General Form of Judgment or Order

In the County Court at Reigate	
Claim Number	B11YM862
Date	31 October 2016

THE COUNTY COURT

MISS ADRIANNA CHMIEL	**1st Claimant** **Ref** 149691/CHMIEL/AJM
MR DAMIAN CHIBWANA	**1st Defendant** **Ref** CSW JDZ 46018 56274
MR LLOYD WILLIAMS	**2nd Defendant** **Ref** DPH/GR31/831195/1

Before His Honour Judge Simpkiss sitting at the County Court at Brighton, William Street, Brighton, East Sussex BN2 0RF

Upon handing down judgment and

Upon the Courts own motion. The Court has made this order of its own initiative without a hearing. If you object to the order, you must make an application to have it set aside, varied or stayed within 7 days of receiving it

IT IS ORDERED THAT

1. Judgment formally handed down;

2. The appeal is dismissed;

3. The Appellant is to pay the Respondent's cost to be assessed by summary assessment;

The parties are to file the Respondent's costs schedule and their respective submissions in relation to it by 4.00pm on 22 November 2016;

The papers to be submitted to His Honour Judge Simpkiss to deal with the assessment on paper.

Dated 27 October 2016

Weightmans Llp
100 Old Hall Street
Liverpool
L3 9QJ
718100 LIVERPOOL 16

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IN THE COUNTY COURT AT BRIGHTON **Claim No. B11YM862**

27th October 2016

Before:

HIS HONOUR JUDGE SIMPKISS

Between:

MISS ADRIANA CHIMEL

Appellant

-v-

(1) DAMIAN CHIBWANA

(2) LLOYD WILLIAMS

Respondents

Counsel for the Appellant	Matthew Winn-Smith
Counsel for the First Respondent	Paul McGrath
Counsel for the Second Respondent	Lionel Stride

Introduction

1. This is an appeal by the Claimant in these proceedings against the dismissal of the claim by District Judge Hammond on 14th January 2016. This was at a hearing to deal with the Respondents' applications to strike out the claim under CPR 3.4(2)(a) (b) as disclosing no reasonable cause of action or as an abuse of the process and alternatively for summary judgment under CPR 24.2(a) (i) or (iii).

Background

2. The claim arises out of a road traffic accident on 30th January 2014 at about 8.00pm, when the Appellant's car collided with the First Defendant's car as she emerged from a road onto a T junction. At the time of the accident there was a van which belonged to the Second Respondent parked on the right side of the road down which the First Respondent was driving at the left hand corner as the Appellant approached the T junction.

3. Following the accident, the First Respondent alleged that it had been caused by the Appellant's negligent driving and initiated a claim under the provisions of The Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the Portal"). This was done by submitting a Form RTA1 Claim Notification Form ("CNF") to the Portal and serving the Appellant's insurers Tesco Insurance. A form RTA2 was served on the Appellant.

4. The RTA1 contains a section which requires the defendant's insurer to complete. This includes the ticking of a box to indicate if the defendant admits:

> *Accident occurred*
> *Caused by defendant's breach of duty*
> *Caused some loss to the claimant, the nature and extent of which is not admitted*
> *The defendant has no accrued defence to the claim under the Limitation Act 1980*

5. The box admitting the above was ticked on the RTA1 response form. The RTA2 form for the defendant contains no provisions for a response.

6. In due course a settlement was agreed between the insurers for the Appellant and the First Respondent's solicitors and the matter was settled.

7. Following the settlement, the Appellant made a claim against the First Respondent in which she alleged that the accident was the fault of the First Respondent. She also made a claim against the Second Respondent, saying that the accident was caused by the negligent parking of the van on the corner.

8. This claim is the subject of these proceedings against the Respondents.

9. The Appellant's case before the District Judge was that her insurers did not have her actual or apparent authority to make any admission to bind her in respect of uninsured losses – ie her loss which she now wishes to claim from the First and Second Respondents. It was submitted that the tick of admission on the RTA1 response form is not to be construed as an admission by the Appellant but only by her insurer. Even if it is an admission, the effect is to be limited to the claim made under the Portal alone. It has no effect in relation to proceedings for uninsured losses by the Appellant, either against the First Respondent (who was a party to the Portal claim) or the Second Respondent (who was not a party).

10. The Respondents' positions are, for the most part, co-extensive, but there are differences. The issue of whether the admission in the Portal binds her in the claim against the Second Respondent gives rise to different factors and, even if it does not, the Second Respondent argues, for the purposes of the application under CPR 24(2) that the claim has no reasonable prospect of success because the position of the van is irrelevant to the accident, having regard to the Appellant's accounts of how it occurred.

The District Judge's decision

11. District judges usually have much more contact with Portal claims than any circuit judge or other appellate judge and District Judge Hammond's judgment refers to his knowledge and experience of the system. This should be respected.

12. The Appellant has not disclosed her insurance policy with Tesco Insurance, and therefore it is not possible to see what terms it contained. The District Judge, rightly in my judgment, inferred that it would contain a provision which would give the insurer conduct (including admitting liability) of claims against the insured. This was

so in the case of **Ullah v John** 2YJ0830 (a decision of DJ Lana Wood on 20th March 2013). As the District Judge pointed out, it would be very unusual for this not to be a contractual term as between the insured and the insurer. At the appeal hearing Mr. Winn-Smith, counsel for the Appellant, conceded that the insurer did in fact have actual authority to complete the Portal response and to make an admission in it. He submitted that this was a limited admission for the purposes of the Portal alone.

13. Next, the District Judge held that because there was a need to avoid a multiplicity of proceedings, and "*the double jeopardy of conflicting decisions on the same facts*" the status of an admission of liability in the Portal has the status of an admission of liability for all purposes connected with the accident. His decision was made because of the need for the court to exercise its jurisdiction in every cause or matter before it so as to secure: (a) as far as possible, all matters in dispute between the parties are finally determined and (b) as far as possible, all multiplicity of legal proceedings with respect to those matters is avoided.

14. He then decided obiter, that CPR 14.1B applied to this admission made in the Portal system and that there is no provision in the rules for it to be withdrawn in the current proceedings because, having been made, it had been acted upon by the parties compromising the claim. The only circumstance in which it could be set aside would be if fraud had been alleged. In my judgment, once a claim has been compromised under the Portal, it is a contractual settlement in the same way as any other and could be set aside on the grounds that contractual settlements could be set aside – fraud, mistake or misrepresentation. The District Judge's view was that CPR 14.1A did not apply because it was mutually exclusive to an admission to which 14.1B applied.

15. Finally, although he did not give any detailed reasons, he stated that he would have struck out the claim against the Second Respondent in any event because he was of

the view that the presence of the van on the road was not relevant to any cause of the accident on the Appellant's case. It would only have been relevant if it had obscured her view of the First Respondent's oncoming car so that she drove into it. Her case was that she saw the First Respondent's car and stopped before he collided with her.

Permission to appeal out of time

16. The notice of appeal was sent to the court outside the 21day period and the Appellant therefore needs permission to bring this appeal out of time. At the time of considering the appeal on paper I gave permission to appeal because the box indicating that the notice had been served in time had been ticked. The Respondents made an application to set aside the permission on the grounds that the decision to extend time should not have been made. I indicated that I would dispose of this issue at the hearing of the appeal on the basis that I had not granted permission – as my previous decision had been made on paper the Respondents were entitled to an oral reconsideration of it.

17. The principles are the same as those which apply to applications for relief from sanctions which are set out in **Denton v TH White** [2014] EWCA Civ 906 (**R (Hysaj) v Secretary of State for the Home Department** [2014] EWCA Civ 1633). The application to extend time is not an application for relief from sanctions but is treated as analogous (Moore-Bick LJ at paragraph 36 in **Hysaj**). There are therefore 3 steps for the court to consider:

    a. is the failure to bring the appeal in time serious and significant?

    b. If so, is there a good reason for it?

    c. If not, the court must then evaluate all the circumstances of the case, so as to enable it to deal justly with the application including the factors at (a) and (b) in CPR 3.9(1) – which are for litigation to be conducted efficiently and at

proportionate cost and to enforce compliance with practice directions and orders.

18. The notice of appeal did not request an extension of time for appealing as a box was ticked to indicate that the Appellant was filing the notice of appeal in time. This was not correct. The 21 days for appealing expired at 4pm on 4th February 2016. Mr. Moore, solicitor for the Appellant, says that the notice was "*forwarded*" to the court on 4th February 2016 but he does not say at what time. The court file confirms this and that the letter was received on 8th February 2016.

19. In his statement dated 12th May 2016 he appears to accept that it was filed *"1-2 days late"*. In any event the correct fee (£170) was not paid because the fee had increased from £140, by coincidence, on the day when he filed the notice. In fact, the correct fee was not received by the court until 11th February 2016 (the date of the court stamp). No reason is advanced by the Appellant's side why the notice was not filed within the required period but it appears to have been an oversight.

20. In my judgment it is important that notices of appeal are served on time, because the judgment or order under appeal is meant to be final, in the sense of disposing of that stage of a case or, as in this case, disposing of the case entirely. Parties should be able to assume that once time for appealing has expired that order is not going to be challenged.

21. In the context of this case the delay of 4 days until deemed filing on 8th February 2016 (in the context of it having been received by the court on that date would not in my judgment be serious or significant. The problem is that the correct fee was not in fact paid until 11th February. This is a more significant delay but, in the context, not a serious one and, for the purposes of the Denton test, not in my judgment significant one.

22. What is the reason for the delay? None has been given. There may be one but in the absence of any explanation I cannot find that there is a good reason. If it was due to the oversight of the increase in fee, then this might be a reason that the court should forgive, but only if the correct fee is sent to the court immediately. That didn't happen and therefore there is no good reason for the delay.

23. I now turn to the third stage which doesn't in fact arise because I have found that the delay was not serious or significant. The court service has not been prejudiced by the delay and it cannot really be said that other court users have been inconvenienced as no hearing date has been lost. The consequences of refusing permission would be that the Appellant could not argue the appeal (which I have decided on paper was one which had a real prospect of success). Against that, the Respondents (insurance companies) might say that they have been delayed in closing their files. If the appeal is successful then the ultimate resolution of these cases might have been delayed. I first saw the appeal on 18th April 2016, and made an order which was then sent out to the parties. I gave directions for service of an appeal bundle on the Respondents. The delay has been the extra time that it took to put the papers before me, or another circuit judge, as a result of the failure to pay the correct court fee. It would be unjust and disproportionate to refuse permission to appeal in this case. Furthermore, the point raised has given rise to several other decisions at District Judge level and it is desirable that there should be a decision at a higher level which is a good reason for extending time for appealing.

24. I therefore accede to the application to extent time for appealing and now turn to the substantive appeal.

The Appeal

25. The starting point is the Portal protocol. The following provisions are relevant:

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) ....

1.4 Subject to paragraph 5.1 the standard forms used in the process set out in this Protocol are available from Her Majesty's Courts and Tribunals Service ("HMCTS") website at www.justice.gov.uk/forms/hmcts:

(1) Claim Notification Form ("Form RTA1 1 – referred to in this protocol as "the CNF");

(2) Defendant Only Claim Notification Form ("Form RTA 2");

(3) ....

1.1 In this Protocol:

(1) "admission of liability" means the defendant admits that:

(a) the accident occurred;

(b) the accident was caused by the defendant's breach of duty;

(c) the defendant caused some loss to the claimant, the nature and extent of which is not admitted; and

(d) the defendant has no accrued defence to the claim under the Limitation Act 1980.

(6) "claim" means a claim, prior to the start of proceedings, for payment of damages under the process set out in this Protocol;

(7) "claimant" means a person starting a claim under this Protocol unless the context indicates that it means the claimant's legal representative;

(10) "defendant" means the insurer of the person who I s subjected to a claim under this Protocol , unless the context indicates that it means:

(a) *the person who is subject to the claim;*

(b) *the defendant's legal representative;*

(c) *the Motor Insurer's Bureau ("MIB");*

(d) *a person falling with the exceptions in section 144 of the Road Traffic Act 1988 ("a self-insurer");*

26. The Protocol applies to claims where damages arise from a road traffic accident after 31st July 2013, which include damages in respect of personal injury, which are no would not normally be allocated to the small claims track.

27. Section II of the Protocol makes provision for service of various communications via a Portal address or by email and a strict timetable for the steps to be taken by each party during the Portal procedure. This starts when the CNF is served on the correct defendant. Paragraph 5.7 enables a claimant who cannot comply with the Protocol before the expiry of the Limitation Period to issue proceedings in court and then apply for a stay which the claim is made through the Protocol.

28. Section III of the Protocol deals with the stages of the process.

29. Stage 1 covers matters such as completion and service of the CNF and the Defendant Only CNF and the Insurer's Response. If inadequate mandatory information is provided this is a valid reason for the defendant to decide that the claim should no longer continue under the Protocol (Paragraph 6.8(1).

30. Paragraphs 6.10 and 6.11 are beneath the heading "*Response from the insurer*". The deal with the requirement of "*the defendant*" to send an acknowledgment of and to complete the "*Insurer Response*" section of the CNF and send it to the claimant within 15 days. This period is extended to 30 days where no insurer is identified and the claim falls to be dealt with by the MIB.

31. Paragraph 6.15 provides as follows:

6.15 the claim will no longer continue under this Protocol where the defendant, within the period in paragraph 6.11 or 6.13:

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

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

(3) does not admit liability; or

(4) notifies the claimant that the defendant considers that:

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

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

6.16 Where paragraph 16.15 applies the claim will proceed under the Pre-Action Protocol for Personal Injury Claims starting at paragraph 6.3 of that Protocol (which allows for a maximum of three months for the defendant to investigate the claim) except where paragraph 6.15(4) applies the claim will proceed under paragraph 5.1 of that Protocol.

32. Stage 2 covers the damages claimed and includes provisions relating to medical reports, non-medical expert reports, specialist legal advice and interim payments. Paragraphs 7.32 deal with the service of the Stage 2 Settlement Pack Form and the response to it. The procedure will not proceed to this stage if it has dropped out of the Portal at stage 1. If it drops out at any time, then those steps that remain to be completed will become redundant.

33. The Stage 2 Settlement Pack contains the material which will enable to defendant to consider whether to make an offer of settlement and he has 15 days from receipt to do so. There is then a further period of 20 days for the parties to negotiate in order to reach a settlement and this can be extended by agreement as can the period for

making an initial offer. During the prescribed period (or agreed extended period) the defendant must either accept the claimant's offer made in the Stage 2 Settlement Pack or make a counter-offer using the Settlement Pack Form.

34. Paragraph 7.39 provides that a claim will drop out of the Protocol if the defendant gives notice to the claimant within the prescribed period that he considers that if proceedings were started the small claims track would be appropriate or if he withdraws the admission of causation as defined in paragraph 1.1(1)(c) (set out above). The claim will also drop out of the Protocol if the defendant does not respond to the Stage 2 Settlement Pack within the prescribed time.

35. Paragraph 7.47 requires the defendant to pay the agreed damages (less certain deductions) plus fixed costs within 10 days of the settlement. There is provision where the settlement needs to be approved by the court.

Ground 2 - 5 – issues arising out of admissions in Portal affecting both Respondents

36. It is convenient to deal with the issues affecting both Respondents first and in any case is logical since if there is no binding admission at all issue 1 doesn't arise.

37. The Appellant submits in the grounds of appeal and by Mr Winn-Smith's skeleton argument that:

    a. the insurer had no actual authority to make the admission so as to bind the Appellant in relation to claims (whether made by her or against her) outside the Portal claim or in relation to uninsured claims;

    b. the insurer had no ostensible authority to make such admissions;

    c. District Judge Hammond's view that the double jeopardy rule and the principle that a multiplicity of claims should be avoided had any relevance was misconceived;

d. The District Judge was wrong to find that the admissions could not be withdrawn.

38. Firstly, actual authority and the scope of any actual authority.

39. As I have already said, most motor insurance policies give the insure actual authority to deal with any claims made against the insured driver. The problem in this case is that the Appellant, for reasons that have not been disclosed, decided not to disclose her policy with Tesco Insurance. No reason has been given why it could not have been produced. In submissions Mr. Winn-Smith conceded that the insurer had actual authority to make admissions and to settle the claim. Absent the policy, it is not open to him to argue that the insurance contract restricts the actual authority of the insurer. Nor has it been suggested that the First Respondent or his legal representatives were given anything to put them on notice that there was a restriction. Any argument about actual or ostensible authority must therefore depend on the terms of the Portal.

40. Mr. Winn-Smith criticised the District Judge's finding that there was actual authority because he failed to take into account an implied term in insurance contracts that the insurer will not prejudice the rights of the insured in the exercise of its subrogated rights. He referred to passages in **Chitty** (31-056) and to **England v Guardian Insurance Ltd** [2000] Lloyd's Rep IR404. The passage in **Chitty** is not relevant to the issue of actual authority as it concerns ostensible or apparent authority. England, and the passage in **McGillivray on Insurance Law** 13th ed paragraph 24-059 do not assist in this case. They concern the contractual relationship between insured and insurer and not the effect of any admission with regard to third party claimants or defendants. They also relate to the exercise of the insurer's rights of subrogation and have nothing to do with its authority to make admissions or to settle or compromise

proceedings. If they did, and there was a breach, then the insured's remedy is to sue the insurer.

41. **Taylor v. O. Wray and Co** [1971] 1 Lloyds Rep 497 and **Capon v Evans** 11th April 1986 are of no relevance to the authority issues. The issue in those cases was whether the settlement of the insured claims prevented the insured from recovering his uninsured losses in subsequent proceedings. In **Taylor** it was determined that he could because of the wording of the settlement of the insured loss claim made it clear that the settlement was confined to that claim, and in **Capon** the negotiations between the claimant and the defendant's insurers were in the context that everyone was aware that there were separate ongoing claims in relation to the different classes of loss.

42. I therefore reject ground 2 of the appeal. The District Judge rightly found that there was actual authority for the insurers to reach a settlement of the claim between the Appellant and the First Respondent arising out of the accident. If the authority was limited in some way (ie to insured claims) then the Appellant has failed to demonstrate this by producing the policy. If, as the Appellant asserts in her Reply in these proceedings, she did not consent to the insurers compromising the claim by the First Respondent, then this was not made known to the First Respondent and it has not been shown that this was an option open to her on the terms of her insurance policy. Even if she could have argued that there was an implied term of her policy, I cannot see how the court could imply any such term without seeing the policy. Her remedy, if she had one, is to sue her insurer for breach of contract.

43. If the insurer had actual authority to make the admission, that determines the authority issue with regard to the First Respondent.

44. I now turn to the apparent or ostensible authority issue.

45. Apparent or ostensible authority arises as a matter of agency law. Mr. Winn-Smith referred to paragraph 31-056 of Chitty 32nd ed:

"The authority will be that which the agent reasonably appeared to have to the third party, taking into account the manifestations of the principal, the implied authority normally applicable in the circumstances or to a person in the agent's position, or both."

46. I was referred to 2 cases in which this, and the other issues raised in this case, were discussed: **Malak v Nasim** March 2015 District Judge Lana Wood and **Ullah v Jon** 20th March 2013 District Judge Parker. DJ Wood's judgment was reserved. DJ Parker found that the insured's Portal admission was binding in subsequent proceedings and that CPR 14.1A applied. DJ Wood found that the Portal admission was not binding in respect of uninsured losses and that CPR 14.1B applied but did not permit the claimant in that case to withdraw the admission and that CPR 14.1A did not apply.

47. **Ullah** was an application for summary judgment (following an application to amend the defence to plead the admission). The claim arose out of a road accident between vehicles driven by the claimant and the defendant. The defendant issued a claim against the claimant through the Portal. Before any admissions were made, the claimant's solicitors wrote a personal injury protocol letter to the defendant's solicitors. Therefore, before any admissions were made both drivers were alleging that it was the other's fault and had intimated claims. The claimant's insurers then made admissions through the Portal. Shortly afterwards the insurers purported to withdraw the admission, unsuccessfully. They then settled the defendant's claim at stage 2 and payment was made. Before the settlement, and apparently without knowledge of the Portal proceedings, the solicitors for the claimant issued a Part 7 claim against the defendant claiming damages on the basis that the accident was the

defendant's fault. As by that time the claimant had admitted liability in the defendant's Portal claim the application was initiated for summary judgment against the claimant.

48. In **Ullah** the claimant's insurance policy was before the court and the terms gave the insurers to conduct the defence or settle any third party claim on behalf of the insured. Clause 3.3 provided "*we may admit liability on your behalf or on behalf of anyone else insured by this policy*". District Judge Parker found, rightly in my judgment, that the insurers had actual and ostensible authority to make the admission. He then went on to consider the nature of the admissions and whether they could be withdrawn. It does not appear that the cases of **Taylor** or **Capon** were cited. It is not pleaded in the present case, nor is there any evidence advanced, that the First Respondent or anyone other than the Appellant or her insurers had any thought that it might be alleged that the accident was the fault of the First Respondent. Furthermore, there was no suggestion in the CNF response that there was an allegation of even contributory negligence. If there had been then the claim would have dropped out of the Portal at that stage.

49. In **Malak** the defendant similarly submitted a claim against the claimant through the Portal. As in **Ullah** and also the present case, the claimant's insurers ticked the box in the CNF response section indicating that they were the contractual insurers and that the defendant admitted the accident had occurred, was caused by the claimant's breach of duty and had caused some loss. It was common ground that the insurer had the claimant's authority to make the admission "*within the Portal*" and that there was a right to make the admission in the insurance contract. The defendant's claim was subsequently settled through the Portal and payment made.

50. Following the settlement and payment the claimant submitted his own claim against the defendant through the Portal – as in this case. Liability was not admitted and the claim therefore left the Portal and in due course the claimant issued proceedings for personal injury and also damage to his vehicle. The defendant denied liability and alleged that the claimant was bound by the admission in the defendant's Portal claim. The application before DJ Wood was an application to set aside a previous order by a DDJ to strike out the claim. Similar issues therefore arose as arise in the present case. An application also arose whether the claimant could withdraw his admission. District Judge Wood decided that there was actual authority but limited to the actual claim and no further. She did not deal with the issue of apparent or ostensible authority.

51. The insurer is conducting the negotiations under the Portal and, for those purposes, must be taken to have apparent or ostensible authority to made an admission (as this is specifically contemplated by the Protocol which cannot proceed further if an admission is not made). The insurer or its solicitors are handling the claim as agent for the insured and must be taken to have authority to compromise it as a solicitor would acting in proceedings. Therefore, any admission made in the Portal must at the very least be made by the Portal defendant's insurer with apparent or ostensible authority.

52. The real issue isn't authority, but the extent to which the admission applies outside the Portal and this I now turn to the construction of any admission and whether it applies to uninsured losses and to claims against third parties.

53. District Judge Wood decided as follows:

    a. the admission in the CNF response form was a true admission;

    b. She rejected the submission that it was only binding as between the insurer and the claimant to whom it was addressed because she said that CPR 14.1B

made provision for it to be withdrawn if the case left the Portal (ie because the insured would then become the defendant and could apply to withdraw);

c. the admission remains binding after the claim exits the Portal and is binding on the defendant (by which I assume she meant the party making it) unless it is withdrawn;

d. she departs from DJ Parker's finding and decides that it is only binding "*within the claim within which it was made*" and is not an admission of liability in relation to any counterclaim;

e. she accepts the submission of the claimant's counsel that the Portal is intended to be a low-cost resolution forum, within which claims may be settled for commercial reasons, without a careful examination of their merits, and perhaps without the insurer having had the opportunity of discussing the claim with the insured before submitting the response.

54. By implication, it follows from DJ Wood's decision that a claim against a third party who was not originally involved in the Portal claim would also be untainted by the admission. This decision would of course be obiter, but it is inconceivable that if the admission does not affect a counterclaim that it would prevent a claim against a third party.

55. District Judge Wood saw no difficulty with there being a different result in the Portal than in subsequent proceedings because the Portal did not give rise to a judicial decision. There would not therefore be 2 decisions in conflict. It was also an important factor in her decision that she decided that it was not open to the claimant to withdraw the admission under CPR 14.1B in subsequent proceedings.

56. First, I will deal with the CPR 14 point.

Admissions made before commencement of proceedings

57. **14.1A**

(1) A person may, by giving notice in writing, admit the truth of the whole or any part of another party's case before commencement of proceedings (a 'pre-action admission').

(2) Paragraphs (3) to (5) of this rule apply to a pre-action admission made in the types of proceedings listed at paragraph 1.1(2) of Practice Direction 14 if one of the following conditions is met –

(a) it is made after the party making it has received a letter before claim in accordance with the Practice Direction (Pre-Action Conduct) or any relevant pre-action protocol; or

(b) it is made before such letter before claim has been received, but it is stated to be made under Part 14.

(3) A person may, by giving notice in writing, withdraw a pre-action admission –

(a) before commencement of proceedings, if the person to whom the admission was made agrees;

(c) after commencement of proceedings, if all parties to the proceedings consent or with the permission of the court.

(4) After commencement of proceedings–

(a) any party may apply for judgment on the pre-action admission; and

(b) the party who made the pre-action admission may apply to withdraw it.

(5) An application to withdraw a pre-action admission or to enter judgment on such an admission –

(a) must be made in accordance with Part 23;

(b) may be made as a cross-application.

Admissions made under the RTA Protocol or the EL/PL Protocol
14.1B
(1) This rule applies to a pre-action admission made in a case to which the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ('the RTA Protocol') or the Pre-action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ('the EL/PL Protocol') applies.

(2) The defendant may, by giving notice in writing withdraw an admission of causation –

(a) before commencement of proceedings –

(i) during the initial consideration period (or any extension to that period) as defined in the relevant Protocol; or

(ii) at any time if the person to whom the admission was made agrees; or

(b) after commencement of proceedings –

(i) if all the parties to the proceedings consent; or

(ii) with the permission of the court.

(3) The defendant may, by giving notice in writing withdraw any other pre-action admission after commencement of proceedings –

(a) if all the parties to the proceedings consent; or

(c) with the permission of the court.

(6) An application under rule 14.1B(2)(b)(ii) or (3)(b) to withdraw a pre-action admission must be made in accordance with Part 23.

58. CPR 14.1A was introduced in 2006 with effect from 7th April 2007 and applies to admissions made in pre-action letter after a person has been in receipt of a pre-action letter of claim or after receipt of any relevant pre-action protocol. In other words, provided it is one of the types of claim to which this part applies (which includes cases to which the pre-action protocol for personal injury claims applies). Unlike CPR 14.1B it does not use the word "*defendant*".

59. CPR 14.1B was introduced in in 2010 upon the coming into effect of the Protocol and makes specific provision in relation to admissions made under the Protocol. There are separate provisions for the withdrawal of admissions of causation and the withdrawal of other admissions, it being easier to withdraw an admission of causation before the commencement of proceedings. An admission of liability can only be withdrawn with the consent of all the other parties to the proceedings or with the permission of the court and the applicant is referred to as "*the defendant*".

60. In **Malak** there was argument about the determining factor in deciding which rule applied. Counsel for the claimant submitting that this depended upon which protocol applied when the admission was made. Since it was made under the Protocol, CPR 14.1B applied. The defendant's counsel argued that either could apply, since once a case drops out of the Portal, the personal injury protocol applied (paragraphs 6.15 and 6.17 of the Protocol), for example if liability is not admitted or admitted subject to contributory negligence, and the case drops out of the Portal.

61. DJ Wood decided that CPR 14.1A did not apply and CPR 14.1B governs all cases of withdrawal where an admission is made under the Portal. She gave a number of reasons:

    a. if it did not, then there was no need to introduce CPR 14.1B which would duplicate CPR 14.1A. I note that CPR 14.1(2) has not been amended to exclude Portal admissions although the current wording is broad enough to include claims to which the Portal applies. If the Rules Committee did not intend duplication, then they would have amended this rule;

    b. although she decided that a claim falling out of the Portal would proceed under the personal injury claims protocol, she did not consider that this would bring it within CPR 14.1A because 14.1B applied where proceedings had been commenced, necessarily meaning that the case had dropped out. In my judgment the 2 provisions are mutually exclusive and I agree with District Judge Wood on this issue.

    c. The argument is that the issue of which provision should apply is dependent upon where the admission is made. If made in the Portal, then DJ Wood says CPR 14.1B applies. If made outside the Portal then CPR 14.1A applies. CPR 14.1B enable the withdrawal of an admission of causation while the claim is

still in the Portal without it dropping out in relation to a discrete aspect of the quantification of the claim. Nor does CPR 14.1B appear to be limited to Portal admissions. The provision applies to all pre-action admissions once a claim is made through the Portal, although in practice the only admission relevant while a claim remains in the Portal is the Portal admission.

d. The use of the word "*defendant*" in CPR 14.1B is interesting. If a claim is made under the Portal and settled, then it will not drop out of the Portal and no proceedings will be issued. It is only if it drops out before a settlement that proceedings arise, in which case the insured will be named as the defendant and will be able to apply to withdraw any admission made in the Portal. There is specific provision for this in CPR 14.1B (both in relation to causation and to any other pre-action admission) which points to there being a different regime once a Portal claim is made. It is probable that the Rules Committee contemplated that once an admission had been made in the Portal, and a settlement concluded, that would be the end of the matter.

e. District Judge Wood also said that a potential claimant should not be bound by an admission made in the Portal "*by his insurer*" because it was made by the insurer over whom he had no control, could not be withdrawn while the Portal claim continued and could not be withdrawn once the Portal claim had been concluded. This begs a number of questions which I will now turn to.

62. Firstly, who is making the admission? This leads to the meaning of: "*defendant*" in the Portal. I do not agree with DJ Wood and Mr. Wynn-Smith that "*defendant*" in paragraph 6.15 (and therefore in the insurers response section of the RTA1) can mean anything other than the defendant to the Protocol claim, namely the insured. This is the context. In the RTA1 response form the "*Defendant*" is asked to admit: "*Caused*

by the defendant's breach of duty" and if he has any accrued Limitation Act defence to the claim. How can this be the insure? The RTA1 has sections where "*defendant*" means the insured: the "*defendant's details*" Other sections clearly refer to the insurer: for example, paragraph 6.10 of the Protocol which is headed "*response from insurer*" who must acknowledge receive of the CNF electronically.

63. Secondly, while the claim remains in the Portal, no admission of liability can be withdrawn – nor could he under CPR 14.1A. The only way out of an admission of liability is to drop out of the Portal. District Judge Wood is right that the defence of the claim is under the control of the insurer, but this is a necessary consequence of the insurance policy terms. If, under the terms of the policy, the insurer is entitled to settle the claim and to override the insured, then that is a matter of contract and insurance law between them even if the consequences extend to uninsured loss. It is not difficult to drop out of the Portal by failing to admit liability or making a counterclaim or alleging contributory negligence (save for not wearing a seat belt). The authority of the insurer to settle claims is a matter of agency and contract law and there is nothing to suggest that there is any difference to this whether the claim is under the Portal or outside it (or high value for that matter). Before the Protocol came into effect insurers had the power to settle agreements in the same way as they now do under the Portal. If the insured wishes to challenge his insurer, then he can through litigation or, in many cases, by arbitration. The real effect of the Portal is to provide a convenient, cheap and simple procedure to enable these settlements to be resolved without the issue of proceedings and a low cost. If an admission under the Portal was intended to have no effect outside the Portal then I would have expected this to have been made explicit.

Decision

64. In my judgment, if a case drops out of the Portal then the provisions of CPR 14.1A do not apply to any admission made in the Portal, unless there was an admission made before the Portal claim was made, provided the provisions of CPR PD 14.1(2) apply. The regime for withdrawing Portal admissions is CPR 14.1B.

65. If an admission is made by a Portal Defendant that should be treated as any other admission, although on the facts of this case, it cannot now be withdrawn because the Portal claim was settled and there is no claim to which the Claimant in these proceedings is defendant.

66. I think it was probably the intention of the Rules Committee to exclude such claims as being inconsistent with the settlement of the Portal claim and the Portal admission. If the parties who settle the Portal claim do so on terms that permit the defendant to bring a counterclaim notwithstanding the settlement (as in **Capon**) that is a different matter but would have to be agreed as part of the settlement terms. If, however, the defendant wishes to allege that the claimant to the Portal claim was in fact the driver at fault, then the remedy is to dispute liability and make a counterclaim, in which case the claim will drop out of the Portal. Even if there is an admission in the Portal claim, provided that claim is not settled, the defendant can apply to withdraw the admission in the consequent proceedings under CPR 14.1B.

67. I do not agree with the concerns expressed

68. What happens if the Portal claim settles? I prefer the decision in **Ullah** to that in **Malak** on this point. In my judgment the settlement in the Portal is binding as between the Portal claimant and the Portal defendant in the same way as any other settlement. As in **Taylor** and **Capon**, the question of whether settlement prevents other claims is dependent upon the terms of the settlement. A settlement agreement "*in full and final settlement of all claims between the parties*" is the end of the matter

between them. If the parties chose to settle on terms which enables the claimant to make a claim against the Portal defendant for uninsured losses, that it a matter for them and would depend on the settlement terms. The problem here is that the Portal defendant is making a claim which is completely inconsistent with the admission in the Portal claim. There is a distinction between the settlement of a claim to insured losses, in terms express or implied which allow the claimant to make a subsequent claim for uninsured losses, and the settlement of a claim which leaves it open to the other party to make a wholly inconsistent claim against the original claimant. That is "*blowing hot and cold*" and is inconsistent with the whole ethos of litigation and the Portal. I agree with DJ Hammond that the courts go to considerable efforts to ensure that there is consistency in decisions in relation to liability and that it would be counter this for there to be inconsistent decisions in the Portal and in subsequent proceedings.

69. I do not agree with him that there might be an element of double jeopardy (in its strict sense) but a claimant reaching a settlement under the Portal on the basis of the defendant admitting that she was sole cause of the accident, should not subsequently expect to be on the receiving end of proceedings alleging that the accident was in fact his fault.

70. The Portal, however, requires an admission to be made before it can proceed to the next stage. This must also be treated in the same way as any other admission. As between the parties to the admission (the Portal claimant and the Portal defendant) the defendant is admitting that the accident was caused by a breach of duty on her part and the parties proceed to settlement on that basis. This means that unless the admission is withdrawn, a party who has admitted liability under the Portal (albeit through the agency of his insurer) cannot then bring a claim against the Portal

claimant which is inconsistent with that admission. In other words, a counterclaim which can only succeed on proof of the accident having been the fault of the Portal claimant and not the Portal defendant.

71. As regards a third party claim, I cannot see that the admission can have any binding effect as they are not parties to the Portal proceedings nor to the settlement. It is an admission and therefore has evidential value in any subsequent claim between the Appellant and any third party (whichever brought the claim), but is not directly binding on those parties.

72. I do not therefore accept DJ Wood's dictum that the possibility of inconsistent decisions or disposals in relation to liability should be discounted. In my judgment there are very good policy reasons for claims to be decided consistently and for parties who settle on one basis to be discouraged from bringing claims inconsistent with such settlements.

73. I therefore dismiss the appeal against the First Respondent.

The Appeal against the Second Respondent

74. Having concluded that the Portal settlement does not preclude a claim against a third party, the issues which now arise are (1) was the District Judge wrong to strike out this claim on the basis of causation; and (2) should he have come to a different decision if he had considered contributory negligence.

75. The case against the Second Respondent is that he was parked dangerously, exposing the Claimant to risk. Even if the Claimant must share part of the blame for the accident, the District Judge should not have given summary judgment against the claimant because it "*did not disclose no reasonable prospect of success*" for the purposes of CPR 24(a)(1). Mr. Winn-Smith correctly said that this meant "*not fanciful*".

76. I accept that the Portal admission has, in practice, little relevance to these issues. A settlement with the Portal claimant is not inconsistent with a claim against a third party, with or without contributory negligence.

77. The issue on this appeal is a short one. The Second Respondent says that the Appellant's account of the accident precludes any claim against him because it is inconsistent with any causative effect. While the District Judge struck out this claim as being inconsistent with the Portal admission, he went on to say that he would have made the same decision in any event. The particulars of claim allege that the Appellant's vehicle. While she says that she had edged out. When she saw the First Respondent approaching, she stopped "*for a few moments*" and was no longer moving forward, waiting for this vehicle to pass. This leaves no room or argument about the alleged cause of the accident (the First Respondent's negligence).

78. In my judgment, the claim against the Second Respondent is totally without merit. She has no prospect at all of persuading a judge that if she was stationary the parked vehicle had any relevance to the accident. The District Judge rightly dismissed that claim and I dismiss the appeal against that decision. If you take into account the Appellant's admission in the Portal (which I have not done for the purpose of the above decision) her case falls apart even further.

Conclusion

79. The appeal is dismissed. I will make an order that the Appellant pay the Respondent's costs of the appeal to be assessed on the standard basis by a summary assessment. If any party who wishes to challenge the costs decision they may apply by letter for an oral hearing within 7 days of the order (ie from 26 October 2016). As to assessment, I will deal with this on paper (or by phone if the parties prefer and write in to the court) and suggest that the parties liaise and send me the Respondent's bill, the Appellant's

written comments on the Respondent's bill and the Respondent's reply to them within 14 days of the judgment being handed down.