IN THE NEWCASTLE-UPON-TYNE COUNTY COURT **Conjoined Appeal No: AP20/15**

On An Appeal from the County Court at Newcastle: District Judge Kramer: Claim No: A02NE406; and
On Appeal from the County Court at Gateshead: District Judge Pescod: Claim No. A00GH386; and
On Appeal from the County Court at Sunderland: District Judge Malik: Claim No. A00SR343; and
On Appeal from the County Court at Gateshead: District Judge Kramer: A00GH363

The Law Courts
The Quayside
Newcastle-upon-Tyne
NE1 3LA

Friday, 18th September 2015

Before:

HIS HONOUR JUDGE FREEDMAN

Between:

(A02NE406)
MR DANIEL MULHOLLAND Claimant/Appellant
-v-
MR JEFFREY HUGHES Defendant/Respondent

-and-

(A00GH386)
MISS CHARLOTTE WAREHAM Claimant/Appellant
-v-
MR LEE DODD Defendant/Respondent

-and-

(A00SR343)
MR BEN PURVIS Claimant/Appellant
-v-
MR MOHAMMED IQBAL Defendant/Respondent

-and-

(A00GH363)
MR DAVID SAUL Claimant/Appellant
-v-
MRS KIRSTEN FIELDING Defendant/Respondent

Mr Nicholas Bacon QC and Mr Tim Chelmick appeared on behalf of all four appellants

Mr Roger Mallalieu appeared on behalf of the respondents in the first three appeals

Mr Duncan McNair appeared on behalf of the respondent in the fourth appeal

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JUDGMENT

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JUDGMENT

HIS HONOUR JUDGE FREEDMAN:

Introduction

1. For the sake of convenience, in this reserved judgment, I shall refer to the parties respectively as claimants and defendants, albeit that the court was sitting as an Appellate Court.

2. These four conjoined appeals raise very similar issues which relate to the interpretation and operation of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the Protocol"). The issues relate to the status of offers made in Stage 2 of the Protocol; whether it is open to a defendant to rely on matters not raised during the negotiation process under the Protocol in any subsequent Part 8 proceedings; and whether a court can order repayment of sums paid to claimants under the terms of the Protocol, in the event that the court awards less than that which was offered by the defendants under the Protocol.

3. I should record, at the outset, that in each of the appeals, I gave permission to appeal on paper on the grounds that each of the appeals appeared to have a real prospect of success and, in any event, there was a compelling reason why the appeal should be heard.

4. The common theme that unites all four appeals is that, in each case, the court has assessed the sum payable to the claimants to be less than the sum previously offered by the defendants pursuant to the Protocol. In the result, and because of provisions within the Protocol as to payment of damages, in three of the four cases, there was an "overpayment" so that the claimants were ordered to repay sums to the defendants.

5. Three of the cases involved claims for hire charges. In two of the cases, although an offer had been made by the defendants in relation to hire charges under the Protocol, the court disallowed the claims in their entirety because there was no evidence from the claimants of a need to hire an alternative vehicle ("need"). The issue of need had not been raised by the defendants in Stage 2 of the Protocol but only, for the first time, at the Part 8 hearing before the Judge. In the third case concerned with hire charges, there was a paper assessment of damages and the District Judge limited the hire charges to the sum offered by the defendant on the basis that need had not been proved.

6. In the fourth appeal, what was in issue was the amount of General Damages for Pain, Suffering and Loss of Amenity. The Judge awarded a sum less than that offered by the defendant at Stage 2 and ordered repayment of the difference.

The Protocol

7. In order to understand the factual background to these four claims, it is necessary to look at the relevant provisions of the Protocol.

8. The Protocol applies to all personal injury claims arising out of road traffic accidents where the sum claimed is less than £25,000 (where the Form RTA 1 is issued after 31st July 2013) and where the usual track for the claim is not the small claims track (paragraph 4. 1 of the Protocol). CPR 26.6(1) (a) provides that the small claims track is the normal track for a claim for personal injuries where the value of such claim is not more than £1,000. The Protocol therefore applies to claims where General Damages are valued at between £1,000 and £25,000. But for the Protocol, by virtue of CPR 26.6(4) (b), such claims would be allocated to the Fast Track.

9. The Preamble to the Protocol (paragraph 2.1) stipulates:

> *This Protocol describes the behaviour the court expects of the parties prior to the start of proceedings where a claimant claims damages valued at no more than the Protocol upper limit as a result of a personal injury sustained by that person in a road traffic accident. The Civil Procedure Rules 1998 enable the court to impose costs sanctions where it is not followed.*

10. I turn now to what are said to be the key objectives of the Protocol and which, to my mind, underpin the whole rationale of the Protocol. Paragraph 3.1 states:

> *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 fixed costs at each appropriate stage.*

11. Whilst issues of costs do not feature in these appeals, Mr Bacon QC makes the point that the twin aims of the process, namely simplicity and efficiency, are illustrated by the fixed costs regime set out in CPR 45.18 which allows the claimant's legal representatives to recover fixed costs in respect of each stage; and to be paid such costs at the conclusion of each stage.

12. There are three phases in the protocol. Stage 1 is the initial notification stage when Form RTA 1 (a CNF) is submitted in the prescribed electronic form to the Portal.

Paragraphs 6.10-11 require the defendant to acknowledge receipt of the CNF the next day and to provide a substantive response using Form RTA 2 within 15 days.

13. If liability is admitted, either without any allegation of contributory negligence, or if the only allegation of contributory negligence relates to the failure to wear a seatbelt and if it is not contended that the claim should be allocated to the small claims track, the claim continues under the Protocol (paragraph 6.15). As a condition of the claim remaining within the Protocol, the defendant must pay the claimant's Stage 1 fixed costs (paragraph 6.18).

14. If the claim proceeds to Stage 2, the claimant is required to submit evidence in support of the claim. Paragraph 7.32 requires the claimant to submit *the Stage 2 Settlement Pack to the defendant*. This *must comprise* -

(1) the Stage 2 settlement pack form;

(2) a medical report or reports;

(3) evidence of pecuniary losses;

(4) evidence of disbursements (for example the costs of any medical report);

(4A) in a soft tissue injury claim, the invoice for the costs of obtaining the fixed cost medical report and any invoice for the costs of obtaining medical records;

(5) any non-medical expert reports;

(6) any medical records/photographs served with medical reports; and.

(7) any witness statements.

15. In relation to the service of witness statements, it is said at paragraph 7.11:

> *In most cases, witness statements, whether from the claimant or otherwise, will not be required. One or more statements may, however, be provided where reasonably required to value the claim.*

16. The Stage 2 Settlement Pack Form sets out which heads of damage are being pursued, whether evidence is attached, any relevant comments in relation to each claim, the gross value claimed and the net value claimed. Once this form has been submitted together with the other documents making up the Settlement Pack, a negotiation period of 35 days follows. The defendant has 15 days to make an initial response which is, essentially, a counter-offer. In relation to each item of damage claimed, the defendant is required to say whether the amount is agreed, to make any relevant comments, to specify the gross and net value offered and to identify the amount in dispute by filling in the relevant columns on the form. What the defendant is required to do is given greater clarity by the contents of paragraph 7.41:

> *When making a counter-offer, the defendant must propose an amount for each head of damage and may, in addition, make an offer that is higher than the total amount proposed for all heads of damage. The defendant must also explain in any counter-offer why a particular head of damage has been reduced. The explanation will assist the claimant when negotiating a settlement and will allow both parties to focus on those areas of the claim which remain in dispute.*

.

17. In the event that negotiations do not result in settlement of each head of damage, the claim moves to Stage 3 to be adjudicated upon by a court in (most circumstances) Part 8 proceedings. Paragraph 7.64 provides:

> *Where the parties do not reach an agreement on*
>
> *(1) the original damages within the period specified in paragraph 7.35 to 7.37; or*
>
> *(2) the original damages and, where relevant, the additional damages under 7.51* (these are vehicle related damages which have been dealt with by a third party separate from the claim and of no application in these appeals).
>
> *the claimant must send to the defendant the Court Proceedings Pack (Part A and Part B) Form which must contain -*
>
> *(a) in Part A, the final schedule of the claimant's losses and the defendant's responses comprising only the figures specified in sub-paragraphs (1) and (2) above, together with supporting comments and evidence from both parties on any disputed heads of damage; and*
>
> *(b) in Part B, the final offer and counter-offer from the Stage 2 settlement pack...*

18. Paragraph 7.66 makes it clear that the parties are required to ventilate all issues during negotiations at Stage 2. Specifically, it is said:

Comments in the Court Proceedings Pack (Part A) Form must not raise anything that has not been raised in the Stage 2 Settlement Pack Form.

19. It is important to understand the difference between Part A of the Court Proceedings Pack and Part B. Whereas the former is essentially a final schedule and counter-schedule with comments from both parties supporting their positions, the latter is confined to the claimant's final offer and the defendant's final offer expressed in global terms (the 'Protocol offer'). It is specifically recorded on the Part B Form that *the offer inserted in Part B may differ from the total of the separate heads of claims listed in Part A.* There would therefore appear to be three options: for each party to make a final offer which is the sum of the heads of damage set out on the Part B Form, to make a final offer which is less than the aggregate of the heads of damage on the Part A Form or which is more than the aggregate of the amount of the heads of damage on the Part A Form. On the face of it, it would be surprising if the defendant's final offer was less than the aggregate of the heads of damage on the Part A Form and, equally, surprising if the claimant's final offer was more than the aggregate of the heads of damage on the Part A Form. The requirement of the Part B Form is that it should be submitted to the court in a sealed envelope, only to be opened at the conclusion of the hearing when the Court considers costs (CPR 36.28)

20. Before the claim proceeds to a Part 8 hearing, the defendant is required to make what is described as a *non-settlement payment*. This payment includes the final offer of damages made by the defendant in the Court Proceedings Pack less monies payable to this CRU and any previous interim payment (paragraph 7.70). The defendant is also required to pay to the claimant any unpaid Stage 1 fixed costs and the Stage 2 fixed costs as well as agreed disbursements.

21. Part 8 proceedings are governed by the special procedure set out in PD8B. The claimant is required to file with the claim form the Court Proceedings Pack Part A and Part B Forms as well as copies of medical reports, evidence of special damages and evidence of disbursements. The only evidence the defendant submits is an acknowledgement of service which must state whether the amount of damages claimed is contested, whether the making of an order for damages is contested, whether the court's jurisdiction is disputed, whether there is an objection to the use of the Stage 3 procedure and whether the defendant wants the claim to be determined by the court on the papers or at a Stage 3 hearing.

22. Paragraph 7.1 of PD8 stipulates that no additional documents or evidence may be submitted without the permission of the court. Unless a further order of the court is made, the claim is therefore determined, whether on paper or at a hearing, based upon the documents submitted with the claim form and the acknowledgement of service.

Summary of facts in each Appeal

23. It has been necessary to set out in some detail the provisions of the Protocol not only to explain the issues which arise in these appeals but also to give context to the factual background to each appeal. In summarising the facts in the appeals, I gratefully adopt the summaries provided by Mr Bacon QC in annexes 1-4 to his skeleton argument.

Mulholland v Hughes

24. The accident occurred on 9th January 2014. The CNF was submitted into the Portal on 10th January 2014. Liability was admitted by the defendant. The Stage 2 Settlement Pack was uploaded to the Portal with supporting documentation on 4th June 2014. In response, the defendant offered the sum of £1,093.14 for hire costs. The reason given

for the deduction was that the defendant disputed the rate. No issue was taken with the need for a replacement vehicle.

25. On 7th August 2014, the claimant received cheques for the agreed heads of loss including a cheque for the £1,093.14 in respect of the hire costs.

26. Agreement could not be reached on the balance of the claim. Accordingly, the claimant sent Court Proceedings Pack Part A and Part B Forms for approval. Part 8 proceedings were issued on 29th August 2014. Acknowledgement of service was served on 23rd September 2014 which confirmed that the amount of damages was disputed.

27. A disposal hearing took place on 2nd December 2014 before District Judge Kramer. The District Judge dismissed the claim for hire costs because the claimant had not proved that there was a need for a replacement vehicle. The District Judge ordered that the difference between the offer made by the defendant and the sum awarded be repaid by the claimant, that sum being £1,093.14. He also ordered the claimant to pay the costs of the Part 8 proceedings.

Wareham v Dodd

28. The accident occurred on 3rd February 2014. The CNF was submitted into the Portal on 4th February 2014. Liability was admitted by the defendant in their response to the CNF on 6th February 2014. The Stage 2 settlement pack was uploaded to the Portal with supporting documentation on 7th July 2014. In its response, the defendant allotted the sum of £854.50 for hire costs. The reason given for the deduction was that the defendant disputed the rate of hire. No issue was taken with the need for a replacement vehicle.

29. On 3rd September 2014, the claimant received cheques for the agreed heads of loss including a cheque for £854.50 in respect of the hire costs.

30. Agreement could not be reached on the balance of the claim and, accordingly, the claimant sent Court Proceedings Pack Part A and Part B Forms for approval. Part 8 proceedings were issued on 28th October 2014. An acknowledgement of service was served on 5th November 2014 which confirmed that the amount of damages was in dispute.

31. On 2nd January 2015, District Judge Pescod conducted a paper hearing. The order which he made was that hire charges should be assessed in the sum of £854.50 (the defendant's figure) as the claimant had not proved need for a replacement vehicle. According to the District Judge, recovery was therefore limited to the sum admitted by the defendant in Stage 2 of the Protocol.

Purvis v Iqbal

32. The accident occurred on 21st March 2014. The CNF was submitted into the Portal on 22nd March 2014. Liability was admitted by the defendant on 3rd April 2014. The Stage 2 settlement pack was uploaded to the Portal with supporting documentation on 20th June 2014. In its response, the defendant offered the sum of £2,090.40 for hire costs. The reason given for the deduction was that the defendant disputed the rate. The defendant also requested information regarding the agreement between On Hire and the owner of the vehicle. No issue was taken with the need for a replacement vehicle.

33. Agreement as to damages could not be reached. Accordingly, the claimant sent the Court Proceedings Pack Part A and Part B Forms to the defendant for approval on

7th August 2014. Part 8 proceedings were issued on 12th September 2014. An acknowledgement of service was served on 19th September 2014 which confirmed that the amount of damages was disputed.

34. A Part 3 hearing took place on 16th January 2015. District Judge Malik assessed the hire charges at nil, ordered the defendant to repay the *interim payment* on account of the car hire claim in the sum of £2,090.40 and ordered the claimant to pay the costs of the Part 3 hearing.

Saul v Fielding

35. The accident occurred on 3rd May 2014. The CNF was submitted into the Portal on 6th May 2014. Liability was admitted by the defendant. The Stage 2 settlement pack was uploaded to the Portal with supporting documentation on 14th July 2014. In its response, the defendant offered the sum of £1,900 for general damages and £298 for physiotherapy charges.

36. Agreement could not be reached in respect of General Damages and physiotherapy costs. Accordingly, Part 8 proceedings were issued on 12th September 2014.

37. A Part 3 hearing took place on 20th January 2015. District Judge Kramer assessed general damages in the sum of £1,500 and physiotherapy charges in the sum of £350. He ordered that the difference between the offer previously paid by the defendant and the sum awarded to the claimant be repaid by the claimant amounting to £348. The claimant was ordered to pay the defendant's fixed Stage 3 costs.

Issues raised on the appeals

38. There are, in essence, three issues raised in these appeals:

(1) The status of offers made by the defendant at Stage 2: do they take effect as 'admissions' and therefore binding both on the defendant and on the court or is the term 'offer' to be given its plain and ordinary meaning?

(2) If a defendant does not put a matter in issue at Stage 2, can the point still be taken at a Part 8 hearing before a judge?

(3) If the award made by the Judge is less than the final offer already paid to the claimant, can a Judge order repayment of the difference, on the basis that the 'non-settlement payment' takes effect as an interim payment?

Although identified as separate issues, in reality, they are at least, to some extent, interrelated. By way of illustration, if, for example, a monetary offer made at Stage 2 in relation to hire charges constitutes a binding admission, then, at least by implication, not only is it accepted that that is the minimum sum payable to the claimant but also that no issue is taken in relation to need.

Claimant's submissions

39. Mr Bacon's overarching submission is that these appeals should be considered from the standpoint that the Protocol is designed primarily to achieve, promptly and efficiently, a negotiated settlement in fast-track personal injury claims arising from road traffic accidents; but if such a settlement is not achievable, then the purpose of the Stage 2 process is to identify the key issues, allowing the court to concentrate on what remains in dispute. He argues that the offers and counter-offers made at Stage 2 are analogous to pleadings. In this regard, he places heavy reliance on the Editorial Introduction in the White Book at 8BPD.0, which says:

A

B

C

D

E

F

G

H

"The stage 3 procedure builds on the Protocol process. In various ways, the procedure restricts the issues that can be contested and the evidence that may be adduced, in effect treating steps taken by the parties during the Stage 1 and (particularly) the Stage 2 processes as steps that might otherwise have been taken during the post-issue and pre-trial stages of a claim started under Part 7."

40. Mr Bacon derives support from what is said at paragraph 7.41 of the Protocol to the effect that by explaining in a counter-offer why a defendant has reduced a particular head of damage, the parties will be able to focus on those areas of the claim that are still in dispute. He says that this is consistent with what is stated at paragraph 3.4 of the PD8B to the effect that the purpose of a final hearing is "*to determine the amount of damages that remain in dispute between the parties*." The amount in dispute, submits Mr Bacon, is the difference between the figures in the claimant's schedule and the figures in the defendant's schedule as set out on the Part A Form. It is said, therefore, that the claim is issued not for the full sum originally claimed but for the balance of the sum in dispute. In other words, the open offers made at the conclusion of Stage 2 set the boundaries for the dispute to be resolved by the Judge. Thus he argues that the District Judges, (in three of the four appeals) in awarding less than the amounts proposed by the defendant, as recorded on the Part A Form, fell into error. Mr Bacon makes the point that the court has no jurisdiction to deal with matters that are not in dispute between the parties.

41. Mr Bacon also places reliance upon the column in the Stage 2 Settlement Pack which is headed "Amount in dispute." I do notice, however, that there is no such column in Form Part A. Be that as it may, Mr Bacon asks rhetorically what is the purpose of

telling the court what offers and counter-offers have been made if not to explain what is in dispute. This is the mechanism by which the court is provided with an *identified* dispute and, however tempting it might be, a court is not permitted to go behind the concessions made by the defendant or in some other way to unpick the admissions.

42. Mr Bacon is, however, forced to concede that if the Protocol and the Stage 3 hearing is to be approached in this way, of necessity, the word 'offer' cannot be allowed to have its ordinary (legal) meaning. It is trite law that an offer only becomes legally binding when it is accepted. Nevertheless, Mr Bacon argues that in the context of the Protocol and its stated purpose, offers made by the defendant at Stage 2 should be deemed to take effect as admissions at Stage 3. He says that only if this construction is adopted will the Protocol operate as intended. Mr Bacon submits that a court should not construe the word 'offer' narrowly, in a strict legalistic sense but it should be interpreted in its proper context as meaning something akin to a conceded amount or figure. In the course of his oral submissions, Mr Bacon argued that the only formal offer was that contained in the Part B Form being equivalent to a Part 36 offer and not being shown to the Court until the conclusion of the hearing. In support of the submission, Mr Bacon relies upon CPR 36.25 which defines the offer set out in the Part B form as being a "Protocol offer". At CPR 36.28 it is stated that a Protocol offer must not be communicated to the court. This, says Mr Bacon, is to be compared and contrasted with the Part A offers which are, of course, shown to the court.

43. As to the question of need, Mr Bacon submits that this was not a 'live' issue at the hearings before the District Judges. He advances essentially three arguments to support his submission that the District Judges were wrong to reject the claims for cost of hire (and in *Wareham* to limit the award to the offer made by the defendant).

44. First, Mr Bacon says that it is incumbent upon a defendant to raise the issue of need at Stage 2 if the intention is to put need in issue. In support of this argument, he relies upon the wording at paragraph 7.41 to the effect that the purpose of the defendants making counter-offers is to enable the parties to focus upon matters which *remain in dispute*. He draws further support for this proposition from the notes to PD8B to the effect that Stage 1 and, particularly, Stage 2 are analogous to the pre-trial status of a claim so that by the time of Stage 3, the areas of dispute have been identified.

45. Mr Bacon says that if in any of these cases, at Stage 2 the defendant had called into question need, then it would have been open to the claimant to file a short statement justifying the need for an alternative vehicle during the repair period. He says that it would be futile for a claimant to file a statement at the beginning of the Stage 2 process given that, in most cases, need is not in dispute. Moreover, he relies upon the provision in the Protocol which suggests that in most cases, witness statements will not be necessary. It should not therefore be the case that a claimant should be required to file a statement justifying need at the commencement of the Stage 2 process, as a matter of course.

46. Whilst Mr Bacon acknowledges that need does not prove itself (although in his written argument, he suggests that there is a rebuttable presumption that need of a replacement vehicle is presumed), he argues that the point only arises when the defendant puts the matter in issue. To put it another way, if the defendant does not challenge need at Stage 2, then the claimant is entitled to assume that it is not in dispute and the Judges should likewise have proceeded on the assumption that need was not in issue.

47. The second point which Mr Bacon relies upon is that not only did the defendants not raise the issue of need at Stage 2 but by making a counter-offer in monetary terms,

they were overtly admitting need. He says that by referring only to the rates of hire as being in dispute and then making a specific offer, this constituted an unequivocal admission of need. If the defendants had wanted to put need in issue, then it was open to them to offer zero in relation to this head.

48. The third point is that it is manifestly unfair for a claimant, without forewarning, to be confronted at the Stage 3 hearing with a *new issue* which had not been touched upon at any earlier stage. The consequence of raising the issue at the Stage 3 hearing is that the claimant is in no position to meet the claim given that only evidence submitted in the Stage 2 Settlement Pack can be relied upon at the final hearing. In effect, it is said that it is unfair and unjust for the claimant to have been deprived of the opportunity to adduce evidence to demonstrate need.

49. As part of the unfairness argument, Mr Bacon points out that to raise the issue only at Stage 3 runs wholly contrary to the collaborative nature of the Protocol. He says that the whole purpose of the Protocol is to avoid technical points being raised at a late stage; and to flush out what is and is not in dispute at an early stage, as with pleadings in a Part 7 claim.

50. As a backstop position, Mr Bacon says that if there was a burden on the claimant to prove need at the Part 8 hearing, then it would have been open to the court to order that further evidence be filed pursuant to paragraph 7.1(3) of the Practice Direction to 8B and to adjourn the case accordingly. In dismissing the claims for hire, in circumstances where there was provision to order further evidence to be served, it is said that the District Judges in *Mulholland* and *Wareham* wrongly exercised their discretion and erred in law.

51. The further ground of appeal relates to the orders for repayment. Of course, this issue only arises if it is not accepted that the defendant's offers made at Stage 2 take effect as admissions in Stage 3. Mr Bacon argues that the payment of the offer of damages at the end of Stage 2 is a pre-condition to the claim remaining within the Protocol: at paragraph 7.75 it is said that if the defendant does not make the *non-settlement payment* at the end of Stage 2, *the claimant may give written notice that the claim will no long continue under this Protocol and start proceedings under Part 7 of the CPR*. Accordingly, it is said that this payment is not an *interim payment* which under the provisions of CPR Part 25 would ordinarily fall to be repaid in the event that the payment on account exceeds the final judgment sum.

52. Furthermore, it is argued that it is unfair to a claimant to hand money over on account (for example, General Damages for PSLA) and then to expect that claimant subsequently to repay part of the sum. It is also said that if sums are ordered to be repaid, there is likely to be satellite litigation whereby the defendant has to bring proceedings against individuals to recover sums paid out. There may also be contentious issues as between claimants and their solicitors on the basis that a claimant may contend that he has (legitimately) spent the money which was paid to him. Mr Bacon says that there is also a risk of conflicts of interest if adequate advice was not given by a solicitor to a claimant about the risk of repayment of part of the damages.

53. Coupled with the above, Mr Bacon contends that ordering repayment is contrary to public policy; that it undermines the intentions of the Protocol which is designed to deal with claims quickly and efficiently; and it would create confusion and uncertainty for claimants.

Respondents' submissions

54. Without, I hope, doing any disservice to the submissions of either Mr Mallalieu or Mr McNair, I propose to summarise jointly their submissions. There is, of necessity, a considerable degree of overlap as regards both their written and oral submissions.

55. The primary submission is that the language used in the Protocol must be given its natural and ordinary meaning. Thus, the words *offer* and *counter-offer* which appear frequently in the Protocol are well understood and are not susceptible to any interpretation other than their plain meaning. Specifically, it is said that it is not legitimate to interpret an offer made by a defendant as being tantamount to an admission. It is argued that if the Protocol intended that an offer made by a defendant should constitute a *binding admission* then such would be spelt out, whether in the definition section or elsewhere. It is pointed out that in the definition section, the term *admission* is used but only in relation to an admission of liability. It is instructive, say the defendants, that nowhere else in the Protocol does the word *admission* appear: this makes it plain that an offer or counter-offer is to be distinguished from what amounts to an admission. The point is also made that an admission of liability, as defined in the definition section, is to be treated as an admission that the defendant has caused *some loss to the claimant, the nature and extent of which is not admitted*. That being so, it would, it is said, do violence to the language used to treat the use of the words *offer* and *counter-offer* later in the Protocol as amounting to binding admissions. There would need to be express provision for such to take effect.

56. Further, it is argued that CPR 14.1B cannot be reconciled with paragraph 7.46 of the Protocol if offers are to be treated as admissions. The former which was introduced as an amendment at the same time as the original version of the Protocol makes provision for the withdrawal of admissions which can only be done by giving notice in writing.

In contrast, paragraph 7.46 of the Protocol permits the withdrawal of an offer at any stage, without any consent being required. As is pointed out, if an offer was to be treated as an admission, paragraph 7.46 would appear to be of no application.

57. Reliance is also placed upon the wording of paragraph 7.41 of the Protocol. There, reference is made to what is effectively an 'open' offer and a 'final' offer. A 'final' offer is accepted by the claimant as being just that. Yet the 'open' offer is said to be a binding admission. The point is made that if such a distinction is to be drawn, it is somewhat surprising that the same language is used.

58. In relation to the ground of appeal that the claims for hire charges should not have been dismissed (or limited), the defendants, in the first instance, rely upon the judgment in *Singh v Yaqubi* [2013] EWCA Civ 23. Pill LJ made it clear in that case that it is for the claimant to prove that a replacement car was reasonably necessary. In other words, the need for a replacement car is not self-proving. Accordingly, it is said that notwithstanding the existence of the Protocol, the burden remains on a claimant in every case to prove need.

59. The defendants say, therefore, that the burden is on the claimant to adduce brief evidence at Stage 2 as to need. It is argued that this is so even if the defendant does not dispute need, and, indeed, even if the defendant makes an offer in relation to hire charges. It is accepted that in the majority of cases, a claimant will have little difficulty in discharging the burden of proof. Moreover, it is said that it is likely that the defendant will not challenge such evidence save in a rare case.

60. Of course, in many cases there will be settlement at Stage 2. The defendants contend, however, that if the case has not settled at Stage 2 and proceeds to a Stage 3 hearing

and if the claimant has not produced any evidence to demonstrate need, then that is of itself, fatal to the claim for hire charges.

61. As to the proposition that the District Judge should have adjourned the matter to enable the claimants to file evidence as to need, it is said that such would be inconsistent with the working of the Protocol, in that it is intended to be as streamlined and cost-effective as possible. To have an adjournment with increased costs would not meet the aims and objectives of the Protocol for the disposal of low value claims.

62. In relation to the final ground of appeal, namely the question of repayment, it is contended that there is nothing within the provisions of the Protocol to suggest that the non-settlement payment is anything other than an interim payment and subject to the usual rules. Some reliance is placed upon the wording of paragraph 7.70 which is concerned with the non-settlement payment: the sum to be paid is net of 'any previous interim payment'. It is argued that use of the word 'previous' is otiose unless the non-settlement payment is regarded as an interim payment.

63. Furthermore, it is argued that, as a matter of fairness, if the claimant has not done better than the final offer made by the defendant, it cannot be right that the claimant should be allowed to retain a sum in excess of the amount awarded by the court. This would be an unmerited windfall.

64. Nor is it accepted that by ordering repayment in circumstances where the final offer was higher than the award made by the court it causes any difficulty in the relationship between the claimant and his solicitor. In practice, it is said that claimants can be told that this is money on account and that it must not be spent until such time as the proceedings are concluded. Furthermore, it is said that under the SRA Accounts Rules

2011, a solicitor would be entitled to retain an interim payment until the final resolution of the case.

Discussion

Offer/admission

65. There can be no doubt but that the aims and objectives of the Protocol are laudable and, wherever possible, they are to be achieved. In summary, early resolution of low value RTA claims for personal injuries with prompt payment of damages and costs and if settlement without court proceedings is not possible, then, at least, a narrowing and defining of the issues. In addition, the Protocol has the distinct advantage of a fixed costs regime so that there is rarely, if ever, any scope for argument about costs; and recovery of costs is proportionate to the low value of the claims. It is also plain that the Protocol encourages cooperation between the parties in order to achieve a sensible and a prompt settlement: this is evidenced, for example, by the Preamble at paragraph 21 which talks in terms of *the behaviour the court expects of the parties*.

66. It is not unreasonable, therefore, to seek to apply the Protocol in a way which best serves the furtherance of its objectives. That said, it is not open to this court (or, indeed, any court) in any way to re-draft the Protocol because that might assist in the efficient or effective resolution of claims. This court must interpret the Protocol without changing the express words which have been used by those who drafted it.

67. It is therefore necessary briefly to identify the principles of linguistic interpretation which should be applied. For this purpose, I gratefully adopt what was said by Males J in *Alex Terry Patterson v MOD* [2012] EWHC 2767 (GB) at paragraph 18:

(1) The task of the court is to ascertain the intention of the legislator expressed in the language under construction. This is an objective exercise.

(2) The relevant provisions must be read as a whole, and in context.

(3) Words should be given their ordinary meaning unless a contrary intention appears.

(4) It is legitimate, where practicable to assess the likely practical consequences of adopting each of the opposing constructions, not only for the parties in the individual case but for the law generally. If one construction is likely to produce absurdity or inconvenience, that may be a factor telling against that construction.

(5) The same word, or phrase, in the same enactment, should be given the same meaning unless the contrary intention appears.

Males J also cited what was said by Lord Steyn in *Attorney General's Reference (No.5 of 2002)* [2004] UKHL 40, [2005] 1 AC 167 at [31]:

"No explanation for resorting to purposive interpretation of a statute is necessary. One can confidently assume that Parliament intends its legislation to be interpreted not in the way of a black letter lawyer, but in a meaningful and purposive way giving effect to the basic objectives of the legislation."

68. With those principles in mind, the first issue which arises on this appeal is whether it is possible to construe the words *offer* or *counter-offer* as equating to admissions in the context of the Protocol. It is not difficult to understand why Mr Bacon seeks to argue

that that is the interpretation which should be applied. If the offers and counter-offers do take effect as admissions, the Claimant has the comfort of knowing that if the matter proceeds to a Stage 3 hearing, the amount awarded will not be less than that which was offered by the defendant and, furthermore, the defendant would not be in a position to raise matters (such as the need for hire) at a Stage 3 hearing, if such has not been flagged up during Stage 2. Coupled with these matters, it is a compelling argument to say that what was intended by the Protocol was for a Stage 3 hearing to be concerned only with the difference between the parties' respective positions rather than considering damages *de novo*. In this regard, Mr Bacon is entitled to rely upon the wording of the PD to Part 8 where it is said that the court will determine *the amount of damages that remain in dispute between the parties*. Mr Bacon is also entitled to rely upon what the editors to the White Book say in the introduction to PD8B to the effect that Stages 1 and 2 are steps which would generally be taken during the post-issue and pre-trial stages of a Part 7 claim.

69. In my judgment, however, it is quite impossible to construe the use of the words *offer* and *counter-offer* as amounting to admissions. There are a number of compelling reasons as to why I reach this conclusion which may conveniently be summarised as follows:

(1) The ordinary meaning of *offer* and *counter-offer* is far removed from, and in stark contrast to, an *admission*.

(2) It is a matter of trite law that an offer remains an offer unless and until it is accepted when it then becomes binding.

(3) If it had been intended that an *offer* should be equated to an *admission*, it would have been a simple matter for those who drafted the Protocol to incorporate words to

the effect that once a defendant has made an *offer* or *counter-offer*, that is deemed to be an *admission* that the particular head of claim is worth at least as much as the *offer/counter-offer* (of note, the word *admission* does appear in the definition section of the Protocol where there is reference to an "admission of liability").

(4) The word *offer* is used throughout the Protocol whether reference is being made to individual offers, an 'open' offer at the end of Stage 2 or a 'final' offer at the end of Stage 2. It is impermissible to construe the 'final' offer to be a formal offer (for it cannot be anything other than that) but to interpret the word *offer* used in other contexts as being an *admission*. The same word in the same piece of drafting should be given the same meaning unless there is a clear intention to the contrary.

(5) The provisions relating to the withdrawal of admissions made under the RTA Protocol set out at CPR 14.1B would make no sense if they applied also to *offers* because such would mean that an offer could only be withdrawn in writing before commencement of proceedings or with the permission of the court or the consent of the parties after commencement of proceedings but the Protocol at paragraph 7.46 provides that a party can withdraw a Stage 2 offer without any consent or permission being required. As Mr Mallalieu puts it, if the *offer* were an *admission*, it would be subject to conflicting provisions as to the ability to withdraw it.

70. Accordingly, in my judgment, at no time is a defendant bound by any offer or counter-offer made unless, of course, accompanied by words such as *agreed*. Equally, a court at Stage 3 is not in any way bound by offers made by the defendant at the end of Stage 2. To use Mr Bacon's words, the open offers in relation to each head of damage do not set the boundaries for the assessment of quantum. Of course, it may well be helpful for a court to know what a defendant is prepared to offer in relation to each head and

this may inform the court's approach but a court is required to carry out its own assessment and, if appropriate, a court is entitled to make an award which is less than an offer made by the defendant at the end of Stage 2. I should add that the fact that the offer is an 'open' one does not give the offer any special status: as Mr Mallalieu points out, open offers feature not infrequently in litigation and are now (for example) a mandatory part of detailed assessment of costs proceedings (see CPR 47 PD8.3).

Proof of need

71. Whatever interpretation is placed upon Lord Mustill's dictum at paragraph 167 of *Giles v Thompson* [1994] 1 AC 142, I accept that the law is that it is for a claimant to prove that a replacement car was reasonably necessary (*Singh v Yaqubi* [2013] EWCA Civ 23). Accordingly, and as with every other item of loss or damage, the evidential burden rests with the claimant. The need for a replacement vehicle is, therefore, not 'self-proving'.

72. But the fact that the burden is on the claimant to prove the need for a replacement vehicle is not necessarily an answer to this ground of appeal. It is merely the starting point. The question which has to be considered is what is the effect of the defendant not challenging need at any time during the Stage 2 process.

73. Although the Settlement Pack and Response are (self-evidently) not pleadings, they do bear certain similarities in that their purpose is for each party to set out their case. It is, therefore, not unhelpful to look at the rules governing Statements of Case in CPR Part 16. CPR 16.5 is concerned with the contents of a defence. At sub-paragraph (3):

> A *defendant who* -
>
> *(a) fails to deal with an allegation; but*

(b) has set out in his defence the nature of his case in relation to the issue to which that allegation is relevant;

shall be taken to require that allegation to be proved.

At sub-paragraph (5):

Subject to paragraphs (3) [and (4)], a defendant who fails to deal with an allegation shall be taken to admit that allegation.

74. It is also instructive to look at what is said in the Practice Direction to Part 16 in relation to schedules of loss. At paragraph 12.2:

Where the claim is for personal injuries and the claimant has included a schedule of past and future expenses and losses, the defendant should include in or attach to his defence a counter-schedule stating:

(1) which of those items he -

(a) agrees, (b) disputes, or (c) neither agrees nor disputes but has no knowledge of, and

(2) where any items are disputed, supplying alternative figures where appropriate.

75. It seems to me that what underpins these rules and practice direction is that it is incumbent upon a defendant to set out, with clarity, the precise nature of his defence: what is agreed, what is disputed and, if disputed, why, as well as indicating those matters upon which the defendant is unable to comment.

76. To take the analogy a step further: suppose a claimant in a Part 7 claim included in his schedule of loss the costs of hire of an alternative vehicle. And suppose too in the counter-schedule the defendant avers that the rate of hire was excessive and proffers an alternative figure. The case then comes on for trial. The defendant, for the first time, seeks to raise the issue of need and relies upon the lack of evidence to prove the same. Would he be permitted to do so not having raised the matter in advance of trial? Of course, if the claimant was present, he could be asked about need. In my view, however, it would not be permissible to allow the matter to be raised at that late stage, it not having been canvassed in the pleadings.

77. If that is the correct approach, then, arguably, it is of greater application in the context of the Protocol. It is instructive (again) to look at what is said at paragraph 7.41 of the Protocol:

> *The defendant must also explain in the counter-offer why a particular head of damage has been reduced. The explanation will assist the claimant when negotiating a settlement and will allow both parties to focus on those areas of the claim that remain in dispute.*

It follows that it is the intention of the Protocol that if a defendant wishes to raise an issue such as the need for hire, that is to be done at the time of the making of the counter-offer. To allow a defendant to raise the issue of need at Stage 3 runs entirely contrary to the notion that at the end of Stage 2 the parties should have clarity as to what remains in dispute.

78. Further, it seems to me that requiring the claimant to prove need in every case, even when it is not raised by the defendant does not sit easily with paragraph 7.11 which states that in most cases witness statements will not be required. The point is made on

behalf of the defendants that, in some instances, hire charges which come under the umbrella of 'vehicle related damages' will be dealt with outside the provisions of the Protocol. Accordingly, it will only be those cases where hire charges are being claimed within the Protocol that a witness statement will be required. Nevertheless, it seems to me that the fact that the Protocol anticipates that it will be comparatively rare that witness statements would be required tends to support the proposition that evidence will only be required when the issue, be it the need for hire or (for example) the need for care, is formally raised by the defendant at Stage 2.

79. Irrespective of the above, I regard it as inequitable and unfair for a defendant, for the first time, to raise the issue of need at the Stage 3 hearing. It seems to me that it is tantamount to trial 'by ambush'. It hardly needs to be said that to litigate in that way runs entirely contrary to the spirit of the Protocol, the *expected behaviour* of the parties and the intended collaborative approach.

80. In my judgment, it comes to this: to make an offer in respect of hire charges is not to admit the need for hire but not to challenge the need at Stage 2 is equivalent to saying that the claimant does not need formally to prove it. Such is the binding on the Court.

81. Finally, in relation to this ground of appeal, even if it were permissible for a defendant to raise the question of need at a Part 8 hearing, given the absence of any forewarning, in my judgment, the proper course would have been to adjourn to enable the claimant to file evidence to demonstrate need: this is permitted by paragraph 7.1(3) and paragraph 7.2 of the practice direction. As I have made clear, however, in my opinion, the defendant should be estopped from raising need at this very late stage.

Repayment of monies paid

82. It is important to emphasise that the offer which has to be paid at the end of Stage 2 by the defendant (the "non-settlement payment") is the defendant's final offer in Part B i.e. the closed offer which is not shown to the Judge. This offer might well be in excess of the "open" offer because a defendant may want to tempt a claimant with a higher sum to avoid a hearing or to try and obtain protection in costs. If the claimant's arguments, however, are correct, if a judge were to award less than the final offer, the defendant would not be entitled to recover the difference. If this is the approach to be adopted, then it seems to me that the defendant secures somewhat of a Pyrrhic victory in persuading a judge to award less than the final offer, save that the claimant would be ordered to pay the defendant's costs under the provisions of CPR 36.29. Furthermore, the question might be asked as to what a claimant has to lose by going to a Stage 3 hearing if, as a minimum sum, he will be entitled to retain the amount paid to him by way of a final offer. The only risk would be in relation to costs.

83. There is also illogicality in the claimant's analysis: the £1,000 paid as an Interim Payment would be repayable but not any sum in excess of that paid by way of a non-settlement payment.

84. In this judgment, I have already raised the issue of fairness. I do so again but, in this instance, it seems to me that fairness dictates that this ground of appeal should be rejected. It cannot be just or equitable that a claimant is entitled to retain a sum in excess of that which is awarded by the court at the end of a hearing. That would be, in my view, manifestly unfair to the defendant. I do not think that such was the intention of the Protocol. If the claimant chooses to go to a Stage 3 hearing, he must accept the risk that a court will award less than the non-settlement payment and that he will have to refund the difference.

85. In the final analysis, a Protocol offer is, in essence, what is now generally referred to as a 'Part 36 offer'. It is, after all, governed by CPR Part 36. Its purpose is the same, principally to obtain protection in costs. There is a difference in that under the usual provisions of Part 36, no money is in fact paid to the claimant but it seems to me that the same principles should apply.

86. Arguably, the closest analogy is a 'Payment into Court' pursuant to RSC Ord. 22 and CCR Ord. 11 which were largely superseded by Part 36. (Although there is still provision for payments into Court by virtue of CPR Part 37.) Under the old regime, if a Claimant (Plaintiff) did not recover more than the sum paid into Court, the Defendant was entitled to have the balance returned to him.

87. Accordingly, my view is that the non-settlement payment should be treated as an interim payment and, therefore, governed by CPR Part 25.

88. Nor do I accept that there are any particular practical problems in ordering a repayment. The claimant's solicitors can either retain the interim payment (without being in breach of the solicitor's rules) or if it is paid out to the claimant, there will be no difficulty in explaining that it must be preserved in the event that there is an order for repayment of part of the sum.

Decision

89. It seems to me that the most sensible way to proceed is for me to consider the issues of hire charges afresh rather than remitting the cases to the District Judges for re-determination.

90. Accordingly, having found that the decisions in *Mulholland, Wareham* and *Purvis* were wrong, and there being no evidence from the defendants, the claimants' claims for hire fall to be allowed in full. The costs orders should also be set aside.

91. In *Saul*, the appeal fails and the order for repayment of the sum of £348 stands.

92. It is to be hoped that counsel will be able to agree orders in each of the four cases.

93. Finally, I wish to express my gratitude to all counsel for their helpful and skilful written and oral arguments.