Case No: G00CF771

IN THE COUNTY COURT AT CARDIFF

Cardiff Civil and Family Justice Centre
2 Park Street
Cardiff
CF10 1ET

Judgment circulated in draft: 1st February 2021
Judgment handed down: 10th February 2021

Before :

HIS HONOUR JUDGE PETTS

- -

Between :

MARVA GREYSON	**Claimant**
- and -	
MR RYAN FULLER	**Defendant**

- -
- -

Kriti Upadhyay (instructed by **Admiral Law**) for the **Claimant**
Nicola Hunt (instructed by **BLM**) for the **Defendant**

Hearing date: 25th January 2021
Further written submissions filed sequentially on 27th and 28th January 2021

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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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HHJ Petts

Approved Judgment

HHJ Petts :

Introduction

1. A claimant obtains a medical report under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the RTA Protocol") but does not send it to the defendant through the Portal at that stage. The claimant later obtains further medical reports from different experts and sends all the medical reports to the defendant at the same time. Does this mean that the further medical reports are not "justified" within the meaning of paragraph 7.8B(2) of the RTA Protocol? If so, what (if any) are the consequences for the claimant of the reports not being "justified", and if there are consequences, do they follow automatically or is it a case where the court must exercise its discretion to impose, or grant relief from, sanctions?

2. These are the issues in this case. In summary, the Defendant argues that the failure to disclose the first medical report before disclosing the further reports means that the Claimant is debarred from relying on any reports apart from the first one, while the Claimant says that, even if there has been a breach, there is no automatic sanction of inadmissibility and the Claimant ought to be allowed to rely on the further reports at the Stage 3 hearing.

Summary of the facts

3. The facts can be stated relatively shortly. The Claimant sustained an accident on 28th June 2017. Liability was swiftly admitted. On 3rd August 2017, she was seen by a GP (Dr Abrahams) who prepared a report the same day, anticipating full recovery from her soft tissue injuries within a further 4 months (i.e. by early December 2017), failing which he would recommend a further report. His report was not disclosed to the Defendant at that stage.

4. It appears that the Claimant failed to recover as anticipated and she was seen by an orthopaedic surgeon, who produced various reports between April 2018 and January 2019, and then by a pain management expert, who produced a report in October 2019.

5. The Stage 2 Settlement Pack, together with the reports from all three experts, was submitted to the Defendant through the Portal on 13th March 2020. This was the first time that the Defendant had seen any of the reports. Offers were made by both parties but the case did not settle and the Court Proceedings Pack was submitted on 6th May 2020. The claim was issued on 8th June 2020 and listed for a Stage 3 oral hearing on 3rd December 2020.

6. The Defendant first raised the issue of failure to comply with paragraph 7.8B(2) on the day before the Stage 3 hearing by serving a witness statement from the insurer's claims handler. District Judge Muzaffer adjourned the case for argument on the issue, with a costs order against the Defendant, and the case was listed before me on 25th January 2021. In view of the complexity of the points raised, and the possible wider importance of the issue, I reserved judgment, and subsequently invited written submissions on a potentially relevant Court of Appeal decision that had not been mentioned by either party.

Compliance with the protocol

7. Paragraphs 7.8A and 7.8B of the RTA Protocol are follows:

> "Soft tissue injury claims – medical reports
>
> **7.8A** In addition to paragraphs 7.1 to 7.7, and subject to paragraph 7.8B, in a soft tissue injury claim—
>
> (1) the first report must be a fixed cost medical report from an accredited medical expert selected for the claim via the MedCo Portal (website at: www.medco.org.uk); and
>
> (2) where the defendant provides a different account under paragraph 6.19A, the claimant must provide this as part of the instructions to the medical expert for the sole purpose of asking the expert to comment on the impact, if any, on diagnosis and prognosis if—
>
> (a) the claimant's account is found to be true; or
>
> (b) the defendant's account is found to be true.
>
> **7.8B** In a soft tissue injury claim—
>
> (1) it is expected that only one medical report will be required;
>
> (2) a further medical report, whether from the first expert instructed or from an expert in another discipline, will only be justified where—
>
> (a) it is recommended in the first expert's report; and
>
> (b) that report has first been disclosed to the defendant; and
>
> (3) where the claimant obtains more than one medical report, the first report must be a fixed cost medical report from an accredited medical expert selected via the MedCo Portal and any further report from an expert in any of the following disciplines must also be a fixed cost medical report—
>
> (a) Consultant Orthopaedic Surgeon;
>
> (b) Consultant in Accident and Emergency Medicine;
>
> (c) General Practitioner registered with the General Medical Council;
>
> (d) Physiotherapist registered with the Health and Care Professions Council."

8. In other words, paragraph 7.8B(2) sets out two conditions for a further medical report to be justified: that it is recommended in the first expert's report, and that the first medical report has first been disclosed to the defendant.

9. In this case, the first condition is satisfied. However, the second condition has not been satisfied since all the reports were disclosed at the same time. I find therefore that none of the further reports were "justified" within the meaning of the RTA Protocol.

10. The Defendant submitted that the rationale for the second condition was to allow the paying party to have some input into the process before the further report(s) were obtained, whether by involvement in the selection of experts or arranging for recommended treatment or investigations (such as an MRI scan, as happened in this case) potentially at a lower cost than the injured party could obtain. This is plausible but there is in fact nothing expressly set out in the RTA Protocol that gives a right of input or involvement to the paying party once a first medical report has been disclosed. This contrasts with the Pre-Action Protocol for Personal Injury Claims, which "*requires a completely open approach in respect of medical treatment, experts and rehabilitation, none of which is reflected (for obvious reasons of proportionality) in the RTA Protocol*".[1]

11. The Claimant submitted that paragraph 7.8B(2) was a guide for parties, not prescriptive. It did not prevent a claimant obtaining a further medical report without disclosing the first report: at most it regulated the timing of disclosure of the two reports such that, for example, a claimant could disclose the first report at 10am and the further report at 11am. It was submitted that this would mean that there had been compliance with the procedure and that it could not be said that the second report was not justified. This is an unattractive interpretation. There would be no sense in having a provision that could be gamed so easily. The natural meaning, in my view, is that a claimant is not justified in obtaining a further medical report (assuming it is recommended) without disclosing the first report prior to obtaining the subsequent one.

12. I am supported in this interpretation, firstly, by the aims of the RTA protocol, which include ensuring that the use and cost of medical reports is controlled. Paragraph 7.8B(2) is therefore best interpreted as a restriction on obtaining a further report, not as merely a pernickety and pointless hurdle meaning that the first report can be disclosed a matter of minutes before a further report is disclosed without any consequence. Secondly, by paragraph 7.12, which provides that if a claimant needs to obtain a subsequent expert report, the parties should agree to stay the Protocol process for a suitable period and then an interim payment can be requested. If a claimant does not recover within the prognosis period of the first report, then it seems to me that the proper procedure is for the first report to be disclosed with the defendant being told that a further report is needed. The defendant is thus kept informed of progress and of important developments that might affect the value of the case, whether or not the defendant wants any input into rehabilitation or the selection of another expert. Whether any failure to do this is important will depend on the facts of each case, of course.

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[1] *Cable v Liverpool Victoria Insurance* [2020] EWCA Civ 1015, paragraph 78 per Coulson LJ.

Is the Defendant estopped from taking the point?

13. The statement from the Claimant's solicitor says that the Defendant is estopped from contending that any non-compliance with the RTA Protocol should limit the evidence that the Court can consider when assessing damages at the Stage 3 hearing. The Claimant argues that the offers made by the Defendant were clearly based on a longer prognosis period that the few months allowed for by the first medical report, and that no objection was made to the manner in which the claim had proceeded until very late in the day either before proceedings were issued or in the Acknowledgment of Service. The Claimant also notes that there have been substantial part-payments towards fixed costs and disbursements that would include the disputed reports.

14. The Defendant replied that offers can be made for commercial reasons rather than based on the value of the claim as disclosed by admissible expert reports. However, there was no evidence that this is what had happened here. In fact, this would be contrary to the submission by the Defendant that those dealing with the matter were unaware of the decision of HHJ Gosnell in *Mason v Laing* (unreported, 20th January 2020), this being the case that seems to have inspired the Defendant's present challenge and to which I shall have to return.[2] It seems to me that the Defendant did not have any commercial reason to pay more than the case was worth, assessed on all the medical reports rather than simply the first one, since it did not occur to the Defendant that there had been a breach of the Protocol with potential consequences on admissibility of evidence. I accept the Defendant's point, however, that the Acknowledgment of Service does not cover the situation where a defendant accepts that the Stage 3 procedure is being properly used but challenges the Claimant's ability to rely on some of the evidence served in support of the claim.

15. While the Defendant can certainly be criticised for the belated way in which the point was taken, I do not think that the Defendant is estopped from raising the point. There has been no detrimental reliance by the Claimant on the Defendant's pre-proceedings stance, for instance. In fact, estoppel was not relied on by Ms Upadhyay in her skeleton argument or during the hearing, and the factors that potentially arise are best considered in another way, as I hope to demonstrate.

Mason v Laing

16. As I have already said, the Defendant rely on the decision of HHJ Gosnell, Designated Civil Judge for North and West Yorkshire, in *Mason v Laing*. This is a case with considerable similarities to the one before me. The claimant obtained a first report, then further reports from an orthopaedic surgeon and a psychologist, before uploading all the reports to the Portal at the same time. At the Stage 3 hearing, Deputy District Judge Ellington ruled that the further medical reports were not justified within the meaning of paragraph 7.8B(2) because the first report had not been disclosed separately first to the defendant, and the claimant could not rely on reports that were not "justified". This decision was upheld on appeal.

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[2] Ms Hunt for the Defendant said that those dealing with the claim were not aware of *Mason* until shortly before the hearing. She said that she first saw it mentioned in Gordon Exall's Civil Litigation blog. I do not know when those dealing with this sort of case more frequently than me generally first became aware of *Mason v Laing* but for what it is worth a search of my emails, as a subscriber to the very helpful blog, shows that the decision was circulated by Mr Exall on 27th October 2020. I doubt that Ms Hunt was instructed in this case at that time, but nothing turns on this.

17. HHJ Gosnell said that (contrary to the claimant's first argument) the court had power to debar reliance on the further reports, because the claimant could only file with the claim form those documents that already been sent to the defendant under the protocol (paragraph 6.3 of PD8B), which he interpreted to mean "sent in accordance with the relevant protocol".

18. As to whether the power should have been exercised in that way, HHJ Gosnell said that there were three possible interpretations of paragraph 7.8B(2) of the RTA Protocol on whether a further medical report was justified. Firstly, that there was no sanction: the claimant was entitled to rely on it and claim the cost. Secondly, the sanction was that the report could not be relied upon. Thirdly, the report could be relied upon, but the defendant could challenge the cost.

19. HHJ Gosnell rejected the first option, because it would not comply with the aims of the RTA Protocol on controlling the use and costs of medical reports, and because a breach of the Protocol had to have a consequence. He rejected the third alternative, saying that paragraph 7.31 of the Protocol (which allows challenge to the costs of any report not reasonably required) is for situations where a report has been obtained in compliance, perhaps even technical compliance, with the Protocol but the defendant still says that they should not pay for the cost of that report. He said that the correct interpretation was the second one, that the report could not be relied upon by the claimant.

20. On that basis, HHJ Gosnell said that there is no provision in the RTA Protocol allowing the claimant to seek relief from sanctions for a failure to comply with its provisions and so the deputy district judge had no discretion to allow reliance upon the unjustified report.

21. The Claimant argues that the decision is wrong and / or has been overtaken by the approach of the Court of Appeal in *Cable v Liverpool Victoria Insurance* [2020] EWCA Civ 1015, a decision post-dating *Mason*. I will also consider *Wickes Building Supplies v Blair* [2019] EWCA Civ 1934, which was decided in between the decisions of the deputy district judge and HHJ Gosnell in *Mason* but which is not mentioned in HHJ Gosnell's judgment.

Cable v Liverpool Victoria Insurance

22. *Cable* concerned a case under the RTA Protocol where Part 8 proceedings were started and immediately stayed on the false premises that the claim was a low-value RTA claim when the claimant's solicitors knew or ought to have known that it was worth almost a hundred times more than the upper limit of the Protocol. It clearly addresses very different issues to the present case and to *Mason,* but the Claimant says that there are relevant statements of principle, for example repeated references to the Practice Direction on Pre-Action Conduct and Protocols ("the Pre-Action Practice Direction") in relation to the need for compliance with pre-action protocols and the consequences of failing to do so. I shall deal with that submission later.

Wickes Building Supplies v Blair

23. In *Wickes*, the claimant was injured at work and the claim proceeded under the EL/PL Protocol, which is very similar, but not identical to, the RTA Protocol. Damages were

not agreed, and the claim went to a Stage 3 hearing. The defendant objected to the claimant relying on a witness statement that had not been served in accordance with the Protocol, and the district judge excluded it from consideration when assessing damages. The claimant argued that the defendant was actually opposing the claim because of the claimant serving new evidence with the claim form that had not been provided under the Protocol, and so the claim had to be dismissed under PD8B paragraph 9.1, leaving the way for the claimant to start proceedings under Part 7. The Court of Appeal disagreed, saying that the matter was covered by PD8B paragraph 7, not paragraph 9. Accordingly, while the default position was that the evidence may not be relied upon, the court had a discretion to order otherwise under PD8B paragraph 7.1(3) if the court considered that the claim could not be properly determined without it.

24. Following the hearing, during which *Wickes* was not mentioned by either party, I invited written submissions on whether it was relevant to the present case.

25. The Claimant said that any relevance is limited because the Defendant has not relied upon either paragraph 7 or paragraph 9 of PD 8B, nor has the Claimant served additional evidence with the Claim Form that was not sent to the Defendant at Stage 2. In any event, says the Claimant, the case shows that the court has discretion to deal with late service as it considers appropriate, in line with *Cable* and the Pre-Action Practice Direction (the Claimant's preferred analysis being that any question of the application of a sanction has to be considered under paragraph 15 of that Practice Direction).

26. The Defendant says that the same issue arises in both *Wickes* and the present case – should a party be permitted to rely on evidence at a Stage 3 hearing that was not served in accordance with the Protocol? At the hearing the Defendant submitted that the Protocol was a technical, rules-based system where one slip meant that you were penalised, and that there was no facility to be able to undo the mistake. This is true, I accept, of compliance with time limits but the question of the admissibility of evidence is not as clear-cut. In written submissions, the stance was softened slightly, the position now being that the Defendant concedes that PD8B paragraph 7.1(3) could be used to allow the admission of evidence served otherwise than in accordance with the Protocol, but submits that this would mean that there would be no sanction for the failure to follow the Protocol and so the power ought not to be used.

Is there a sanction for breach of paragraph 7.8B(2) of the RTA Protocol?

27. I approach the matter in this way:

    i) By disclosing the first and the further medical reports to the Defendant at the same time, the Claimant breached paragraph 7.8B(2) of the RTA Protocol (as discussed above).

    ii) That breach meant that the further medical reports were not "justified".

    iii) If a claimant discloses a medical report that is not justified because of a failure to follow paragraph 7.8B(2), then that report has not been sent to the defendant in accordance with the Protocol for the purposes of PD8B paragraph 6.3. I agree with the way that HHJ Gosnell interpreted this provision, and in my

view, this also accords with the approach of the Court of Appeal in *Wickes* at paragraph 32:

> "Under [paragraph 7 of Practice Direction 8B], the court at the hearing must disregard any evidence not served in accordance with the Protocol and the Practice Direction unless the court considers that it cannot properly determine the claim without it." (emphasis added)

iv) In such circumstances, the default position is that the claimant cannot rely on that report without the court's permission, under PD8 paragraph 7.1(3), in the same way that the failure to serve the witness statement in accordance with the EL/PL Protocol in *Wickes* meant that the claimant needed permission to rely upon it. In other words, there is a sanction for a failure to follow the Protocol, but one over which the court has a discretion.

v) Accordingly, I respectfully disagree with *Mason* where it decides that a judge has no discretion to admit a report that was not served in accordance with the Protocol. In fairness to HHJ Gosnell, as neither PD8B paragraph 7.1(3) nor *Wickes* feature in his judgment, it might well be that neither was cited in argument.

vi) I accordingly reject the Defendant's stance that the fact that the reports were not justified means that they were irremediably inadmissible.

vii) I also reject the Claimant's stance that "justified" is a matter solely relating to costs considerations, based on the term's use in CPR 45.19(2C).[3] That approach would mean that a party could obtain and then disclose *en masse* any number of further medical reports, regardless of whether any expert recommended them, and face no restriction or limitation on their use, and suffer no consequences save for a potential costs penalty. That does not seem to me to accord with the aim of controlling the use of medical reports. It could potentially be a means of a claimant using the RTA protocol as a tactical device to secure an unfair advantage over a defendant, which must not happen (paragraph 4 of the Pre-Action Practice Direction).

Should the Claimant be given permission to rely upon the reports?

28. I can take some preliminary points quickly:

i) The Claimant says that the appropriate route for considering sanctions is paragraph 15 of the Pre-Action Protocol but this does not fit with the approach upheld by the Court of Appeal in *Wickes* in an analogous situation, which was to look at the matter under PD8B paragraph 7.1.

ii) The Claimant criticises the Defendant for not making an application under PD8B paragraph 7.1 but in fact it is for the Claimant to show that permission ought to be given to rely upon the reports, not for the Defendant to show that permission ought not to be given.

[3] "The cost of obtaining a further expert report from an expert not listed in paragraph (2A)(b) is not fixed, but the use of that expert and the cost must be justified."

iii) As noted above, the Defendant says that using PD8B paragraph 7.1(3) to allow the admission of disputed evidence would mean that there would be no sanction for the breach of the RTA Protocol. I disagree. It would simply mean that the court decided that the sanction ought not to apply in the circumstances of the case. This is the same whenever, for example, a party obtains relief from sanctions for breaching an "unless" order.

iv) The Claimant says that there is no prejudice to the Defendant and so the reports ought not to be excluded. I agree that prejudice to the Defendant is a factor, but it is not the sole factor, so a decision on the issue would not be determinative in either direction.

29. The wording of PB8B paragraph 7.1 is that

> *"the parties may not rely upon evidence unless… (3) (where the court considers that it cannot properly determine the claim without it), the court orders otherwise and gives directions."*

30. The Defendant says that the claim can be properly determined without the further medical reports. I accept that the claim can be determined without them, but the question is whether it would be properly determined without them. That involves wider considerations than whether it is technically feasible to assess damages without a particular piece of evidence. In my view, the question of whether the sanction ought to remain in place needs to be considered using the well-known three stage approach of *Denton v TH White* [2014] EWCA Civ 906.

31. The Claimant says that it is legitimate to consider in addition the provisions of the Pre-Action Practice Direction, which provide general guidance on pre-action behaviour and the consequences of non-compliance. The Defendant says that it is not because they are not relevant where there is a specific protocol, as with the RTA Protocol, which is why they were not mentioned in *Mason*. I agree with the Claimant. The Court of Appeal considers them in *Cable* without any suggestion that they have no applicability to claims proceeding under the RTA Protocol. The lack of mention in *Mason* is not determinative. However, despite the Claimant's submissions relying in part on the way the Court of Appeal went about exercising its discretion in *Cable*, I am not carrying out the same exercise, which was deciding whether there was an abuse of process followed by selection of the appropriate sanction. My task is very different.

32. The Claimant relies on the following provisions of the Pre-Action Practice Direction:

i) Under paragraph 13, the court will consider whether all parties have complied in substance with the terms of the relevant pre-action protocol and is not likely to be concerned with minor or technical infringements;

ii) Under paragraph 15, the court may order (inter alia) that sanctions are to be applied for non-compliance;

iii) Under paragraph 16, the court will consider the effect of any non-compliance when deciding whether to impose any sanctions, and four possible sanctions are given relating to costs and interest.

33. The Claimant says that paragraph 16 does not include a sanction of inadmissibility. There are two problems with this submission. Firstly, as I have already concluded, the sanction arises under the terms of the RTA Protocol and the Claimant needs to obtain relief from sanctions. It is not the case that the reports are already properly in evidence and the Defendant is asking the court to exercise its discretion under the Pre-Action Practice Direction to impose a sanction and exclude them. Secondly, paragraph 16 is not a closed list of possible sanctions, as was accepted during the hearing.

34. When considering an application for relief from the sanction imposed by paragraph 7.8B(2), it is important to bear in mind the aims of the RTA Protocol as set out in paragraphs 3.1 and 3.2, the main points here being:

    i) To ensure that damages to be paid within a reasonable time, and fixed costs to be paid at each appropriate stage, without the need for proceedings; and

    ii) To ensure that the use and cost of medical reports is controlled, and that in most cases only one medical report is obtained.

35. No application for relief from sanctions has been filed by the Claimant but in the circumstances in which the point has arisen, against a complicated backdrop of provisions and authorities, I do not hold that against the Claimant. Both parties have ventilated the necessary points even if not by reference to the three-stage test, to which I can now turn.

36. Firstly, was the breach serious or significant? A breach of paragraph 7.8B(2) could be serious or significant in a particular case. In my view, however, this is not the case here.

    i) I cannot see, on the evidence before me, that there was any actual effect on the way that the pre-action stage of the litigation was handled by either party. There is certainly no evidence of any impact put forward by the Defendant.

    ii) There was no objection from the Defendant at the time. If the Defendant had been concerned by the late disclosure of the first report, and the failure to keep the Defendant informed of the progression of the Claimant's symptoms and the need for two further experts, I would have expected a contemporaneous complaint.

    iii) Furthermore, the parties' respective offers set out in Part A of the Court Proceedings Pack bear out the Claimant's submission that the parties were negotiating based on the full medical picture set out by all three experts. The figures under discussion for PSLA are far higher than would be expected for a whiplash injury lasting under six months. That clearly points to the breach having no impact. There is no evidence from the Defendant of any factors that would explain offers at such a level apart from the inherent value of the claim.

37. I noted earlier the Defendant's submission as to the rationale of paragraph 7.8B(2) – to allow the paying party input into further medical examinations and treatment. However, in this case, there is no evidence that this is something that the Defendant wanted to do and would have done but was unable to do so because of the breach. I

cannot take this point any further in the Defendant's favour without evidence. Bearing in mind the passage cited from *Cable* earlier, it also strikes me as unlikely that the Defendant would have become involved in this way in a low-value case proceeding under the RTA Protocol rather than the Personal Injury Pre-Action Protocol.

38. In my view, the Defendant has seized, opportunistically and belatedly, on a previously unnoticed breach by the Claimant of the RTA Protocol. In reality, the Claimant has complied in substance with the terms of the RTA Protocol (to adopt the phrase used in paragraph 13 of the Pre-Action Practice Direction) by disclosing the reports upon which she seeks to rely sufficiently early in the process for the parties to be able to negotiate and attempt settlement. Furthermore, the breach has not actually affected compliance in practice with the aims of the RTA Protocol in paragraphs 3.1 and 3.2:

    i) The breach has not led to the need for proceedings to be started unnecessarily (paragraph 3.1(1)) – proceedings were necessary because the parties could not agree damages regardless of admissibility issues.

    ii) The breach (as opposed to argument about the breach) has had no impact on the payment of damages within a reasonable time (paragraph 3.1(2)).

    iii) Given the failure to recover within the prognosis period of the first report, further investigations were always going to be needed. This is not a case where only one medical report should have been obtained (paragraph 3.2(2)), and so the failure to disclose the first report before obtaining the further reports has not made any difference overall to how the use and cost of the reports would have been controlled (paragraph 3.2(1)).

    iv) Importantly, it was not suggested that the failure to comply has made any difference to the likely level of damages compared to a situation in which the reports were disclosed without breach of paragraph 7.8B(2).

39. Overall, therefore, the lack of any demonstrable effect flowing from the breach leads me to conclude that the breach was neither serious nor significant.

40. The second stage of *Denton* is to ask why the default occurred. No explanation is given in the Claimant's solicitor's witness statement, so there is nothing to say whether it was a deliberate breach or an oversight. The Defendant submits that it must be assumed that it was deliberate because there was no evidence that the provision was breached by mistake. I do not consider that is an inference that is justified on the evidence before me. It is entirely plausible that the Claimant overlooked the requirement (as the Defendant clearly did until very shortly before the Stage 3 hearing) and I do not see anything sinister in a statement that was not drafted as a CPR 3.9-related statement not addressing the reason for the breach in circumstances when the Claimant's arguments at the time of preparing the witness statement were aimed in a very different direction.

41. Thirdly, I need to consider all the circumstances of the case so as to deal justly with the application, giving particular weight to the need for litigation to be conducted efficiently and at proportionate cost, and to enforce compliance with rules, practice directions and orders. In my view, the latter provision also includes compliance with pre-action protocols, and if there was any doubt about this proposition, then paragraph

59 of *Cable* makes it clear that the RTA and EL/PL Protocols are expressly interwoven into the CPR and cannot be divorced from the CPR.

42. In this case, the breach has caused no prejudice to the Defendant. The highest it was put on the Defendant's side during the hearing was that it was simply not possible in the circumstances to say if there had been prejudice to the Defendant and if so, what that prejudice was. In contrast, if the sanction is allowed to stand, the Claimant will be deprived of seeking damages based on the full picture presented by all three medical experts and that would be a clear prejudice to her. It would also be an outcome that was wholly disproportionate to the severity of the breach.

43. In my view, the court does need to look at all the medical reports in order to determine the claim properly. Compliance with the RTA Protocol is obviously important but the breach here is at the lower end of the scale and a key point is that the breach has not had any impact on the efficient conduct of the claim or the proportionality of costs.

44. Looking at the matter in the round, this is in my view a clear case for granting the Claimant relief from sanctions and permitting her to rely upon all the medical reports.

Conclusions

45. I will relist the claim for a Stage 3 hearing in front of a district judge, with a direction that the Claimant has permission to rely on the medical reports of all three experts. I do not think that the breach of paragraph 7.8B(2) makes it appropriate to disallow the costs of obtaining further reports in principle, given my conclusions on admissibility etc above, but if there are specific reasons why the Defendant wishes to argue that he should not be paying for a particular report, or if there are issues as to the amount claimed for a particular report, these are matters for the adjourned Stage 3 hearing.

46. As to costs more generally, the Defendant has won on the issue of whether there was a breach of paragraph 7.8B(2) (not that this was seriously disputed) and on the issue of whether "justified" goes to admissibility. Nevertheless, the Claimant has won on the issue of whether the inadmissibility can be cured, and most importantly on the overall issue of whether the reports should be admitted into evidence. I have also concluded that the Defendant's stance was opportunistic. It seems to me to be the sort of behaviour that was criticised in paragraph 43 of *Denton* and one that ought to be penalised in costs. My provisional view is that the costs of this exercise ought to be the Claimant's in any event, but I will hear submissions to the contrary with an open mind.

47. Ms Hunt said in her skeleton argument that the *Mason v Laing* issue is coming before the courts with increased frequency. The effect of my decision is that there are now two competing approaches from different circuit judges as to the effect of a breach of paragraph 7.8B(2). I will certainly listen to any application for permission to appeal, which might lead to the matter being resolved authoritatively.

48. I invite the parties to agree a draft order in good time for the handing-down of judgment (at least 24 hours before). If the order is agreed, or if the remaining matters are limited to short points that can be dealt with by written submissions, then I will dispense with attendance at that hearing.

Postscript

49. After receiving the above draft judgment, the Claimant has asked for clarification of two points and the Defendant of one.

50. I have addressed the Defendant's point by rewording paragraph 40. The Claimant firstly asks me to consider whether I consider paragraph 15(a) of the Pre-Action Practice Direction of relevance and assistance, and if not why not. I do not consider it of assistance and explained why in paragraph 28(i) above. The second point related to the costs of the further medical reports, and I have reworded paragraph 45 to make my view clearer.

51. As to costs:

    i) The Defendant does not take issue in principle with an order for costs in the Claimant's favour, but says that the matter is still subject to the fixed costs regime in CPR Part 45 Section III as an adjourned Stage 3 hearing, albeit a lengthy one with skeleton arguments and a reserved judgment, and that the Claimant's reference to the hearing as a CCMC is incorrect.

    ii) The Claimant says that the costs ought not to be limited to fixed Stage 3 costs given the Defendant's behaviour, and the Court should either transfer the claim to the Part 7 procedure or exercise its powers under the Pre-Action Practice Direction and/or CPR 3.1 to order the Defendant to pay the costs of the hearing on an indemnity basis. This would discourage opportunism and act as a deterrent to taking points without substance about technical non-compliance with the RTA Protocol.

52. I agree with the Defendant on the nature of the hearing. None of the court orders that I have seen in this case refer to the hearing in front of me as a CCMC, which is held for cases proceeding on the multi-track and for which a district judge based in Cardiff would always issue the standard directions (two pages) for a CCMC hearing, which include provisions for agreeing / revising budgets and filing a CCMC bundle. Instead, District Judge Muzaffer ordered a trial bundle to be filed. We are not in the realms of the multi-track or budgets; we have never left the land of the Stage 3 hearing. The hearing before me was an adjourned Stage 3 hearing with a preliminary issue about admissibility that happened to be listed before a circuit judge instead of a district judge, as would usually be the case under PD8B paragraph 1.2, simply by reason of relative judicial availability that day. Had I been able to determine the admissibility issue quickly, I would have proceeded to assess damages and deal with costs, but time did not permit that.

53. As I announced after hearing argument about costs at the handing-down of judgment, in my view fixed costs of £250 plus VAT apply. I said that I would give my reasons in the final version of the judgment, not only because I had another hearing about to start but also because it seemed to me to be neater to do so, particularly in circumstances where one party was having connectivity difficulties at the hand-down hearing.

54. Firstly, it would be inappropriate to transfer the claim to Part 7 just to allow the Claimant to seek more costs that the fixed costs regime allows. This is not a situation

within PD8 paragraph 7.2, for example, which says that the court will transfer the claim to Part 7 and allocate it to a track when it considers that further evidence must be provided by any party and the claim is not suitable to continue under the Stage 3 procedure. The only reason the Claimant seeks a transfer is for costs purposes, as was confirmed by Ms Upadhyay in the hearing. While there is a general power to transfer from Part 8 to Part 7 under CPR 8.1(3), to do so simply for costs recovery purposes to evade the fixed costs regime would be to allow the tail to wag the dog even in circumstances where I have been critical of the Defendant.

55. Secondly, costs in Stage 3 hearings are governed by CPR 45.17 rather than the court's general discretion on costs in CPR Part 44 or the provisions of the Pre-Action Practice Direction or CPR 3.1 (which deals with case management not costs). The Claimant relied on *Broadhurst v Tan* [2016] EWCA Civ 94 to say that the provisions of the Stage 3 costs regime could be overridden by other provisions in the CPR but that was addressing a very different situation and is not at all comparable to this one.

56. The Defendant asks for permission to appeal, pointing to the differences in approach between my decision and that of HHJ Gosnell and the wider implications for cases where there is a breach of paragraph 7.8B(2), both in those where proceedings have already been issued and also those pre-issue, where it is said (for example) that the parties will have to speculate as to whether an application for relief from sanctions would succeed when deciding what offers to make.

57. Nothing in the written submissions persuades me that an appeal would have a real prospect of success (CPR 52.6(1)(a)) but the undesirability of having two decisions at circuit judge level taking different approaches on an important point of principle is a compelling reason for an appeal to be heard (CPR 52.6(1)(b)) so I grant permission to appeal to the Defendant.

58. The Claimant sought permission to cross-appeal in advance of and at the hearing on 10th February. The Claimant's approach, in essence, is that I should have reached the same result of allowing reliance on the further reports by a different process of reasoning. That is not an appeal against paragraph 1 of the order giving the Claimant permission to rely on the reports, because the Claimant does not object to that order. One appeals against an order, not against reasons in a judgment for the order. The asserted defects in my reasoning to get to the end result that the Claimant wanted are points that can be raised in a Respondent's Notice asking the appeal court to uphold my decision for additional or alternative reasons (CPR 52.12(2)), not by way of an appeal by the Claimant. As I said at the hand-down hearing, the Claimant is welcome to apply for permission to appeal directly to the High Court if it is still thought that I am wrong on this point.

59. The Claimant also asks for the quantum hearing (whether Stage 3 or Fast Track) to be listed now, rather than wait for the conclusion of an appeal. I disagree as it would be a waste of the parties' and the court's resources for there to be potentially two quantum hearings if the Defendant's appeal is allowed.

HHJ Petts

31st January 2021 (in draft) / 10th February 2021 (final with postscript)