by an order for costs since there has been no opportunity to contemporaneously examine Mrs Tandara to verify the findings of treating doctors.

258. I am also concerned that several years after the accident Mrs Tandara now appears to be introducing fresh injuries to those from which she originally suffered. She told Mr O'Dowd (see paragraph 146 above) that she had injured her right shoulder. This is entirely new. This was never disclosed to either Dr Newman or Mr Kucheria. In addition, she now says that she had been experiencing cognitive difficulties with memory loss for the last five years which

would date back to 2014, before the issue proceedings although there is scant if any contemporaneous evidence for this that I can see.

259. Moreover, this is precisely the sort of problem or difficulty that arises when litigants failed to progress matters as they should and begin to dwell on their injuries. Due to the delay there were no substantive medico-legal reports between April 2014 and October 2019. If there had been, these 'new' injuries would have been identified some years ago and action taken to address them. However, now, EUI are apparently facing additional injuries which have little or no basis in the medical evidence to date. It is one more aspect which would not have to be dealt with but for the delay.

260. The issue of rehabilitation also arises. Paragraph 2.1 of the Rehabilitation Code 2007 (amended in December 2015) stated:

> "It should be the duty of every claimant's solicitor to consider, from the earliest practicable stage, and in consultation with the claimant, the claimant's family, and where appropriate the claimant's treating physician(s), whether it is likely or possible that early intervention, rehabilitation or medical treatment would improve their present and/or long term physical and mental well being. This duty is ongoing throughout the life of the case but is of most importance in the early stages."

261. Given the fact that Mrs Tandara's injuries were not improving and were probably getting worse, by 2014 this was something that really ought to be in the contemplation of Camps. Instead, Mr Grant rather glossed over the issue of rehabilitation by saying that the Court was fixed with the knowledge that Mrs Tandara was receiving considerable rehabilitation German and, he therefore contended, that the outcome of any intervention by EUI would have been no different than it turned out to be. I take a different view. Of course, in the absence of the disclosure of any medical evidence until September 2016 it would have been impossible for EUI to begin considering this or, indeed, appreciate that they might have to. Nonetheless, if the matter had properly proceeded under the PI Protocol, and EUI had been able to instruct their own medical experts, or Mr Kucheria had been able to complete his first report, it may well be that Mrs Tandara's vulnerability and propensity towards fibromyalgia would have been identified at considerably earlier date than March 2018 and steps taken to try to avert it.

262. I also note that whilst Mrs Tandara was in Germany a great deal of attention was given to holistic and alternative therapies and remedies which, although they have their place, may not have featured as recognised methods of rehabilitation had an expert instructed by EUI been

able to examine Mrs Tandara. The point is that, at this late stage, it is unlikely that it will ever be known whether any form of rehabilitation treatment would have worked or not. It is all very well for Mr Grant to seek to dismiss this in a few submissions but rehabilitation, particularly in a high-value case, is an important part of a defendant's response, recognised by the PI protocol, but this possibility or opportunity to has now been lost to EUI.

263. This state of affairs would have been avoided had Mrs Tandara's case exited the Protocol when it should have done. It would then have become subject to the PI Protocol which requires cooperation and collaboration both of which have been missing in the approach of Camps and Taylor Rose. If Mrs Tandara had issued Part 7 proceedings by March 2015 this would also have given the Court control.

264. By the failure and inaction of her advisors and herself Mrs Tandara has been able to totally circumvent all those usual checks and balances. There has been no consideration or scrutiny at the material time of her injuries by EUI's solicitors who have been entirely cut out of the decision-making process either to participate in the selection of experts or their instruction, all the more so after Taylor Rose were instructed when three experts have reported. By issuing proceedings under the Protocol when she should not have done so she secured a stay which endured for just over four years and thereby neutered the usual effect of limitation, a defence which would otherwise be open to EUI.

265. I should deal briefly with the inability of EUI to fix a reserve. I accept the decision in ***Cain*** that such a factor could never justify a finding of prejudice, or that it would carry very little weight. EUI will have had to set a reserve in 2019. If that is of about £¾ million it makes little difference to the fact that they would otherwise have done set this in 2015/2016. A reserve, like a valuation of the claim, will need to be kept under regular review. However, in my judgment, had EUI been apprised of the true position when they ought to have been they would undoubtedly have husbanded and organised their resources in a different way to protect their position which cannot now be regained or recovered.

266. Overall, I conclude that EUI were misled on a number of fronts, on some occasions deliberately, to believe that certain steps were being taken when they were not, that Mrs Tandara's case was confidently within the upper limit of the Protocol, that she had not had any time off work and that special damages were up to £10,000. As it has transpired, all that was untrue. It is not difficult to conclude that whether by conduct and/or delay there has been a wholesale breach by Mrs Tandara and her advisers of the overriding objective, the Protocol

and the PI Protocol. This has resulted in an unfair advantage for the reasons I have given and, in my judgment, it is a clear abuse.

267. I would also observe that pursuant to CPR 1.2 the Court must seek to give effect to the overriding objective when it exercises any power given to it by the rules and, under CPR 1.4, must further the overriding objective by actively case managing cases. By allowing the stay to remain Mrs Tandara has prevented the court undertaking those functions and is, in my judgment, in breach of her obligation under CPR 1.3. It has not been possible to case manage this case most notably in relation to seeking to establish an equal footing between the parties and in the area of expert evidence. Equally, the Court has lost the ability to control costs through budgeting and, as I have already observed, Mrs Tandara's advisers rushed to obtain medical evidence at the probable expense of proportionality. I accept the proposition that costs within the Portal and the Protocol might have been relatively low but this does not necessarily hold true for the incurred costs overall to date. Case and cost management since 2013 has been intrinsic and essential to any set of proceedings but, to date, has not been possible in this case.

268. The potential future costs are also of considerable concern. If the matter proceeded I have already noted that the experts would have to trawl through the translated German medical records (which translation of itself will be expensive) before they are able to reach any firm or definitive conclusions. That is an expense which will only have to be incurred because it would be done in 2020 and not in 2015 or so. It is demonstrably the case that the delay will have inevitably increased the costs in this regard, and generally, and there is a danger therefore that they will become disproportionate.

269. Having concluded that Mrs Tandara has gained an unfair advantage through abuse, the issue then becomes, what is to be done? Mr Grant sensibly acknowledged in his submissions that EUI have indeed been prejudiced but went on to submit that any such prejudice was *de minimis* and whilst there had been delay and incompetence, the absence of bad faith meant that the case could, and ought, to proceed with any sanction being confined to costs. In addition, Mrs Tandara would submit to robust case management. He suggested that Mrs Tandara's case was unusual and that to strike it out meant that she would lose a large damages claim leaving her to sue her advisers which would be "very messy".

270. I also take on board the raft of authorities to which he referred me which collectively instruct me not to strike out a claim unless there is no other course available and for it to be taken only

as a last resort. However, whilst this is the general principle, each case has to be considered upon its own merits.

271. In my judgment this is not an unusual case at all save for the level of failure and delay on the part of Mrs Tandara and her advisers. There has, unfortunately, been a catalogue of failure from the beginning to date. I am clear that the way in which it has been conducted, the lack of progress, the obfuscation and lack of openness is far worse than that in either ***Lyle*** or ***Cable***.

272. I take the view that EUI had been placed in an irredeemable position. I do not consider that a fair trial of the issues can now be achieved. No order for costs or selective striking out of certain parts of Mrs Tandara's claim will, or could, remedy the unfairness or prejudice caused to them. That being so the claim can only be struck out in its entirety. There is no alternative and the Court has therefore to exercise that last resort which would, in my view, in any event have been the consequence if all these matters are being raised at the lifting of the stay hearing in March 2019.

273. For the sake of completeness, I should deal with the ***Denton*** criteria. Although obvious that EUI's application to strike out was being based upon Mrs Tandara's failure and that, in turn, any striking out would operate as a sanction, this has not triggered any specific application for relief from sanctions. Be that as it may, the problems with this case are legion and it could not be said that the breaches which have occurred were anything other than serious and significant. Save for the general allegation that Mrs Tandara's original solicitors were incompetent, no explanation or good reason has been advanced for the delay and/or the conduct of her case. Lastly, having regard to all the circumstances of the case, the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders, there would be no option but to refuse relief.

General

274. Accordingly, for all these reasons, Mrs Tandara's claim must, and will be, struck out. I will fix a date for this judgment to be handed down at which time I will make an order in these terms. Costs will normally follow the event. If there is no issue in relation to costs or they can be agreed, and if there are no other applications which either party consider it necessary to make, there will be no need for either party to attend if they do not wish to. I should be grateful if Counsel would let me have an agreed draft order at least 24 hours before the handing down, if that is possible.

275. Lastly, I would like to thank both Mr Grant and Mr Arney for their respective assistance, both on paper and orally, which has made my task much immeasurably easier. I am grateful to them both.

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District Judge Avent

9th July 2020