CLAIM No CO3 NE 882

IN THE MIDDLESBROUGH COUNTY COURT

BETWEEN:

JAMIE MOON

Claimant

And

KATIE CATLEY

Defendant

JUDGEMENT

(1) Introduction

1. This claim arises out of a road traffic accident which occurred on 4 November 2014. The claimant claimed damages under the following heads (i) damages for personal injury; (ii) the cost of car hire provided by way of credit hire; (iii) recovery and storage costs; and (iv) physiotherapy costs. During the course of negotiations the quantum of damage for personal injury was agreed at £2,000. However, no agreement was reached in respect of the other three heads of damages.

2. The RTA protocol applied and, pursuant to the schedule which forms part of Pack A, the dispute between the parties was as follows:

Head	Claim	C Comments	D offer	D comments
Car hire	£4752.48	Hire invoice and bank statements attached- Claimant's impecunious. Therefore had no option but to hire on credit. In line with Stevens v Equity you are obliged to pay the full rate	£2073.60	Please see attached offer to settle. We will offer 32 days at £54 as this rate could have been provided to your client had he not hired on credit. No offers for young driver's charge or CDW.

Medical expenses	£717.00	Please provide evidence to show that our client could have obtained treatment at the rate you offer	£560.00	We will pay £50.00 for the assessment and £50.00 for each session of physio (9) plus the discharge report fee. We have no offers for the questionnaire or triage fee
Other losses (Recovery and Storage)	£884.40	Nothing about the R & S invoice is unreasonable- the charges are what our client is liable to pay, therefore the cost should be met	£300 .00	We have only been provided with the recovery charge invoice of £560.40 which is excessive. We will offer pounds £250+ VAT

3. As the parties were not able to resolve these issues the claimant issued proceedings under CPR Part 8B seeking an order that there be a Stage 3 hearing.

4. The defendant filed an acknowledgement of service in which it said:

> The claim for general damages was agreed and settled within the portal with payment of the non-settlement payment. The remaining damages relate to Credit Hire and financial losses only. As such this matter is not suitable for Part 8 proceedings and should be dealt with under Part 7 as directions will be required for impecuniosity, basic hire rate evidence, witness statements and for the claimant to attend the hearing to be cross-examined over issues of rate, duration, need and enforceability.

5. The matter came before Deputy District Judge Hambler on 16 December 2016 as part of box-work. The Deputy District Judge allocated the case to the Fast Track and made consequential directions consistent with that allocation. The order contained the usual notice informing the parties that they could apply to set aside or vary the order providing that they applied within 7 days of the order being served.

6. By an application dated 22 December 2016 the claimant applied to set aside the order of the Deputy District Judge and for an order that the claim be listed for a stage 3 oral hearing pursuant to **CPR PD 8B 11.1**

7. The claimant's application came before me this morning (9th January 2017) by telephone. The claimant was represented by Miss Gibson and the defendant by Mr Bell. At the conclusion of the hearing I indicated that I would take a little time to consider my judgement and would send out a typed judgement no later than close

of business on 10th January. I apologise that the judgement has not been completed until 11th January.

(2) The Claimant's argument

8. The claimant contends that the Deputy District Judge's approach was wrong for the following reasons:

   8.1 The fact that the personal injury element to the claim has been resolved is not a reason to direct that it should leave the protocol process;

   8.2 Under Stage 2 of the Protocol process the parties should seek to narrow the issues between them. Further, the evidence which the parties can rely upon at Stage 3 should be limited to that which was contained in the court proceedings pack;

   8.3 It is for the defendant to demonstrate, by evidence, that there is a difference between the rate paid by the claimant to the credit hire company and the basic higher rate (BHR);

   8.4 As the defendant had not put forward any evidence as to the BHR during the Stage 2 process there was no reason to allow it to do so now. In the circumstances, the matter could properly remain within the protocol process for a Stage 3 hearing without further evidence or any cross-examination.

(3) The Defendant's position

9. The defendant contends that the Deputy District Judge's approach was correct and that:

   9.1 it had engaged properly with the stage 2 process by making an offer in respect of the credit hire element of the claim. In doing so it had not conceded any of the following (i) need; (ii) impecuniosity; (iii) duration or (iv) enforceability;

   9.2 as all these issues were live they could not properly be determined without further evidence and cross-examination;

   9.3 This was not a case in which the defendant was attempting "to ambush" the claimant because it had set out its position in the acknowledgement of service and was seeking directions at an early stage. Therefore, this case could be distinguished from the decision of the Court of Appeal in **Phillips v Willis [2017] RTR 4** and the decision of HH Judge Freedman in **Mulholland v Hughes and others [2015] WL 9298783**;

   9.4 in the circumstances, I should not disturb the decision of the Deputy District Judge. Alternatively, if I thought that the matter should remain within stage

3, I should make a direction pursuant to PD §7 allowing the defendant to serve evidence about the BHR and allowing the claimant to serve a witness statement in reply.

(4) Phillips v Willis

10. In my judgement the starting point is the decision of the Court of Appeal in **Phillips v Willis** and it is useful to set out the approach taken by **Jackson LJ**.

11. **Jackson LJ** explained the way in which Stage 2 of the protocol operated in **§6-§8** of his judgement. In particular **Jackson LJ** explained that the procedure was designed to lead to a narrowing of the issues between the parties. If there was no settlement then, at the end of Stage 2, the claimant sends to the defendant "a court proceedings pack". The 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 its final offer together with all fixed costs and the case proceeds to Stage 3.

12. In the words of **Jackson LJ:**

> The Stage 3 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. A court assesses the items of damages which remain in dispute either on paper or at a single "Stage 3 hearing".

13. **Jackson LJ** went on to refer to the various provisions of the CPR as "the rules". He pointed out that:

> 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.

14. In **Philips** the only outstanding issue was the claim for hire charges. The claimant claimed £3,486 and the defendant had offered £2,334. The claimant issued proceedings on 29 January 2014 and on 7 March 2014 the court notified the parties that the assessment of damages hearing would be on 9 April 2014. At the hearing the District Judge ordered that the action should proceed as a **Pt.7** claim on the Small Claims Track. He then gave further directions for such a trial to take place in June.

15. Jackson LJ identified the evidence that was before the court on 9 April 2014-with the Claimant having put forward detailed evidence explaining the claim for hire and the Defendant having failed to put forward any evidence on the issue. As Jackson LJ noted:

> That evidence comprised only (and was required by the rules to comprise only) the documentation which the parties had exchanged during Stage 2.

16. In paragraph 33 of his judgement observed:

> Once a case is within the RTA protocol, it does not automatically exit when the personal injury claim is settled. On the contrary the RTA process is carefully designed to whittle down the disputes between the parties as the case passes through the various stages. It is to be expected that the sum in issue between the parties will be much smaller when the case reaches Stage 3 than it was back in Stage 1. The mere fact that the personal injury claim has been resolved is not specified as being a reason to exit from the RTA process.

17. If the hearing had gone ahead before the District Judge on 9 April the Defendant had intended to argue that: (a) the Claimant should have accepted the cheapest of the quotations his own evidence had disclosed; and (b) the Claimant should have hired on a weekly rather than daily rate. Cross-examination was relevant only to the latter issue, which made a potential difference to the claim of **£462.** In the circumstances, the Court of Appeal held that the claim did not fall within **CPR PD 8B §7.2** and that the District Judge's decision that further evidence was necessary to resolve the outstanding dispute between the parties was "irrational".

18. The Court of Appeal was invited this to give guidance as to the circumstances in which paragraph 7.2 might apply. The court observed at §35:

> 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.

(5) Daniel v Mulholland

19. I also look, rather more briefly, at the decision of HH Judge Freedman in **Mulholland v Hughes** upon which the Claimant relies.

20. In the claims with which HH Judge Freedman was concerned were all in the Stage 3 process and the issue was whether it was open to a Defendant to rely on matters not raised during the Stage 2 negotiation process at the Stage 3 hearing.

21. The court held that:

21.1 The offers made by a Defendant in the Stage 2 procedure could not be regarded as admissions: see §64-70. Therefore, a Defendant was not bound by any offer made;

21.2 *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:* see §75;

21.3 *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*: see §77;

21.4 *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, the need for higher or (for example) the need for care, it is formally raised by the defendant at Stage 2:* see §78;

21.5 to allow a party to raise the issue of need at a Stage 3 hearing amounts to *trial by ambush:* see §79.

(6) My role

22. As this is an application to set aside or vary an order without a hearing I must consider the issue afresh and the Claimant does not have the additional burden that he would carry on an appeal of establishing that the Deputy District Judge's case management decision was "wrong".

(7) The position in this case: Stage 3 or Pt.7

23. I respectfully agree with (and am bound by) the approach taken by the Court of Appeal in **Phillips**. Further, I respectfully agree with and adopt the approach taken by HH Judge Freedman in **Mulholland**.

24. It is clear from the decision of the Court of Appeal in **Phillips** that the settlement of the personal injury element of the claim is not a factor which should persuade the court that the claim should exit the Protocol process. Therefore, the principal reason put forward by the Defendant in its Acknowledgement of Service when seeking to persuade the court that the claim should exit the Protocol is irrelevant.

25. I look next at the amount in issue:

    25.1 The dispute in relation to the ancillary issues amounts to £741.40;

    25.2 The dispute in relation to credit hire amounts to £2,678.88.

    25.3 This produces a total of £3,420.28.

26. In the circumstances, I do not see why the Deputy District Judge directed that the claim be determined on the Fast Track. Even if this should be a Pt. 7 Claim it should be allocated to the Small Claims Track given the limited sum in issue.

27. Whilst there are issues relating to medical expenses and recovery/storage charges the Defendant did not seek to argue that these issues could not be properly resolved within the Stage 3 procedure.

28. I see nothing in this case to suggest that it falls into the category of case involving *very high car hire charges* identified by **Jackson LJ** at §35 of his judgement in **Phillips**. Further, even then **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 judgement 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.

29. Even if I assume in the Defendant's favour that all the issues identified in the Acknowledgement of Service are open for argument, namely need, rate, period of hire and impecuniosity, there is nothing in this case to suggest that this credit hire claim more complex in law or fact than might ordinarily be expected.

30. Therefore, I consider that this is just the sort of case where the expenditure of costs should be minimised so as to deliver the *fairly rough justice* envisaged at §9 of **Phillips** rather than requiring the parties to take all the steps identified in the directions and then undergo a full trial on the Small Claims Track where no costs would be recoverable.

31. Therefore, I would not direct that the claim proceed as a Pt. 7 Claim but would require it to continue within the Stage 3 procedure.

(8) Further evidence

32. I must then go on to consider whether I should adopt the alternative approach suggested by the Defendant and make a direction for further evidence in accordance with §7.1 of the Practice Direction so that all issues of need, duration, impecuniosity and BHR can be fully explored.

33. The Claimant contends that the court can properly determine the claim without further evidence arguing that:
    - 33.1 the Defendant had put in issue the rate at which the Claimant had hired a replacement vehicle and, by stating that a lower rate would have been available if the Claimant had not hired on credit, the Defendant had required the Claimant to prove that he was impecunious in so far as that was material to the rate of hire. However, the Defendant had not raised the issues of need and duration and should not be allowed to do so at this stage;
    - 33.2 The Defendant has failed to provide any evidence of the BHR;
    - 33.3 In the absence of any evidence of BHR the Defendant cannot show that the Claimant has failed to mitigate his loss;
    - 33.4 Therefore, the court can properly determine hire claim at a Stage 3 hearing on the basis of the evidence that is available, namely the Claimant's evidence about the cost of hire;
    - 33.5 The dispute in relation to the issues other than hire can properly be argued at a Stage 3 hearing without further evidence.

34. I agree with Mr Bell that the situation in this case is different from that which arose before HH Judge Freedman in **Mulholland**. In **Mulholland** the Defendants had attempted to raise issues after the direction for a Stage 3 hearing had been made. In this case the Defendant is seeking to raise additional issues at the start of the Stage 3 process and recognises that if it is to have further evidence the Claimant should be entitled to serve evidence in reply. On this basis the Defendant contends that there can be no question of *trial by ambush*.

35. I start by considering whether the Defendant should be allowed to raise the issues of need and duration.

36. In Stage 2 the Defendant made an offer on the basis of the 32-day hire period claimed by the Claimant. **Mulholland** establishes that the Defendant is not bound by that offer. However, in my judgement, the Defendant did nothing during the Stage 2 process to indicate that these issues were in dispute and raised them for the first time in the Acknowledgement of Service.

37. In my judgement, 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.

38. Therefore, I do not consider that it is open to the Defendant to rely on these issues when seeking to persuade the court that further evidence is required as Part of the Stage 3 procedure pursuant to **§7.1** of the Practice Direction.

39. Therefore, when I consider whether there should be a direction for further evidence within the Stage 3 procedure I must do so on the basis that the issues for the court are rate of hire and, in so far as material to the rate of hire, the question of impecuniosity.

40. The relevant provision of the **Practice Direction** provides:

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

As the notes to the **White Book §8BPD.7.1** make clear, the Practice Direction deliberately seeks to restrict the material that the court will consider when determining the damages due in the Stage 3 procedure.

41. I look at each of the sub-paragraphs in turn:

41.1 **§7.1(1):** No evidence has been served about the BHR under paragraph 6.4 because the Defendant did not seek to serve any BHR evidence during the course of Stage 2. If such evidence had been served during Stage 2 then the Claimant would have been obliged to include it in the relevant Pack pursuant to §7.64 of the Protocol[1] and the Defendant would have been able to rely on it;

41.2 **§7.1(b):** PD paragraphs 8.2 and 11.3 do not apply to this case;

41.3 **§7.1(c):** It follows that additional evidence can only be admitted pursuant to this provision. Therefore the question is whether the court considers that it cannot *properly* determine the claim without further evidence.

42. I do not accept the Claimant's argument that *properly* means only whether or not the court is capable of reaching a decision. In my view the term *properly* must involve a value judgement 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.

43. Having considered that issue I do not consider that it would be appropriate to allow the Defendant to introduce further evidence at this stage. In doing so I take into account each of the factors identified in **CPR Pt. 1.1(2)** as follows:

43.1 **Equal footing:** whilst refusing the Defendant permission to rely on BHR 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;

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[1] 7.64

Where the parties do not reach an agreement on
(1) the original damages within the periods specified in paragraphs 7.35 to 7.37; or
(2) the original damages and, where relevant, the additional damages under paragraph 7.51, the claimant must send to the defendant the Court Proceedings Pack (Part A and Part B) Form which must contain—

(a) in Part A, the final schedule of the claimant's losses and the defendant's responses comprising only the figures specified in subparagraphs (1) and (2) above, together with supporting comments and **evidence from both parties on any disputed heads of damage**; and
(b) in Part B, the final offer and counter offer from the Stage 2 Settlement Pack Form and, where relevant, the offer and any final counter offer made under paragraph 7.53.

43.2 **Saving expense:** refusing the Defendant's application will lead to a considerable saving in costs because it will not be necessary to generate a BHR report or for the Claimant to obtain all necessary documentation to establish impecuniosity;

43.3 **Proportionality:** The amount of money involved in this case is very modest. 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";

43.4 **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 judgement the provisions of **§7.1(3)** 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;

43.5 **Appropriate share of the court's resources:** whilst there still must be a Stage 3 hearing, I consider that it is necessary to take the approach identified above to encourage cases to resolve within Stage 2 without the need to call on the resources of the court as part of Stage 3;

43.6 **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 judgement 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.

44. Therefore, I do not consider that the court should give directions for further evidence. In my judgement all that is needed in this case is a direction for a Stage 3 hearing.

(9) Conclusion

45. The Claimant has successfully persuaded me that the order made by the Deputy District Judge should be varied and that I should simply order a Stage 3 hearing.

46. As the Claimant has succeeded I consider that the Defendant should pay the Claimant's costs in the sum of £250 + VAT. [For the avoidance of doubt I do not consider that this was a case in which it was appropriate to award indemnity costs].

47. I would be grateful if the parties could submit an appropriate draft Order.

11th January 2017

HH Judge Mark Gargan