

Case No: F02BD334

IN THE LEEDS COUNTY COURT

The Combined Court Centre, Oxford Row, Leeds

Date: 1 June 2020

**Before**:

HIS HONOUR JUDGE GOSNELL

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**Between:**

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|  | **Mr Mehmood Khan** | Claimant and Appellant |
|  | **- and –** |  |
|  | **Alliance Insurance PLC** | Defendant and Respondent |

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Ms Amy Philipson (instructed by Applebys Solicitors) for the Appellant

Ms Sarah Robson (instructed by Keoghs Solicitors) for the Respondent

Hearing dates: 15th May 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE GOSNELL

**Covid-19 Protocol:** This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down are deemed to be 11:00 am on 1st June 2020.

**His Honour Judge Gosnell:**

1. **Introduction**

This appeal is brought by the Claimant, Mehmood Khan, against the decision of District Judge Foster dated 23rd January 2020. The Defendant Alliance Insurance is Respondent to the appeal and opposes it. The Claimant Appellant is represented by Ms Philipson and the Respondent Defendant is represented by Ms Robson. Neither counsel appeared below. From now on I will refer to the parties as Claimant and Defendant.

1. The Claimant had brought a claim in the MOJ Portal for Low Value Personal Injury in Road Traffic Accidents (“The Portal”) seeking damages for a number of heads of loss including personal injury, and inter alia credit hire. Compensation was not agreed within the Portal Stage 2 Negotiation Period and the claim became subject to a Part 8 claim and was listed for a Stage 3 hearing. The District Judge made decisions on all the disputed heads of loss but only the decision about credit hire charges is challenged on this appeal. The Claimant sought £8,592.00 but was awarded only £1,000.
2. **The hearing on 23rd January 2020.**

The Judge first dealt with the issue of general damages for personal injury and this decision is not challenged. He was then asked to deal with the credit hire claim. The Claimant was represented by Mr Smith, an advocate working for an agency and the Defendant was represented by counsel Ms Lumley. The hearing developed in this way from the transcript:

*“Mr Smith: Yes, the claim is for £8,592.00*

*DJ Foster: Don’t we do it by reference to his loss of earnings now? There was a case last year…*

*Mr Smith: We may well do sir*

*DJ Foster: Let me tell you, I don’t know any taxi driver in Bradford that earns more than £8,000 per year. We actually had a debate because someone said that they earned £9,500 and you think “that can’t be right”. Anyway, there we have it. Right, so what do you want to say about it?”*

1. Mr Smith then explained that the vehicle was hired for 36 days at £175 per day plus some additional items. He stopped the hire a few days after he received the cheque for the pre-accident value of his vehicle. Mr Smith then identified for the District Judge the signed credit hire agreement within the hearing bundle. Miss Lumley was then invited to address the court and said:

*“Sir, you’ll have noted the comments of those instructing in the court proceedings pack. That is the argument that they raise, and I’m restricted by that, because ultimately I accept, I can’t raise new arguments on the day. They say that there is not a signed credit hire agreement. The document that you have before you sir and I note my learned friend has seen. So I don’t take issue with that. It’s whether the court is satisfied that that is a signed credit hire agreement, and I think that’s the furthest I can take the Defendant’s position against the hire.”*

1. The District Judge made some enquiries about a cancellation notice and then turned his attention to the Claimant’s need for hire in the following way:

*“I don’t know much more about his means. At page 37 it states “I need to hire a vehicle because of work and family purposes.” Again I don’t know anything about how much he needs a car, whether other cars were available. This is the problem with trying to deal with credit hire in this situation.”*

He then turned his attention to loss of profits:

*“What we saw in Hussain -v- EUI Limited [2019] EWHC 2647 was the High Court saying that its actually loss of profits. I’ve no idea what Mr. Khan earns and that should be the appropriate quantum. So I don’t think I can award anything for credit hire. Even if the credit hire agreement is enforceable, the appropriate quantum is not set out. Again, I refer to the court’s experience of the small claims track, where we deal with credit hire claims involving taxi drivers. No taxi driver I can think of earns £175 per day, and the accounts at the end of the year always show a profit of somewhere between £6,000-£8,000. The turnover is usually about £20,000 something and that doesn’t relate to £175 per day for Mr Khan to be making money…. I can’t guess. That’s the problem.”*

1. Mr Smith then said:

*“No. In the alternative, we know that the period’s around a month, and you would be entitled to take notice of your experience of similar matters and arrive at a figure that way, if that was the approach you’d prefer to adopt”*

The District Judge replied:

*“See, Mr Khan has to be able to go out and earn a living as taxi driver. Bearing in mind he would have had some time off, is anyone going to argue with £1,000. Mr Smith?*

*Mr Smith: No”*

Miss Lumley made no comment and the District Judge turned to another head of loss.

1. **The Claimant’s submissions:**

The Claimant served a combined skeleton argument and grounds of appeal supplemented by the oral submissions of Ms. Philipson. In essence the Claimant submits that District Judge Foster was wrong in law to introduce the issue of valuing the credit hire claim by reference to loss of earnings and that in any event he exercised his discretion wrongly in applying *Hussain v EUI Limited*.

8. The Claimant relies upon the judgments of His Honour Judge Freedman in *Mulholland -v- Hughes* et al, 18th September 2015 unreported, Newcastle upon Tyne County Court, as approved by H. H. Judge Gargan in *Ianos -v- Clennell*, 23rd October 2017 unreported, Middlesbrough County Court, which establishes that the only issues that the Court can determine at the protocol stage 3 hearing, are those that have been put in dispute by the Defendant in its response to the stage 2 Settlement Pack as then confirmed in the Court Proceedings Pack. Put another way, if the Defendant chooses not to raise an issue at Stage 2 of the process, it cannot then raise it at the stage 3 hearing.

9. In *Mulholland v Hughes* His Honour Judge Freedman dealt with four related appeals. One of the issues concerned the ability of the Defendant to raise the issue of “need” at a stage 3 hearing when this had not been raised at all during stage 2 of the process. After a detailed analysis of the whole process he concluded:

*“77. 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.”*

10. His Honour Judge Gargan was asked to distinguish this decision in *Ianos v Clennell* but found himself reaching the same conclusion as His Honour Judge Freedman:

*“21. I accept Mrs Robson’s submission that CPR rules on pleadings have no direct application to the RTA process. However, the purpose of the Protocol is to enable the parties to identify the issues in dispute and reach agreement where possible and, where such agreement is not possible, to provide a system for resolving any remaining differences at proportionate cost. The parties do not have to identify the matters in issue with the formality sometimes required in pleadings/statement of case. However, the process can only work if the parties each explain their positions in ordinary English, making it clear which issues they contest and why they do so. I reject any suggestion that the litigation clerks employed by the defendant insurers are unable to undertake such a task.*

*22. Further I respectfully agree with the approach taken by HHJ Freedman in Mulholland and others 18.09.15 at paragraphs 75 to 80 of his judgment where he draws assistance from the purpose underlying the CPR and associated Practice Directions: (see paragraphs 75 to 80 of judgement, partially quoted above)*

*23. In my judgment HHJ Freedman held, correctly, that a party could not raise an issue at Stage 3 unless it had already been put in issue during the Stage 2 process.”*

11. In the current appeal the Defendant had put the quantum of credit hire in issue in its response to the Stage 2 Settlement Pack. The comments which were then repeated in the Court Proceedings Pack read as follows:

*“The client has not signed a credit hire agreement for either vehicle, it appears to be an invoice which clearly states is exempt from the consumer credit act. Costs are therefore non recoverable on these grounds.”*

The Claimant submits that Ms Lumley, counsel for the Defendant at the hearing below was clearly aware both of what the Court Proceedings Pack said and the effect of *Mulholland v Hughes* when she said:

“*That is the argument that they raise, and I'm restricted by that, because ultimately I accept I can't raise new arguments on the day”*

12. The Claimant submits that when District Judge Foster introduced issues such as need, the valuation of credit hire by reference to loss of profit and the absence of a cancellation notice he was effectively introducing issues which the Defendant was debarred from raising at the Stage 3 hearing as it had not raised them during stage 2.

13. In any event the Claimant submits that District Judge Foster was wrong to summarise the effect of *Hussain v EUI Limited* as meaning that credit hire is now valued on the basis of loss of profits. Although it clearly was in that case, Mr Justice Pepperall set out a number of exceptions which may mean that the value of credit hire incurred was the appropriate measure of loss.

14. **The Defendant’s submissions**

Ms Robson for the Defendant prepared a very comprehensive skeleton argument and also assisted the court with oral submissions. The main thrust of her submissions was that District Judge Foster was entitled to conduct the hearing in the manner that he did. He was not bound by the decisions in *Mulholland v Hughes* or *Ianos v Clennell* because they were wrongly decided in her submission. There were a number of subsidiary submissions made in case the court did not accept her primary submission that Judges Freedman and Gargan were wrong.

15. The Defendant’s arguments all stem from an analysis of the nature of the Protocol and the fact that it is a self-contained code. The Defendant relies on the editorial comment in the White Book at C15A-009 where it states:

*‘This Protocol and the similar RTA Protocol are, in reality, the only two Pre-Action Protocols with real “teeth”. Whereas normally the rules of court rank first and the Protocols last here the process is reversed****.*** *The Protocol is most important: the rules and practice direction exist to support the Protocol rather than the other way round.’*

Similarly, the editorial comment to the RTA Protocol at paragraph C13A-005:

*“Normally CPR rules are supplemented directly by practice directions and indirectly by pre-action Protocols. Here these relationships are reversed****.*** *The RTA Protocol is the primary source governing party behaviour in the claims to which it applies. Practice direction 8B builds on Protocol Stage 2 processes and provides special and limited court procedures for the purpose of determining the claim if settlement is not achieved (and for some other purposes) in section II of CPR part 36 (RTA Protocol Offers to Settle) and section VI of part 45 (fixed costs) provide the legal framework not only for the Stage 2 procedure but for the pre-action negotiating processes, in effect, supplementing practice direction 8B and the RTA Protocol.”*

16. The Defendant relied on several decisions of Circuit Judges and District Judges in different cases to show that: parts of the CPR do not apply in portal cases; ordinary principles of contract law do not apply; the doctrine of waiver and affirmation does not apply; and the common law doctrine of mistake does not apply. I do not intend to set these out in detail as I do not disagree with them nor are they of direct relevance to this appeal. Ms Robson relies on the guidance of Lord Neuberger in *Willers v Joyce and another (number 2)* [2016] UKSC 44 to persuade the court to take account of these decisions:

*“So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so… I would have thought that circuit judges should adopt much the same approach to decision of other circuit judges.”*

Whilst I accept the authority does support the proposition made it also encourages this court to follow the decisions of Judges Freedman and Gargan who are my peers in this respect.

17. The Portal rules in CPR PD 8B are specific about what evidence can be adduced in a stage 3 hearing. Paragraph 6 provides that the Claimant can only file those documents under stage 3 which have already been sent to the Defendant under stage 2. *Wickes v Blair* [2019] EWCA Civ 1934 concerned a witness statement which was served three days after the end of the Stage 2 process and was excluded by the District Judge at Stage 3. Lord Justice Baker in his decision supported this decision but it is interesting that he concluded as follows:

*“Ms Robson submits that this is an illustration of the principle that the Protocol takes precedence over the rules.*

*In my view, this appeal succeeds for the reasons articulated so clearly by Ms Cullen. The provisions of the Protocol are regrettably not drafted in a way which makes interpretation entirely straightforward. I am sure, however, that Ms Cullen's submissions are correct.”*

So, although it may be the case that the Protocol takes precedence over the rules, it is often difficult to interpret the Protocol, hence the need for the numerous appeals on this topic.

18. The Claimant’s appeal and Judge Freedman’s decision are essentially based on the content of paragraph 7.41 of the RTA Protocol which states as follows:

*“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 of the amounts proposed for all heads of damage. 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.”*

The Defendant submits that this paragraph sets out the obligations of the Defendant when responding to the Stage 2 Settlement Pack, but the purpose is to assist the parties when negotiating (by implication not to limit the arguments that can be raised at Stage 3).

19. Ms Robson makes the following strident criticisms of the ratio of the decision of Judge Freedman in *Mulholland v Hughes:*

*“He noted in [76] how in Part 7 proceedings one could not rely on an issue which had not been raised in the formal pleadings. He concluded if that was the correct approach, then it was arguably of even greater application in the Portal, again clearly missing the point that the Portal Protocol is an entirely stand-alone code to which non-Portal CPRs have no application. He then referred to para 7.41 of the Portal protocol which requires the Defendant to explain why they are offering less than the full sum sought which is there for the purposes of assisting the parties to reach a settlement, and made the quantum leap to concluding there was an unstated obligation on a Defendant to set out in these negotiations every single legal argument which they would ever wish to run should those negotiations fail to reach settlement and court proceedings become necessary! Furthermore, he found this unstated rule also placed an absolute prohibition on running any argument later which had not been mentioned in these settlement negotiations. The Portal rules simply do not have any implied rules”*

20. The Defendant submits that whilst the Portal requires the Defendant to specify which head of claim is disputed and limits both parties in terms of evidence at Stage 3 to what they have disclosed in Stage 2, there is no obligation to set out legal arguments in Stage 2 nor any restriction on pursuing legal arguments at stage 3. This is not a case like *Qader v Esure [2016]* EWCA Civ 1109 where the court can add, omit or substitute words to re-write the rules to give them a purposive interpretation. The Defendant submits that Judge Freedman has added words to the Portal restricting the nature of submissions which can be made that are not present.

21. The Defendant submits that there is no unfairness in allowing the Defendant to make submissions which have not been made at Stage 2 as the Judge at Stage 3 can decide that further evidence is required in order to properly determine the claim under paragraphs 7.1 and 7.2 of PD8B and order that evidence be produced or move the claim to Part 7 CPR if he or she forms the view that the claim is then unsuitable for the protocol.

22. I will deal more briefly with the Defendant’s alternative submissions:

* It is disproportionate in this low value claim for the Claimant to seek to appeal the decision, when his representative proposed the methodology to the Judge and agreed with the result;
* The Judge was entitled to raise the issue he did both about need and the value of hire of his own initiative. There is no rule of law which says that a Judge is not permitted to raise an issue unless a party does so, even in claims outside the portal. In *Phillips v Willis* [2016] EWCA Civ 401 the Court of Appeal criticised the Judge for ordering that the case taken out of the portal but not because he made the order on his own initiative, more because it was not justified on the facts of the case;
* As the representative for the Claimant at trial specifically invited the court to assess quantum of hire by reference to the District Judge’s judicial knowledge of the earnings of taxi drivers and then agreed to the resulting figure of £1,000 the Claimant is prevented from appealing the decision;
* Unless the Claimant can show that the Judge was wrong to consider an issue not raised by the Defendant below the appeal must fail. This argument was extended at the appeal hearing to an appeal on a point not raised by the Claimant at trial;
* Having invited the Judge to take a particular route and then agreeing with the Judge’s conclusion the Claimant is estopped from going back on the position he advocated at first instance. The Defendant did not contest this issue and has established detrimental reliance.

23. **Analysis**

My starting position is that I am reluctant, for reasons of judicial comity, to decide that Judge Freedman and Judge Gargan were wrong in their interpretation of the Protocol and Practice Direction on this issue. As Lord Neuberger in *Willers v Joyce* said a judge should “*generally follow a decision of co-ordinate jurisdiction unless there is a powerful reason for not doing so…”.* Whilst Ms Robson can argue that Judge Freedman did not have the benefit of her submissions about the stand-alone nature of the Portal, it cannot be said that Judge Gargan did not have that benefit.

*“20. On behalf of the Respondent, Mrs Robson referred me to four cases in paragraph 3 of her skeleton argument. The principle Mrs Robson seeks to derive from those authorities is that the portal rules take precedence over the ordinary common law and that the court cannot look to outside law, doctrines or cases decided under the CPR to supplement the RTA process.”*

24. This would appear to me to be the basis of her submissions in this appeal also. The second point I should make is that Judge Freedman’s decision was handed down in 2015 and Judge Gargan’s in 2017. I enquired whether in the interim period any other Circuit Judge had reached a conclusion on this issue which conflicted with those decisions. Ms Robson was not aware of one, and as she has a particular interest in this topic, I feel confident she would have known and relied on that authority if there was one. This is not a promising starting point for the Defendant in this appeal.

25. Judge Freedman was criticised by the Defendant for making an analogy between the Stage 2 process and pleadings in a Part 7 claim. It is clear however he was aware that the strict rule as to pleadings did not apply:

*“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”*

In my view this is not an unreasonable analogy to draw. In fact the editors of the White Book 2020 at 8BPD.0 draw a similar analogy:

*“In effect the steps taken by the parties during Stage 1 and Stage 2 are treated as if they had been taken during the post-issue and pre-trial stages of a claim brought under Part 7.”*

26. Judge Freedman makes an interesting comparison about what would have happened on the facts of the cases he was hearing in Part 7 proceedings:

*“75. 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.*

*If that is the correct approach, then, arguably, it is of greater application in the context of the Protocol.”*

27. The reason why it is arguably of greater application in the context of the protocol is because the Defendant gets the opportunity to set out his reasons for disputing the heads of claim in the response to the Stage 2 Settlement Pack but whatever happens afterwards, whether a paper hearing or with the attendance of advocates, there will be no oral evidence heard, particularly from the Claimant. The opportunity therefore set out in the previous paragraph to ask the Claimant about need cannot arise.

28. Perhaps a better way to analyse the situation is to see what would happen if Judge Freedman was wrong and Ms Robson’s interpretation was right. The claim would be brought to a Stage 3 hearing and the advocate for the Claimant would be ready to argue the issue of hire rates as the only issue raised by the Defendant at Stage 2. To his surprise at Stage 3 the advocate for the Defendant raises need for the first time. Not surprisingly there is no reference to need in the evidence the Claimant has filed. As Ms Robson argued in this case, need is not self-proving, the burden of proof is on the Claimant and in my view the Judge has two choices- to dismiss the claim for hire charges or to rely on paragraph 7.2 of CPR PD 8B to direct further evidence be provided by the Claimant and the claim is not suitable to continue under the stage 3 procedure. This would involve the Claimant starting from scratch again under the Part 7 procedure with all the additional unnecessary costs that were deprecated by Lord Justice Jackson in *Phillips v Willis* [2016] EWCA Civ 401. It may perhaps be argued that the Judge could have made a direction under paragraph 7.1(3) for further evidence but that would have involved the cost of obtaining that evidence and the cost of another hearing.

29. It is easy to read across this example to the present appeal. The Claimant in this case has not served a witness statement as the only issue so far as he is aware is whether a hire agreement has been signed. He can afford to be confident on this issue as he has a signed hire agreement which has been disclosed to the Defendant during stage 2 and is before the court on stage 3. If Ms Robson is right the Defendant’s advocate was entitled to raise need, period, rate, impecuniosity and the *Hussain and EUI* point despite the fact that the Claimant had no prior warning that those arguments were ever in issue. The fact that the Judge could have been persuaded to transfer the case to Part 7 is hardly an adequate remedy, nor is directing further evidence and having to have another full hearing proportionate.

30. Claims involving credit hire can be simple or unnecessarily complicated. I speak as a Judge who has conducted hundreds of such trials on every track under Part 7. In theory there is no doubt that issues relating to credit hire can be resolved at a stage 3 hearing. It is specifically included in paragraph 1.1(18) of the RTA protocol as part of “vehicle related damage”. If all the issues set out in the previous paragraph together with enforceability were disputed this would involve the Claimant preparing a lengthy witness statement together with another witness statement setting out appropriate hire rates. Whilst the Defendant could also obtain rates evidence there would be no opportunity for the Defendant to cross-examine the Claimant and the court would probably have to accept the Claimant’s evidence at face value at a Stage 3 hearing. This is not a satisfactory way for the Defendant to fairly defend a credit hire claim. Where the claim is substantial, and the Defendant wishes to challenge it on all or some issues it is probably better for the Defendant to force the claim out of the portal which it can easily do at any stage including stage 2 by non-co-operation with the process. The claim will then proceed under Part 7 and the Defendant will have a full opportunity to challenge the claim albeit at more substantial cost. In my view, if the Defendant wishes to take advantage of the simple procedure and limited cost of the portal process it can only challenge the credit hire on limited grounds which will not involve testing of the evidence by cross-examination. If that is the only way to fairly resolve the dispute, then it should proceed as a Part 7 claim with all the attendant additional costs. This is not an unfair choice for a Defendant (usually an insurer) to have to make. If the Defendant chooses the cheaper and more limited process of the Portal, then it is also not unreasonable to hold it to the limited issues set out in the Court Proceedings Pack when the case is dealt with at the Stage 3 hearing.

31. The Defendant argues strongly that despite the apparent unfairness of the hypothetical examples shown above the Protocol does not say in terms that whilst the Defendant has an obligation to explain in the counter-offer why a particular head of damage has been reduced this does not limit what the Defendant is entitled to submit at a Stage 3 hearing by way of legal argument. Paragraph 7.41 is expressed on the basis that 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. 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 (par 7.66). The clear implication of these provisions in my view is that these are the issues that have narrowed and remain in dispute.

32. Whilst I agree and accept that the use of the Part 8 means that certain provisions of the CPR do not apply (CPR 8.9) like parts 15 and 16 the Overriding Objective set out in CPR 1.1 does apply. When a Judge decides that a Defendant should not be permitted to raise new arguments at a Stage 3 hearing he is doing so in an effort to deal with the case justly. It would not be just to allow a Defendant to raise an issue for the first time that the Claimant was not expecting and was in no position to deal with at the hearing because of the absence of oral evidence. The limiting of the hearing to those issues set out in the Court Proceedings Pack ensures that the parties are on an equal footing and it also ensures that expense is saved, and the hearing is dealt with proportionately. This is all consistent with the Overriding Objective which is relevant to Stage 3 hearings.

33. I therefore conclude that both Judge Freedman and Judge Gargan were correct in their respective decisions and so it was not open to the Defendant to raise a different argument or issue other than ones which were included in the Court Proceedings Pack.

34. In the current appeal however, the Defendant did not in fact raise the issue, it was the Judge who did so. In my judgment he was wrong to do so, firstly, although a Judge is entitled to raise any issue on his own initiative, he should not in practice raise an issue himself which is one he would not allow a party to raise on the grounds of fairness. If the District Judge in this case had been reminded about *Mulholland v Hughes,* I feel sure he would not have done so. It is unfortunate that neither of the advocates assisted him in this way. Secondly, the District Judge’s view of the effect of *Hussain v EUI* was inaccurate in so far as it suggests that every credit hire claim involving a taxi driver will be dealt with by reference to the lost income of the driver where the cost of hire significantly exceeds the loss of profit. As Mr Justice Pepperall accepted in his judgment:

*“16.6 Even where the cost of hire significantly exceeds the avoided loss of profit, the claimant may still succeed in establishing that he or she acted reasonably:*

*a) First, any business must sometimes provide a service at a loss in order to retain important customers or contracts. For example, a chauffeur might not want to let down a regular client for fear of losing her. Equally, a self-employed taxi driver might risk being dropped by the taxi company that provides him with most of his work. Properly analysed, these are not, however, exceptions to the general rule since in such cases the claimant is really saying that, but for his or her actions in hiring a replacement vehicle, the true loss of profit would not have been limited simply to the pro rata loss calculated on the basis of the period of closure but that future trading would itself have been compromised. Again, claimants are not required to weigh these factors precisely, and a claimant who reasonably incurs what at first might appear to be disproportionate hire costs in order to avoid a real risk of greater loss, will usually be entitled to recover such hire costs from the tortfeasor.*

*b) Secondly, many professional drivers use their vehicles for both business and private purposes. Where such a claimant proves that he or she needed a replacement vehicle for private and family use, a claim for reasonable hire charges, even if in excess of the loss of profit that was avoided by hiring the replacement vehicle, will ordinarily be recoverable in the event that a private motorist would have been entitled to recover such costs.*

*c) Thirdly, it might be reasonable for a professional driver to hire a replacement vehicle even though the cost of doing so was significantly more than the loss of profit because he simply could not afford not to work. The tortfeasor takes his victim as he finds him and impecunious self-employed claimants cannot be expected to be left without any income and forced to look to the state to provide for their families on the basis that they might eventually recover their loss of profit some.”*

35. I cannot say whether the Claimant could have led evidence which would have enabled him to show that he was still acting reasonably in hiring a vehicle on credit hire even though the cost of it significantly exceeded his loss of profit. He had not filed a witness statement and was not at court to give evidence. This shows why it was unfair to raise the issue at the stage 3 hearing when the Claimant had no way of proving that he had acted reasonably, notwithstanding the costs involved.

36. This also deals with one the Defendant’s subsidiary points in the appeal. Whilst a Judge clearly has the right and the jurisdiction to raise any issue during the course of a trial or hearing, whether or not the parties have chosen to raise it, this does not necessarily mean that he or she should raise it. If to raise an issue would be unfair to one or other of the parties because they have no practical opportunity to deal with it in evidence, then the Judge would be wrong to raise it. In my view, this appeal falls into that category because the Hussain v EUI issue had not been raised at Stage 2 and the Claimant had no opportunity to give evidence to show that it may still have been reasonable for him to hire a car on credit, notwithstanding that the cost significantly exceeded his lost income. Phillips v Willis is another example of the Judge having the jurisdiction to take a particular step but the appeal court finding he was wrong to do so.

37. The submission based on proportionality is misconceived. Whilst the court has to deal with cases in ways which are proportionate, the value of the sum in dispute on this appeal is over £7000. A Stage 3 hearing may well have been a proportionate way to deal with the value of the Claimant’s underlying claim provided the issues about credit hire were simple, which they appeared to be at the start of the hearing (whether there was in fact a signed credit hire agreement). Where a party feels aggrieved about the result of a hearing, he has a right of appeal subject to the filter of obtaining permission to do so. There is no lower limit in terms of value further limiting this right to appeal. The Defendant also relies on the advocate below suggesting the method of assessment and consenting to the proposed figure, but this is not a proportionality issue.

38. The Defendant submits that as Mr Smith below specifically invited the court to assess quantum of hire by reference to the District Judge’s judicial knowledge of the earnings of taxi drivers and then agreed to the resulting figure of £1,000 the Claimant is prevented from appealing the decision. I am not convinced there is any legal principle to this effect even if the submission was factually accurate. Mr Smith in fact came to court to persuade the Judge to award the full amount of credit hire but then the hearing took an unexpected turn. The Judge introduced *Hussain v EUI* but then realised he had no evidence of the Claimant’s earnings. At one point it looked as if he was about to dismiss the whole claim: “*So I don’t think I can award anything for credit hire”.* Mr Smith, no doubt in desperation persuaded the Judge to take judicial notice of his own experience of taxi driver’s income (or more accurately declared earnings) so that at least some award would be made under this head. It is also not accurate to say he consented to the award of £1,000. He was asked if he wanted to argue with that award and he said no. There was no dissent but that does not amount to consent. This is certainly not a consent order with all the complications that would incur about accord and satisfaction.

39. Similarly, the Claimant is not estopped from pursuing this point on appeal by acceding to the Judge’s approach below. Issue estoppel clearly does not arise as there is no finding of fact and no subsequent proceedings. Ms Robson’s reference to detrimental reliance seems to suggest some sort of proprietary estoppel which does not apply to a party’s right to appeal.

40. The Defendant submits that unless the Claimant can show that the Judge was wrong to consider an issue not raised by the Defendant below the appeal must fail. This argument was extended at the appeal hearing to an argument that a party is not permitted to appeal on a point not raised by the Claimant at trial. Ms Robson was challenged by Ms Philipson at the appeal hearing to produce authority to support this proposition and she relied on the editorial note to the 2019 White Book (which was the most recent one she had available) at 52.17.3 entitled “point not raised below”. This section has been completely re-written in the 2020 White Book at 52.21.1.1 and is entitled “Appeal on a point not raised at trial”. The distinction is important because most of the jurisprudence on this topic deals with what evidence was advanced below compared with what both parties could have adduced if the new point had been raised **at trial**. This issue came before the Court of Appeal again relatively recently in *UK Learning Academy Limited v Secretary of State for Education* [ 2020] EWCA Civ 370 where Lord Justice David Richards said:

*“40. The circumstances in which a party will be permitted to advance a case for the first time on appeal have been considered in numerous authorities; see, for example, Pittalis v Grant [1989] QB 605 at 611 per Nourse LJ, Jones v MBNA International Bank Ltd [[2000] EWCA Civ 514](https://www.bailii.org/ew/cases/EWCA/Civ/2000/514.html" \o "Link to BAILII version), Singh v Dass*[*[2019] EWCA Civ 360*](https://www.bailii.org/ew/cases/EWCA/Civ/2019/360.html)*at [15] – [18] per Haddon-Cave LJ. Where the new point raises a pure point of law, not requiring any further evidence or involving any injustice to the other party, the court will usually permit it to be taken. However, the position is different where, if the new case had been run below, "evidence could have been adduced which by any possibility would prevent the point from succeeding", or the case would have been conducted differently with regards to the evidence at the trial.”*

In this appeal the Claimant effectively raises a pure point of law – that the Judge was wrong in law to introduce the *Hussain v EUI* argument. This then led to an error in fact in assessing the hire claim at £1,000. The raising of this issue on appeal does not necessitate any new evidence on the part of the Claimant and it would not have resulted in the trial being conducted differently with regard to the evidence at trial. It is somewhat difficult to characterise the stage 3 hearing as a trial as no evidence is heard at all. The whole point of the stage 3 hearing is that the evidence is already set in stone at stage 2. The Claimant is clearly entitled to bring this appeal and the Defendant suffers no detriment or injustice in him doing so, save for the risks inherent in losing an appeal. This point carries more weight as counsel for the Defendant had the opportunity to correct the Judge’s error below but failed to take it.

41. For the reasons I have indicated I find that District Judge Foster fell into error by introducing an issue which neither party had indicated was in dispute in the Court Proceedings Pack. This led to him mistakenly assessing the hire charges at £1,000 when he should have awarded them in full. I say this because the only challenge the Defendant had made at stage two was the absence of a signed hire agreement which was an argument doomed to fail on production of the hire agreement at the stage 3 hearing which is what did in fact occur. I have enormous sympathy with him attempting to deal with this issue in a streamlined procedure not really suitable to potentially complex credit hire issues. It did not help that he had virtually no constructive assistance from either advocate on this point which I am sure he would have appreciated. The appeal therefore succeeds, and I will deal with any ancillary issues at the remote hearing when this judgment is handed down.