Claim No C00 DL 380

IN THE COUNTY COURT AT MIDDLESBROUGH

Teesside Combined Court Centre
Russell Street
Middlesbrough

Date: 23 October 2017

Before :

HIS HONOUR JUDGE MARK GARGAN

- -

Between:

Elena Ianos

Claimant

-and-

Samuel Christopher Clennell

Defendants

- -

Timothy Chelmick (instructed by **Winn Solicitors Limited**) for **the Claimant**

Sarah Robson (instructed by **Horwich Farrelly**) for **the First and Second Defendants**

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Approved Judgment

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

JUDGMENT

(1) Introduction

1. This is an appeal against a decision of District Judge Read made on 9 February 2017. Although the parties are now appellant and respondent I shall continue to refer to them as claimant and defendant.

2. The claim arises out of a road traffic accident which occurred on 6th January 2015 and it is common ground that The Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the Protocol") applied.

3. The claimant submitted the Claims Notification Form (CNF) to the RTA Portal on 8th January 2105. Liability was admitted on 26 January 2015 and, as a result, the claim proceeded to Stage 2.

4. The claimant claimed damages for (i) pain suffering and loss of amenity (psla), (ii) physiotherapy charges and (iii) vehicle credit hire. The claims were included in the Stage 2 Settlement Pack submitted to the Defendant on 22nd June 2015.

5. The claims for psla and physiotherapy were ultimately agreed and the court has only been concerned with the credit hire claim.

6. The Defendant initially responded to the credit hire claim by stating:

> *The duration of 32 days for hire. Our offers are £32.01 per day which is broken down as £17.01 per day hire, £5 per day auto and £10 per day additional driver. We have no offers for CDW or admin charge*

7. The Claimant responded on 9th July 2016 stating:

> *On Hire is reasonable and fair within the norms of the UK Self Market. On Hire are not subscribers to the ABI General Terms of Agreement and as such ABI are not relevant in this matter. There is no evidence in support of this. Please provide rate evidence.*

8. The Defendant added a sentence to its original response when submitting his second Stage 2 Settlement Pack Response on 23rd July 2016 so that its response now read (my underlining):

> *The duration of 32 days for hire. Our offers are £32.01 per day which is broken down as £17.01 per day hire, £5 per day auto and £10 per day additional driver. We have*

no offers for CDW or admin charge. We maintain our offers as the amount you are looking for is too high.

9. The claimant submitted the Court Proceedings Pack to the Defendant on 19th August 2015. On 26th October 2016, the claimant issued proceedings pursuant to CPR PD 8B seeking a Stage 3 hearing to determine the credit hire claim.

10. The defendant duly served an Acknowledgement of Service which stated:

> *Pursuant to CPR 8.8(1)(a) and (b) the defendant avers that there are substantial issues of fact surrounding a significant credit hire claim. Further directions are necessary to encompass elements of period of hire, enforceability of agreement and impecuniosity. None of which can be correctly assessed within the Part 8 process.*

11. The dispute as to whether the proceedings should (i) continue to a Stage 3 hearing under CPR Pt. 8 or (ii) be transferred to CPR Pt. 7 with directions given for a trial, came before DJ Read on 9th February 2017. DJ Read accepted the defendant's submissions and transferred the claim to CPR Pt. 7, giving directions for a small claims track trial.

12. The claimant now appeals against that decision, DJ Read having given permission to do so at the original hearing.

13. I am grateful to both counsel, Mr Chelmick for the claimant and Mrs Robson for the defendant for their well drafted skeleton arguments and helpful submissions.

(2) The law

14. The operation of the Protocol is neatly summarised by Jackson LJ in **Phillips v Willis** [2016] EWCA Civ 401:

> *5.*
> *… The procedure comprises three stages. At Stage 1, the claimant submits a CNF with supporting documents and the defendant's insurers respond. If the defendant admits full liability, the case stays within the Protocol and proceeds to Stage 2.*
>
> *6.*
> *The claimant submits a Stage 2 settlement pack, comprising: (i) the Stage 2 settlement pack form; (ii) a medical report or reports; (iii) evidence of pecuniary losses; (iv) evidence of disbursements (for example the cost of any medical report). The defendant then either accepts the claimant's offer or submits a counteroffer by setting out his proposed figures on the Stage 2 settlement pack form. The settlement pack may go backwards and forwards between the parties as each side puts forward revised figures. The Stage 2 process leads, or should lead, to a narrowing of issues. Individual heads of claim may be agreed. Indeed, all heads of claim may be agreed.*

7.

Thus it can be seen that the case may settle during either Stage 1 or Stage 2. The case does settle, the defendant may pay to the claimant fixed cost figures prescribed. The defendant is not allowed to settle on terms which exclude the fixed costs.

8.

In the absence of any settlement, at the end of Stage2, the claimant sends to the defendant a court proceedings pack. This pack sets out the claimant's claimed losses, the defendant's responses, and the final offers of both sides. It also includes the evidence that both sides have submitted during Stage 2. The defendant then pays to the claimant the amount of the defendant's final offer together with all fixed costs due up to the end of Stage 2. The case then proceeds to Stage 3, which is litigation.

9.

At this point Practice Direction 8B takes centre stage. PD 8B requires the claimant to issue proceedings in the County Court under CPR Part 8. The practice direction substantially modifies the Part 8 procedure so as to make it suitable for low value RTA claims where only quantum is in dispute. This modified procedure is designed to minimise the expenditure of further costs and in the process to deliver fairly rough justice. This is justified because the sums in issue are usually small and it is not appropriate to hold a full-blown trial. The evidence which the parties can rely upon at Stage 3 is limited to that which is contained in the court proceedings pack. The court assesses the items of damage is which remain in dispute, either on paper or at a single "Stage 3 hearing".

15. CPR PD 8B §7.2 identifies the circumstances in which the court can order that a former Protocol claim be transferred out of the Stage 3 procedure and continue as a Part 7 claim. I set out both §7.1 and §7.2 as a party seeking transfer to Part 7 under §7.2 must persuade the court that further evidence is required and §7.1(3) explains the circumstances in which a party can rely on further evidence.

7.1

The parties may not rely upon evidence unless—

(1) it has been served in accordance with paragraph 6.4;

(2) it has been filed in accordance with paragraph 8.2 and 11.3; or

(3) (where the court considers that it cannot properly determine the claim without it), the court orders otherwise and gives directions.

7.2

Where the court considers that—

(1) further evidence must be provided by any party; and

(2) the claim is not suitable to continue under the Stage 3 Procedure,

the court will order that the claim will continue under Part 7, allocate the claim to a track and give directions.

16. I consider that the following principles emerge from **Phillips**:

16.1 The RTA process, made up of the RTA Protocol, CPR Pt. 8 and PD 8B, comprises a set of rules which must be followed and there are consequences for failing to do so: see §11:

> *For present purposes, I shall refer collectively to the provisions of the RTA Protocol, PD 8B and CPR Part Eight as modified by PD 8B as "the rules". It is important to note that the RTA process has an inexorable character. If the case falls within the parameters of the RTA process, the parties must take the designated steps or accept the consequences. The rules specify what those consequences are. The rules also specify when a case must remain in the RTA process, when it must drop out of the process, and when it may drop out of the process.*

16.2 The object of the process is gradually to narrow and define the matters in issue: see Jackson LJ's observations in §6 to §9 and §33. This is consistent with the underlying purpose of the RTA process which is to resolve disputes quickly and at proportionate cost. In my judgment, this objective would be undermined if a party was allowed at a later stage to reopen matters which had not been in issue at an earlier stage;

16.3 Whilst the Stage 3 procedure may deliver only *fairly rough justice* that is proportionate because the procedure is designed to minimise expenditure on costs as the sums in issue are generally small such that it is not appropriate to hold a full-blown trial: see §9;

16.4 Save where it is necessary to obtain a CRU certificate, the evidence which the parties can rely on at Stage 3 is limited to that which has been submitted during Stage 2 **unless** a party can satisfy the provisions of PD 8B §7.1(3) and persuade the court that the claim cannot properly determine the claim without such evidence: see Jackson LJ at §8.

16.5 The District Judge's decision in **Phillips** that further evidence was necessary to resolve a credit hire dispute valued at £462, which hinged on whether the claimant should have hired at a daily or weekly rate, was *irrational:* see §31;

16.6 The court can only order that the claim come out of the RTA process and proceed under Part 7 where PD 8B §7.2 is satisfied;

16.7 Although the Court of Appeal declined to give a general ruling as when §7.2 applied Jackson LJ made the following observations at §35:

> *There has been some debate as to the circumstances in which paragraph 7.2 of PD 8B might apply. We do not need to decide that question today. I should, however, point out that there can be cases where, as a consequence of paras 4.6, 6.4 (one), 7.43 and 7.44 of the Protocol, claims are proceeding under the Protocol which involve very high car hire charges. Such cases might involve complex issues of law or fact which are not suitable for resolution at a stage 3 hearing I need not speculate what orders the court might make in those cases suffice it to say that the case before us is not such a case.*

.

17. The editors of the White Book state at §8B PD 7.1:

> *Paragraphs 7.1 to 7.3 demonstrate that, under the Stage 3 procedure, the material that the court will consider in determining the amount of damages is restricted. The procedure builds on the Stage 2 process. It is not designed to give the parties the opportunity to put forward new material that was not exchanged during the process. Where the defendant opposes the claim because the claimant has filed and served additional or new evidence with the claim form that had not been provided under the Protocol, the court will dismiss the claim (para 9.1). The power of the court to order that the claim is not suitable to continue under the Stage 3 process is a power the court may exercise on its own initiative. However, in Phillips v Willis [2016] EWCA Civ 401 the court to set aside an order of the District Judge, made on his own initiative, to transfer a credit hire claim (all other claims having been settled) from the Stage 3 procedure to Pt 7 proceedings allocated to the small claims track. No further evidence was necessary and the directions given would have required parties to incur costs grossly disproportionate to the damages at stake. The case illustrates that transfer out of the Protocol Stage 3 procedure to Pt 7 will be rare and for exceptional cases only.*

18. I respectfully agree with the approach taken by the editors of the White Book that transfer out of the Stage 3 procedure should be rare and for exceptional cases only.

19. Whilst the Court of Appeal did not give a general ruling on which cases should exit the Protocol I consider it significant that Jackson LJ expressly recognised that cases involving *very high car hire charges* would be being pursued under the RTA process. Jackson LJ suggested only that such cases ***might*** involve complex issues of law or fact which rendered them not suitable for a Stage 3 hearing. In my judgment, it is plain that Jackson LJ was not suggesting that all (or even most) credit hire cases should routinely be removed from the Stage 3 process.

20. On behalf of the respondent, Mrs Robson referred me to four cases set out in paragraph 3 of her skeleton argument. The principle that 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. I do not consider it necessary to examine each of those cases in detail. As set out above, **Phillips** establishes that there is a separate RTA process, which includes both the Protocol and the provisions of PD 8B, that is governed by its own strict code which the parties must follow. The appeal in this case arises out of the interpretation and application of PD 8B §7 and §8 and does not involve any conflict (whether real or apparent) between the RTA process and the law of contract.

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/statements 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 defendant insurers are unable to undertake such a task .

22. Further, I respectfully agree with the approach taken by HH Judge 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:

> ***75.***
> *It seems to me that what underpins these rules and practice directions 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.***
> *…*
>
> ***77.***
> *If that is the correct approach, then arguably, it is a 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 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.***
> *…*
>
> ***79.***
> *…*
>
> ***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.

23. In my judgment HH Judge 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.

24. I accept Mrs Robson's argument that the Defendant who objects to the Stage 3 process and argues that the claim should proceed under CPR Pt. 7 should raise the matter in the Acknowledgement of Service. However, I remain of the view that I expressed in **Moon v Cantley** that:

> *37.*
> *In my judgment, the whole purpose of the Protocol process is to limit the areas in dispute as the claim progresses: see **Phillips** at **§33**. In the circumstances I do not consider that the Defendant should be allowed to raise fresh issues during the Stage 3 procedure that it had not raised during the course of Stage 2. [Further, although no longer material to my decision, I do not consider that a Defendant should be able to raise fresh issues not raised in Stage 2 when arguing that the Stage 3 procedure is inappropriate under **8B PD §8**]. I do not regard adopting such a course as being unfair on a Defendant. All the Defendant had to do in this case was make it clear to the Claimant during the course of the Stage 2 process that he was required to prove need and duration and that those issues were not agreed. The Defendant failed to make this clear and impliedly indicated that the issues were agreed.*

25. I do not accept the suggestion that the approach that HH Judge Freedman and I have taken (and which I regard as consistent with **Phillips**) would render PD 8B §7.1 and §7.2 otiose. Those paragraphs of the Practice Direction set out the circumstances in which the court can admit further evidence relevant to the matters (already put) in issue and identify the circumstances in which such matters (already in issue) should be resolved at "full trial" rather than a Stage 3 hearing.

26. Mrs Robson came close to submitting that any claim for vehicle related loss within the RTA process was exceptional. The basis for this submission is the operation of §7.61 of the Protocol. The claimant accepts that a substantial number of credit hire cases will be resolved outside the Protocol. However, I do not accept that this comes anywhere near rendering such claims exceptional. Further, it is apparent from the observations of Jackson LJ at §35 in **Phillips** that such claims are not be considered exceptional as a class-although I accept that (again as Jackson LJ acknowledges) there may be some credit hire cases which do involve complex issues of law and fact which render them unsuitable for the Protocol.

(3) District Judge Read's decision

27. It would not be fair to begin my analysis of the District Judge's reasoning without first explaining that the matter came before him for a telephone hearing with the time estimate

of 30 minutes. This allowed very little time to read skeleton arguments from both parties, listen to their submissions and give a reasoned judgment.

28. The ratio of the decision is set out in paragraphs 11 and 12 the judgment:

> *11.*
> *My decision, realising that time is pressing, is in this case as follows. It seems to me to be right in the interests of justice and within the jurisdiction allowed to me by the rules, to transfer the matter from stage 3, Part 8 to Part 7. I do that because, it seems to me, the claimant cannot extend the application of Mulholland to the stage where we are now. This is a clear case where the defendant has, to my way of thinking, identified significant disputes and issues of fact, amounting, it is fair to say, to several thousand pounds. Those issues of fact can only be determined fairly, I agree with the defendant, in the way the defendant suggests; we are not at a stage 3 hearing (to distinguish Mulholland) but we are contemplating a stage 3 hearing. We are not quite yet there and the matter has been raised appropriately and accurately in the acknowledgement of service, exactly I think as the rules require.*
>
> *12.*
> *Any prejudice that would be caused by defendant at a stage 3 hearing raising the issues which Mr Dobson says his client intends to, will be cured by the application of directions, giving evidence as to what may be used at the small claims, part 7, hearing where this case will next be going. I shall of course ensure, in doing so, that have made proper enquiry as to the detail of the evidence required. I am assuming that that will include rate, and it may be the opportunity for the claimant to raise impecuniosity. It does strike me that rate and duration are relevant; impecuniosity may well be. That seems clear to me from the written submissions that I have in front of me. Therefore, it seems to me, in the interests of justice and proportionality, having regard to the overriding objective of the Civil Procedure Rules, that that is the right outcome for the matter before me today.*

29. Mr Chelmick contends that the judge's decision comprises three central findings:

> *.1 The decision in Mulholland could be distinguished as the issues had been raised in the acknowledgement of service and not (as in Mulholland) at the Stage 3 hearing (paragraph 11);*
>
> *.2 All issues relating to hire charges remained an issue (including period, impecuniosity and rate) (paragraph 12);*
>
> *.3 Further evidence was required to determine the claim (paragraph 11).*

30. Mrs Robson does not wholly accept this analysis of the judgment as she argues that the District Judge found in paragraph 10 of his judgment that the Defendant had placed all

matters in relation to credit hire (need, duration, rate, impecuniosity and enforceability) in issue during Stage 2. I therefore set out paragraph 10 of DJ Read's judgment at this stage:

> *10.*
> *For the claimant, Mr Kipling says that the only issue is credit hire and it was quite simply up to the defendant to put forward its evidence at stage II and that any lower offers made at that stage needed to be explained. He relies on paragraph 7.4.1 the RTA Protocol and that that is to assist in settlement negotiations, to force the parties to focus on the issues and, if there is no settlement, then paragraph 7.6.1, and 7.7.0 of the Protocol kick in. The claimant has to send the defendant a proceedings pack and the defendant has to pay the claimant its offer. The defendant did not raise the claimant's higher period, but any disputed rate. That is something, I must interject at this point, that I am not so sure of. It seems to me that whilst rate is specifically attacked, the defendant says that the claim is simply too high.*

31. Mrs Robson argues that, having found all matters to be in dispute in Stage 2, the District Judge had simply to exercise his discretion as to whether or not to transfer the claim from Stage 3 to Pt 7.

(4) The test on appeal

32. CPR Pt. 52.21(3) provides:

> *The appeal court will allow an appeal where the decision of the lower court was-*
> *(a) wrong; or*
> *(b) and just because of a serious procedural or other irregularity in the proceedings in the lower court.*

33. It is not suggested that there was any procedural or other irregularity within CPR 52.21(3)(b) in the proceedings before DJ Read. I must consider whether the District Judge was "wrong" in the sense that he (i) erred in law; or (ii) erred in fact; or (iii) erred (to the appropriate extent) in the exercise of its discretion.

34. No difficulty arises in approaching the first limb of the test-I must simply determine whether the District Judge has applied the law correctly.

35. In so far as I must review the exercise of the District Judge's discretion then I must apply the law as set out in the following passage from the White Book at §52.21.5:

> *As to what constitutes a sufficient error in the exercise of discretion to warrant interference by the appeal court, see* Tanfern Ltd v Cameron-MacDonald (Practice Note) [2000] 1 W.L.R. 1311, CA*, para.32. Brooke L.J suggested that guidance might be gained from the speech of Lord Fraser in* G. v G. (Minors: Custody Appeal) [1985] 1 W.L.R. 647*, HL, at 652. In the latter part of the passage cited by Brooke LJ, Lord Fraser stated:*

> "the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."
>
> *Reasons for judgment will always be capable of having been better expressed ... An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that they misdirected themselves (above).*
>
> *An alternative formulation of the threshold test for interference with the exercise of discretion by the appeal court is that stated by Lord Woolf MR in* AEI Rediffusion Music Ltd v Phonographic Performance Ltd [1999] 1 W.L.R. 1507, CA*, at 1523:*
>
> *"Before the court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale."*

36. This is not a case in which the District Judge heard evidence. However, Mrs Robson argues that the District Judge rightly construed the Defendant's comments during Stage 2 as putting all matters relating to credit hire in issue. In my judgment, I should interfere with any such finding by the District Judge's findings about the meaning of the document only if he has taken into account irrelevant factors, failed to take into account relevant factors or reached a conclusion outside the bracket of reasonable interpretations of the Defendant's comments open to him.

(5) Was the District Judge right to distinguish Mulholland

37. There is plainly a difference between the facts of this case and those of **Mulholland**. In **Mulholland** the Defendant attempted to put forward new arguments at the Stage 3 hearing. In this case the Defendant was seeking to put forward (potentially) new arguments in the Acknowledgement of Service-in other words before any direction had been given for a Stage 3 hearing. As District Judge Read pointed out, the course for which the defendant was arguing would have given the claimant an opportunity to put any evidence on which he wanted to rely before the court.

38. However, the underlying principle identified in **Mulholland** was that, pursuant to §7.41 of the Protocol, a party was not entitled to raise issues in Stage 3 that had not been raised in Stage 2. In my judgment (as set out above) there is clear support for that approach in the decision of the Court of Appeal in **Phillips**. Further, in any event, such an approach is entirely

consistent with the underlying objectives of the "RTA process" for the reasons set out above and in my judgment in **Moon v Cantley**.

39. The District Judge held that the defendant had *raised the issues appropriately and accurately in the acknowledgement of service, exactly as I think the rules require*. In doing so, the District Judge held that, as a matter of law, a defendant could pursue any issues raised in the Acknowledgement of Service even if they had not been raised during Stage 2. Further he expressly stated *it seems to me, the claimant cannot extend the application of **Mulholland** to the stage where we are now.* In my judgment, these findings were wrong in law as a defendant may only contest in Stage 3 such matters as have been put in issue during Stage 2.

40. Therefore, to invert the aphorism, the judge was right to identify a difference between the facts of this case and **Mulholland** but wrong to distinguish the principle that case establishes.

41. Therefore, I accept that the claimant has established that the basis of the decision was wrong in law.

(6) Had the Defendant put everything in issue during Stage 2

42. There are five matters which are generally put in issue in credit hire claims: (i) need; (ii) duration of hire; (iii) impecuniosity; (iv) rate; and (v) enforceability.

43. In its Skeleton Argument before DJ Read the defendant argued that all issues apart from need were in dispute. The Acknowledgement of Service did not expressly mention need or rate but it is argued that an issue on rate must be implied where impecuniosity is in issue as the only purpose in raising that impecuniosity is to contend that the claimant was not entitled to claim credit hire rates.

44. Mrs Robson argued that DJ Read had made a finding that all matters had been put in issue during Stage 2 by the addition of the sentence:

> *We maintain our offers as the amount you are looking for is too high.*

45. When considering the defendant's comments in Stage 2 DJ Read said:
    45.1 In paragraph 10:

> *[The claimant argues that] The defendant did not raise the claimant's hire period, but only disputed rate. That is something, I must interject at this point, that I am not sure of. It seems to me that, whilst rate is specifically attacked, the defendant says the claim is too high.*

45.2 After explaining that he was going to order that the claim proceed under CPR Pt. 7 and that he would give appropriate directions:

> *I am assuming that it [the evidence] will include rate and it may be the opportunity for the claimant (sic) to raise impecuniosity. It does strike that rate and duration are relevant, impecuniosity may well be.*

46. In my view, DJ Read did not make any findings about the effect of the Defendant's Stage 2 comments in paragraph 10 of his judgment. I accept that DJ Read stated that he was *not sure* that the claimant was right to submit that the defendant only disputed rate. However, in my judgment, he did not go on to make any positive finding in paragraph 10 that the Defendant was right in asserting that all matters had been put in issue in Stage 2-no doubt because he did not believe such a finding was necessary given his finding that the defendant was entitled to raise such issues for the first time in the Acknowledgement of Service.

47. Further, in my judgment, the District Judge's comments in paragraph 12 were not put forward as his findings on the construction of the Defendant's comments in Stage 2. In paragraph 12 of his judgment the District Judge was not seeking to explain what had been put in issue in Stage 2 but to explain why the claimant could have a fair trial on the issues raised in the Acknowledgement of Service if he transferred the claim to Part 7.

48. Therefore, I do not accept that DJ Read made any finding that the defendant had raised the issues it ultimately wished to pursue in Stage 2.

49. Therefore, I do not accept the argument that Mrs Robson appeared to put forward namely that, the decision could be supported on the basis that the District Judge had found as a fact that all matters had been put in issue in Stage 2 and was properly exercising his discretion under §7.2.

(7) What matters were put in issue during Stage 2

50. I must identify the matters the defendant put in issue during Stage 2 for two separate reasons:
    50.1 Firstly, if I am right in my conclusion that the appeal must be allowed because the District Judge was wrong in law then I must identify the matters that were in issue in Stage 2 when considering the test under PD 8B §7.2;
    50.2 Secondly, if (contrary to my view) DJ Read found as a fact that the defendant had put all matters in issue during Stage 2 I must consider whether such a finding was wrong on the basis identified in paragraph 36 above.

51. I have already identified the matters generally put in issue in credit hire claims. When the defendant first responded to the claimant it stated simply:

> *The duration of 32 days for hire. Our offers are £32.01 per day which is broken down as £17.01 per day hire, £5 per day auto and £10 per day additional driver. We have no offers for CDW or admin charge*

52. I remind myself that an offer by the defendant does not constitute a binding admission. On the other hand, this was the defendant's opportunity to tell the claimant in ordinary language what was in issue. If the defendant wanted to put any of the 5 matters in issue all it had to do was say so. In my judgment, viewed objectively the statement above expressly accepts that the relevant period of hire is 32 days. Further, by failing to raise any issue other than rate I consider that the defendant is impliedly accepting that these issues were agreed.

53. Mrs Robson contends that the defendant's one sentence reply to the Claimant's response changes the construction which should be put upon its reply. That sentence must be put into context. First, the claimant's response was limited to (i) asserting that the rate claimed was fair and reasonable; (ii) pointing out that the vehicle provided, On Hire, was not a subscriber to the ABI General Terms and Conditions; and (iii) asking for rate evidence. It is apparent that the claimant believed only rate to be in issue. The defendant responded:

> *The duration of 32 days for hire. Our offers are £32.01 per day which is broken down as £17.01 per day hire, £5 per day auto and £10 per day additional driver. We have no offers for CDW or admin charge. <u>We maintain our offers as the amount you are looking for is too high.</u>*

54. There is still no suggestion that duration, enforceability, need or impecuniosity are in issue. The only identified issue is that the claim is *too high*. I do not see why adding an assertion that the amount that the claimant is looking for was *too high* should be construed as putting anything other than rate in issue-particularly in the context of the defendant's previous comments. Therefore, I am firmly of the view that, properly construed, the only matter put in issue by the defendant's comments in Stage 2 was rate.

55. Further, if (contrary to my view) the District Judge found that the defendant had put all credit hire matters (or any further credit hire matters) in issue at Stage 2 then:
    55.1 For the reasons set out above I do not consider that this is the appropriate construction;
    55.2 Further, I do not consider that such a construction is within the band of findings open to a district judge who has properly directed himself as to the available evidence. I do not consider that saying the amount claimed is too high in this context could reasonably be considered to put anything other than rate in issue;
    55.3 Therefore, I consider any such finding by the District Judge to be wrong for the purposes of CPR Pt. 52(3)(a) and would allow an appeal against such a finding.

(8) Applying the appropriate test

56. It follows from my findings above that I must now apply my own judgment to determine whether the claim should proceed to a Stage 3 hearing or be transferred to Part 7.

57. Under PD 8B §7.2 it is for the defendant to persuade the court that:
    57.1 Further evidence *must be provided*; and
    57.2 The claim was not suitable to continue under the Stage 3 Procedure.

58. There is no guidance in §7.2 as to the circumstances in which the court might find that evidence *must be provided* by a party. However, in my judgment, §7.1(3) provides valuable assistance when considering §7.2.

59. Under §7.1(3) a party may only rely on further evidence when *the court considers that it cannot properly determine the claim without it*.

60. In my judgment, the court can find that evidence *must be provided* for the purposes of §7.2(1) only where it finds that *it cannot properly determine the claim without it*.

61. As set out in my judgment in **Moon v Cantley** the term *properly* must involve a value judgment and the court must consider whether it can *justly and at proportionate cost* determine the claim in accordance with the overriding objective without further evidence.

62. Applying that test to the facts of this case, in which only rate of hire is involved, I do not consider that it would be appropriate to allow the Defendant to introduce further evidence at this stage.

63. In reaching that conclusion I take into account each of the factors identified in **CPR Pt. 1.1(2)** as follows:
    63.1 **Equal footing:** whilst refusing the defendant permission to rely on independent rate evidence at this stage undoubtedly gives the claimant an advantage in the proceedings this position arises only because the defendant has failed to take advantage of the opportunity to put such evidence forward as part of the Stage 2 process (when it was invited to do so by the claimant);
    63.2 **Saving expense:** refusing the Defendant's application will lead to a considerable saving in costs because it will not be necessary to generate rate evidence or for the Claimant to seek further evidence to rebut it;
    63.3 **Proportionality:** The claim in this case is modest. It looks as though about £3,000 is in issue between the parties in relation to rate. That is towards the lower end of the range of cases for which the Protocol is applicable. Further, the issues are standard for this type of litigation-certainly there is no evidence before me to suggest that they are in any way "special";

63.4 **Expeditiously and fairly:** I note in particular Jackson LJ's observations at §33 of **Phillips** that the intention of the Protocol is gradually to whittle down the areas of dispute and thereby save time and expense. In my judgment, the provisions of §7.1(3) and §7.2(1) are not intended to enable all Defendants who have failed properly and fully to engage in the Stage 2 process to rectify that failure. Therefore, if a Defendant is to persuade the court to grant permission for further evidence it must show some reasoned basis to justify that decision. No such rationale has been put forward here other than the need for such evidence to meet the claim given the failure to do so before. Therefore, I consider that it is fair to prevent the Defendant from relying on such evidence as it will lead to expeditious resolution of cases generally because it will encourage Defendants to ensure that they deal with matters fully at Stage 2;

63.5 **Appropriate share of the court's resources:** Pursuant to my finding there must be a Stage 3 hearing which involves a lesser demand on court resources than a full trial. Further, in taking such an approach parties will be encouraged to ensure that all issues are properly ventilated at Stage 2 which should encourage cases to resolve at that Stage without even the need to call on the resources of the court as part of Stage 3;

63.6 **Compliance:** This is not a case in which the Defendant has failed to comply with the rules or any practice direction or order. However, in my judgment the Defendant is seeking to persuade the court to take an unusual course because it has failed to exchange evidence necessary for its argument as part of the Stage 2 process.

64. It follows that the defendant has failed to satisfy the first limb of §7.2(1).

65. For the sake of completeness, I do not consider that the claim is *unsuitable* to be determined under the Stage 3 procedure. There is nothing to suggest that there are any complex issues of law or fact of the type identified in Jackson LJ in §35 of **Phillips**. This is a straightforward dispute about rate of hire which is eminently suitable for a Stage 3 hearing.

66. Therefore, the defendant has failed to satisfy either limb of the test set out in PD 8B §7.2.

(9) Conclusion

67. Therefore, in my judgment:

67.1 The District Judge was wrong in law to find that the defendant had complied with the RTA process when raising issues (for the first time) in the Acknowledgement of Service;

67.2 The District Judge did not make any finding as to the matters that the defendant had put in issue during the Stage 2 process;

67.3 The only issue raised by the defendant during the Stage 2 process was "rate". In so far as the District Judge made any finding that other issues were raised during Stage 2 his finding was "wrong";

67.4 I must consider whether the claim should be transferred to Pt 7 and/or whether there should be a direction for further evidence;

67.5 Further evidence is not required to enable the court to properly determine the claim;

67.6 The matter should proceed to a Stage 3 hearing.

68. I therefore allow the appeal and would be grateful if the parties could submit an appropriate draft Order.

2nd October 2017

HH Judge Mark Gargan