



In the County Court at Liverpool

Case number F79YJ565

On Appeal from Deputy District Judge Causton sitting on 18th November 2020 (Appeal No 9 of 2020):

BETWEEN

MARK MULLEN

Appellant/Claimant

and

NELSON INSURANCE COMPANY LIMITED

Respondent /Defendant

Before **His Honour Judge Graham Wood QC**

Mr Simon Dawes (instructed by Mark Reynolds Solicitors) for the Appellant

Ms Sarah Robson (instructed by Canford Law Solicitors) for the Respondent

Hearing date: 29th September 2020

APPROVED JUDGMENT

Introduction

1. The issue on this appeal is whether or not an admission by an insurance company backed defendant within the RTA portal (the Pre-action Protocol for Low Value Personal Injury Claims in RTAs, [the “protocol”]) subsequently precludes the insured individual from bringing his own claim for personal injuries in separate proceedings. It is an issue which has been considered at first instance in several decisions which are conflicting, but it has yet to be the subject of higher authority.

2. Specifically the issue arises in circumstances where the deputy district judge’s decision handed down on 18th November 2019 allowed an application by the present defendant for the claim to be struck out pursuant to CPR 3.4 as an abuse of process or on the basis that the claim disclosed no reasonable cause of action. There had also been an application for summary judgment, but there appears to have been no judgment made in relation to that.

3. The Claimant has sought to appeal the decision of Deputy District Judge Causton, but was refused permission on the papers by my colleague His Honour Judge Gregory. On an application for oral renewal the matter was listed for a rolled-up hearing (ie both the consideration of permission and the substantive hearing if granted to follow) because the defendant had pursued a cross-appeal in relation to the order for costs.

4. On 29th September I heard oral submissions from counsel on behalf of the parties and indicated that I would reserve my judgment. Whilst counsel for the Respondent agreed that full argument could be heard yet did not agree that the permission threshold was crossed, as will become apparent I have come to the conclusion that the appeal is arguable and permission should be granted for both the appeal and the cross-appeal. My judgment is now provided.

Background

5. An understanding of the background and the circumstances of the respective parties is necessary, as well as an identification of the necessary documents. In addition to the appeal bundle, the court has been referred to 2 electronic bundles filed as PDF digital bundles, one of which contains some authorities, and the other is said to include documents which were not before the court at first instance, but to which brief reference was made. I shall deal with the significance of this material later in my judgment.

6. Some confusion can arise as to the descriptors for the various parties, and in this regard the judgment of the deputy district judge is a little difficult to follow. There have been two claimants and two named defendants. Suffice it to say, the present claimant, and the Appellant is Mr Mark Mullen. I shall continue to refer to him as the Claimant. He was driving an Arriva single decker bus in Sir Thomas Street Liverpool on 21st October 2018 when it was involved in collision with a Volkswagen Golf motor car driven Mr Farhad Taimoree. Both drivers are said to have sustained injury, and although this court has not been made privy to the correspondence between solicitors and the respective insurance companies of each¹, it is clear that independently both were wishing to pursue claims for their uninsured losses, i.e. personal injury. This is not uncommon, but regrettably pursued and defended claims are not always married up. That is what happened in the present case with unfortunate consequences for the Claimant.

7. Low value personal injury claims, of course, are initiated through the protocol and this requires the lodging of a claims notification form (CNF). On 29th November 2018, just over six weeks after the accident, the Claimant Mr Mullen filed his CNF through Mark Reynolds solicitors. Nelson Insurance Company, the relevant insurers of Mr Taimoree, did not file an appropriate response as they should have done² and the claim immediately exited the portal.³ This meant that the Claimant was free to commence part 7 proceedings, a step which was seemingly taken with a claim form issued out of the money claims centre on 12th June 2019.

8. The dates here are potentially significant, because before any defence was filed to that claim on 28th June 2019 Mr Taimoree lodged his own CNF, with the assistance of solicitors Rushton Hinchy. However, it is to be observed that in the early part of 2019 there had been some communication between Noble Claims Services, who were claims handlers for Nelson Insurance, and Transcare Solutions on behalf of Arriva Insurance, presumably in relation to vehicular damage and insured outlay, because neither were representing the interests of the allegedly injured parties for their uninsured losses. One particular letter on 11th March 2019 was written by Transcare on which reliance is placed in this appeal by the Respondent as the first admission of liability, although as will be seen it was not referred to by the deputy district judge in his judgment:

“Dear Sirs

Incident Date: 21/10/2018

Your Insured: Mr Farhad

Our Client: Arriva North West Ltd

Thank you for your correspondence dated 27/02/19 and 07/03/19.

¹ Although some of this is included in a separate bundle which I have considered principally where I was referred to specific items.

² This was not an oversight – the reason, as will become apparent, was explained in correspondence

³ it is quite possible that this was because of the events described in the following paragraph

Liability for the incident is not disputed.

We note that you do not have an outlay to recover.

Are you aware whether or not repairs have been carried out to your client's vehicle and if there as a representative involved ?”

9. In the response form on 10th July 2019 to Mr Taimoree's CNF, Arriva Insurance (presumably through Transcare) completed the appropriate section addressing the question of liability. Clearly if liability was denied the matter would have immediately exited the portal. It was not, because the box was ticked in which the “defendant”, as the responding party was described, admitted, without any deletion, that the accident had occurred, it had been caused by the Defendant's breach of duty⁴, and that some loss had been caused to the claimant (here Mr Taimoree). It is this admission of liability which is central the appeal issue.

10. Nelson, in their defence of the Claimant's claim dated 19th July, made reference to the March admission in the Transcare letter, asserting that the same was binding at paragraph 6 in their defence and thus Mr Mullen had no basis for continuing his claim. Reference was also made to the CNF form as having been acknowledged on 10th July, and reliance was placed on the admission in section A of the response form.

11. The battle lines were drawn when the Respondent made its application for summary judgment and/or to strike out the claim with the supporting statement of Matt Dowrick, as an associate with the Defendant's solicitors. It is noted that he relied upon the admission made in the CNF response which was annexed to his statement, but not the March admission. He also made reference to the decision of **Chimel v Chibwana & Williams (27.10.16)** of His Honour Judge Simpkins in the County Court at Brighton which is said to be on all fours. I will look at this decision in more detail later.

12. The Claimant's solicitor Mr Speed provided a response to the application which in essence asserted that the Claimant Mr Mullen had never been a defendant in the Taimoree claim and a party to the proceedings in the MOJ protocol. It was said that the admission made on that claim had been by Arriva, the Claimant's employers, and he was not bound by it. The argument was more fully developed by Mr Dawes of counsel and I shall refer to it below.

13. The matter was heard before the deputy district judge on 18th November, and he delivered an *ex tempore* judgment on the same day, in which as I have indicated, he placed reliance on the portal admission as his basis for the finding of an abuse of process. It is unnecessary to make any separate reference to the judgment, but in allowing the application to strike out the claim under CPR 3.4 it is not entirely clear whether he is making reference to

⁴ ie that of the bus driver, and present Claimant Mr Mullen

sub-rule (a) sub- rule (b). This is potentially relevant to the cross-appeal, although neither counsel disputed that it was probably immaterial, because it would not have been open to him to strike out the statement of case under sub-rule (c), an application which was never before the court. He did not make any ruling in relation to the application for summary judgment.

14. I have already made reference to the process by which the appeal has come before me and it is unnecessary to deal with the procedure in any more detail.

15. I indicated to counsel during the course of oral submissions that I would not scrutinise the first of the two digital bundles provided by the Respondent at their request, because it was not accepted by the Respondent that this was admissible material. The material had been put in a separate bundle because none of it had been before the district judge, and was not included in the appeal bundle. However, it was apparent that some material had come to light later, as it post-dated the decision. One particular letter was referred to by Mr Dawes of counsel and is dated 5th May 2020. It is from Transcare and appears to have been elicited by the Claimant's solicitor. I mention it for the sake of completeness, although its significance may not be immediately apparent. It is the last paragraph on which reliance is placed:

"Dear Sirs,

We refer to the above,

Transcare Solutions Lid is a wholly owned subsidiary company of Arriva Plc and are appointed to handle all incidents including damage recoveries for all Arriva companies.

In relation to the above incident Mr Mullen was in the course of his employment with Arriva North West Ltd, Arriva Plc Motor Insurance Policy is third party only and does not cover any claims for damage caused to Arriva property or injury claims on behalf of their drivers. The policy does not bind any drivers to admissions of liability made by Transcare Solutions Ltd on behalf of Arriva Plc."

16. In seeking to identify correspondence within this bundle, however, I encountered a further letter from Transcare to which reference should also be made, although it was not the subject of discussion with counsel. It was written on 20th December 2019 by Transcare to Noble (i.e. Arriva to Nelson):

"Dear Sirs,

We refer to the above case.

Please can you note the change of handler and handling office for your records.

The writer has fully reviewed the file and based on the evidence holds your insured fully responsible for the incident. In view of this we now resile from our admission of liability

and refer to the case of Woodland v Stopford (2011).

It is unclear if you have seen the CCTV footage from the bus so we enclose a copy of this, which is sent subject to the following conditions

17. It is unclear whether this remains the position as far as the settlement of Mr Taimoree's claim against Arriva is concerned. The significance touches upon the submission made by counsel for the Appellant that it was not open to Mr Mullen to resile from an admission which he had not made, but had been made by the insurer for his employers under whose insurance he was covered. Of course, regardless of the outcome of this appeal, if the insurer is successful in resiling from the admission, it may follow that Mr Mullen is no longer bound by it in any event. However, that is not a matter which I have to consider for the purposes of this appeal.⁵

The relevant law

18. The starting point should be the protocol, although there is little that requires any detailed analysis. It is appropriate to mention the editorial comment in the White Book at C13A-001 first and foremost as providing a context.

“The RTA protocol describes in great detail the behaviour the court expects of parties, found legal representatives and of their insurers involved in claims of the type which it applies. The protocol accepts that, and is structured on the basis that in personal injury road accident cases insurers are the real party in interest on the defence side.....”

19. Both counsel made reference to the definitions in paragraph 1. The following are relevant:

Definitions

1.1 In this Protocol—

(1) ‘admission of liability’ means the defendant admits that—

(a) the accident occurred;

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

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

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

⁵ I have made mention of this letter because it was inadvertently considered by me, and I am conscious that I told counsel that I would not go "ferreting" through this controversial bundle. If I had been aware of it I would have raised it with both counsel, although as will become apparent it does not make a difference to the outcome of the appeal.

.....
(10) 'defendant' means the insurer of the person who is subject to the claim under this Protocol, unless the context indicates that it means—

- (a) the person who is subject to the claim;
- (b) the defendant's legal representative;
- (c) the Motor Insurers' Bureau ('MIB'); or
- (d) a person falling within the exceptions in section 144 of the Road Traffic Act 1988 (a "self-insurer");

20. Also pertinent within the protocol, and worthy of mention, is the process whereby the claim no longer continues under the protocol insofar as this is the situation which prevailed with Mr Mullen's claim, whereas Mr Taimoree's claim was the subject admission.

Contributory negligence, liability not admitted or failure to respond

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

- (1) makes an admission of liability but alleges contributory negligence
- (2) does not complete and send the CNF response;⁶
- (3) does not admit liability; or
- (4) notifies the claimant that the defendant considers that—
 - (a) there is inadequate mandatory information in the CNF; or
 - (b) if proceedings were issued, the small claims track would be the normal track for that claim.

21. **CPR 14** deals with admissions, and in particular special provision has been made with an amendment to the rules in 2013 and the insertion of a specific rule relating to protocol admission (14.1B). This is the rule which enables a defendant who was made admissions within the protocol subsequently withdraw them. It is relied upon by both counsel in support of their respective positions.

Admissions made under the RTA Protocol or the EL/PL Protocol

14.1B

- (1) This rule applies to a pre-action admission made in a case to which the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ('the RTA Protocol') or the Pre-action Protocol

⁶ My emphasis

for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ('the EL/PL Protocol') applies.

- (2) The defendant may, by giving notice in writing withdraw an admission of causation –
 - (a) before commencement of proceedings –
 - (i) during the initial consideration period (or any extension to that period) as defined in the relevant Protocol; or
 - (ii) at any time if the person to whom the admission was made agrees; or
 - (b) after commencement of proceedings –
 - (i) if all the parties to the proceedings consent; or
 - (ii) with the permission of the court.
- (3) The defendant may, by giving notice in writing withdraw any other pre-action admission after commencement of proceedings –
 - (a) if all the parties to the proceedings consent; or
 - (b) with the permission of the court.
- (4) An application under rule 14.1B(2)(b)(ii) or (3)(b) to withdraw a pre-action admission must be made in accordance with Part 23.

22. Although CPR 3.4 is a provision well known to the court and the parties, it is helpful to set out the salient parts:

Power to strike out a statement of case

3.4

- (1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.
- (2) The court may strike out a statement of case if it appears to the court –
 - (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
 - (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
 - (c) that there has been a failure to comply with a rule, practice direction or court order.

23. Finally, in terms of the rules and the protocols, reference should be made to CPR 44.15 which is relevant to cross appeal and the disapplication of QOCs.

Exceptions to qualified one-way costs shifting where permission not required

44.15 Orders for costs made against the claimant may be enforced to the full extent of such orders without the permission of the court where the proceedings have been struck out on the grounds that –

- (a) the claimant has disclosed no reasonable grounds for bringing the proceedings;
- (b) the proceedings are an abuse of the court’s process; or
- (c)

24. I have mentioned above other first instance decisions. I indicated to counsel that I would not be seeking to make comparisons or delve deeply into the processes involved in those cases, but it is worth mentioning each case and summarising the issues which the court dealt with. No first instance decision, particularly at district judge level, is binding on me, although I agree that I am enjoined by appellate authority to take into account decisions of circuit judges which have dealt with the same points, as persuasive, and to depart from such decisions only where there is good reason. Understandably this avoids significant discrepancy at first instance level. All these cases involved very similar situations to that which has arisen in the present appeal.

25. In **Ullah v Jon (Croydon CC 20.3.13)**, DJ Parker was dealing with an application for summary judgment by the defendant, and where a question of the terms of the insurance policy which was before the court, and agency arose, he found that the insurers had both actual and ostensible authority to bind the insured to admissions made in a CNF form. This I will describe as the “authority” issue.

26. In **Malak v Nasim (Watford CC 11.11.14)**, no such question of actual or apparent authority arose because it was accepted that for the purposes of the protocol the insurer was able to bind the insured by reason of the admissions. However DJ Lana Wood agreed with the subsequent claimant’s submission that it was only binding within the claim within which it was made, contemplating that a counterclaim by the insured would be sustainable. This I will describe as the “limited admission” issue Essentially there was nothing to prevent that person bringing a separate claim in relation to his own uninsured losses, although it was noted that it would not have been open to him, once he became a claimant in part seven proceedings, to utilise CPR 14.1 B to withdraw the admission, because he was no longer the defendant.

27. In **Chimel v Chibwana & Williams**,^[supra HHJ Simpkins], the principal case upon which the Respondent relies in this case, the judge dealt with both issues which had arisen in the district judge decisions, namely the agency and the limited admission issues. In fact the judge was faced with the same situation as in the present case on the agency question, because there was an absence of any material evidence before him, and in relation to the effect of an admission, he concluded that it was binding between the parties in the same way

as any other settlement, and therefore would preclude subsequent proceedings by a portal defendant for his own uninsured losses. The core of this decision is at paragraph 65.

28. He also addressed two other matters. First, the question of CPR 14.1B and its applicability, identifying that it would be impossible for a previous portal defendant who had now become the claimant seeking to recover his uninsured losses to utilise that provision to withdraw the admission. (the “portal admission withdrawal issue”). Second, the meaning of “defendant” within the protocol definitions, and whether this was essentially the insurer as opposed to the individual. (The “portal defendant issue”). He arrived at a conclusion which is challenged by counsel in the present claim, as will be seen. There are relevant findings at paragraphs 65 and 70.

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

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

29. Finally in the most recent of the cases heard in the County Court at Preston in May of this year, **Mukadam v Nazir** (*Preston CC 14.05.20*), His Honour Judge Khan also dealt with an almost identical situation, following the decision of Judge Simpkins, but additionally disregarding a sidenote in the portal response provided by the insurance company acting for the portal defendant which purportedly made the admission that it “was without admission of liability from the insured”. The learned circuit judge held that this was of no effect.

30. The significance of the **Mukadam** case is that there are now two decisions of circuit judges, one first instance, one on appeal, which would appear to support the stance taken by the deputy district judge in the present case.

Respective submissions

31. On behalf of the Appellant, Mr Simon Dawes of counsel supplemented his skeleton argument with brief oral submissions. It was, he contended, a straightforward matter, with his principal argument being advanced in the first ground of appeal that Mr Mullen had never personally been the defendant who could either be bound by an admission made by his insurance company, or able to withdraw such an admission.

32. In this regard he places very heavy reliance on the definition of the *defendant* within the protocol at paragraph 10, as the “insurer”. Mr Mullen is several steps removed from the *defendant*, and would have had little input in the process by which the insurer of his employer (with a policy which he agreed covered him as the driver of the bus) was able to make admissions without any reference to him. Mr Dawes accepted that the court was not in possession of the insurance documentation which may have been disclosable material, but he submitted that an assumption could not be made that authority, whether actual or ostensible, was given to the insurer to make admissions on behalf of Mr Mullen which might have binding effect on any claim relation to his uninsured losses. This was not based upon any analysis of agency or insurance law (with Mr Dawes confessing that he had carefully researched the point and could find no obvious answer) but because Mr Mullen would not have been a party to the insurance contract.

33. The second ground represented his fallback position which was essentially that the protocol provided a self-contained code, whereby what happened within the portal should stay within the portal and have no bearing on subsequent processes. Insofar as His Honour Judge Simpkins purported to apply the common law to the portal procedure in relation to admissions said to be binding, he was wrong to do so, and other judges have approached this concept in a different way, not least His Honour Judge Parker in Liverpool, in the case of **Fitton v Aegeas (Liverpool CC 08.11.18)** who found that common law mistake had no application in the context of the portal.

34. Otherwise he acknowledged that first instance decisions, particularly from district judges, had arrived at different conclusions, and that this was generally an unsettled area of law. He demonstrated the difficulty which a claimant faced where his insurer, unbeknown to him, had made an admission in a protocol claim brought by the third party if when pursuing his own claim he subsequently sought to resile from the same, by reference to the wording in CPR 14.1B. This did not provide a vehicle for such an application because he was not a defendant but a claimant seeking to resile from an admission purportedly made on his behalf. It did not appear to be an issue that Mr Mullen was not in a position to withdraw the admission.

35. Mr Dawes accepted that the insurance documentation was not disclosed by his instructing solicitors, and therefore it was not possible to drill down into the detail of the contractual arrangements, but this court, he submitted, could not infer whether by judicial notice or otherwise what might have been the position in relation to authority.

36. On behalf of the Respondent, Ms Sarah Robson of counsel provided both oral and written submissions. She invited the court to consider not only the admission within the portal made by Mr Mullen’s insurance company, but also the earlier indication in correspondence that liability would not be disputed, although it was accepted that this was

not referred to by the deputy judge. Either would have provided a basis for striking out the claim, but notably practice direction PD8B 0 specifically identified protocol admissions as pre-action admissions for the purposes of CPR part 14, and the regime which applied therein. She accepted, however, that it would not have been open to the claimant Mr Mullen to utilise 14.1B to withdraw the admission, because he was not the defendant within the present proceedings.

37. Otherwise, in relation to the first ground of appeal, she emphasised that the definition of defendant within the protocol was not limited to the insurer, but specified “*the insurer of the person subject to the claim*” and it was manifest that this could refer to no person other than Mr Mullen. Further, an insurer did not owe a duty of care in relation to the use of the vehicle and this was personal to the claimant, who was the road user. This provided a complete answer, submitted counsel, to the Claimant’s argument that the defendant should be considered a person other than Mr Mullen within the protocol claim brought by Mr Taimoree.

38. In respect of the second limb of the appeal, Ms Robson placed significant reliance upon the decision of His Honour Judge Simpkins in **Chibwana**, though she accepted this court was not bound to follow it, but to find it of persuasive force, in that the facts were virtually identical, and the same issues arose even to the point that the judge in that case did not have any evidence of the insurance position, and properly concluded on an agency point (which did not specifically arise here) that there was no error in the first instance decision of the district judge that the insurer had authority to bind the insured defendant within the portal claim. Ms Robson sought to demonstrate that the approach taken by HHJ Simpkins was a sound one and his conclusion was clearly followed by DDJ Causton in the present case. Insofar as a discretion was exercised by the deputy district judge, it was a within the reasonable ambit of that discretion to preclude any interference by an appellate court.

39. In respect of wider policy considerations, Ms Robson made reference to the difficulties which would arise in the event that an insured defendant was not bound by an admission, so as to bring a subsequent claim for his own uninsured losses. These were twofold. First, the efficacy of the RTA protocol would be seriously undermined, because following an admission of liability within 15 days (the period allowed for the response) a portal claimant would no longer investigate the circumstances of an accident, including the gathering of witnesses, and the retaining of contemporaneous evidence in the light of the implied assurance that this was unnecessary, which could cause serious prejudice in the event that the question of liability was subsequently reopened. Second, it would lead to the inconsistency of decisions, even if the settlement of a portal claim would not classify as a judicial decision as such. The insured defendant could subsequently pursue his claim through part 7 proceedings and obtain a result which was at odds with the portal settlement, thus giving rise to great uncertainty for the purposes of the claims history for any insured person. This could not have been intended by either the protocol, the purpose of which was to provide almost comprehensive resolution of claims on admissions of liability, or the CPR, and in particular the overriding objective.

Discussion

40. I start by acknowledging that there is an apparent unfairness if the procedures that are put in place to allow for the swift and efficient resolution of personal injury claims and uninsured losses (it being noted that the protocol is not intended to enable opposing insurance companies to resolve the incidence of insured loss) could result in two apparently injured drivers making separate claims against each other within the portal with no knowledge of the other, and leaving their insurers to make admissions contrary to their interests. It is clear that in such circumstances the use of the portal would not be appropriate, because liability is not accepted by either driver if they have a perceived claim for damages for personal injury. There is an argument that the unfairness is further compounded if the rules (in this case CPR 14.1B) do not allow a claimant who wishes to bring subsequent claim for his own injuries to withdraw an admission made on his behalf, because he is not the defendant within the new claim.

41. However, such is the nature of motor insurance, and the context in which the protocol was established was to allow the efficient and cost-effective resolution of millions of low value injury claims in RTAs where there are identified insurers who can respond without facing the risk of expensive and drawn out litigation.

42. Whilst no question of agency law has been raised specifically in this case, where there is the same absence of material to allow scrutiny as existed in the **Chibwana** case, it seems to me inconceivable that an insurance policy would not give the insurer the authority to make an admission where it is considered appropriate without reserving to the policyholder a right to object. In Mr Mullen's case, of course, it would have been his employers who were insured, with either him as a named driver, or on a more general description for third-party liability as any driver authorised by Arriva. Therefore, it is difficult understand any circumstances in which Mr Mullen might have been entitled to override an admission. This court does not have to investigate the tripartite relationship between insurer, employer and insured, but if a situation had arisen where either the employer or the insured had not acted in the driver's best interests, or had prejudiced his position, it may have been open to him to rely upon an actionable breach of any term. As I say, that is not a matter which falls for consideration by this court, because the only question which arises on the first ground of appeal is whether or not the insurer was a separate entity to the claimant Mr Mullen, and was therefore properly described as *the defendant* within the protocol, and whose admission could not be visited on Mr Mullen in a separate claim.

43. Insofar as the deputy district judge found that Mr Mullen was the defendant for the purposes of the protocol and not the insurance company, it seems to me that this did not involve the exercise of any discretionary consideration by him, but was a matter of black letter law. I raised this in the course of counsel's submissions with Ms Robson who

maintained that whilst it was a question of interpretation, there was nevertheless a discretionary exercise. I respectfully disagree save to the limited extent that an application to strike out under CPR 3.4 involves by virtue of sub-rule (2) a discretionary decision, but in the specific context of this case I have no doubt that if Mr Mullen was properly identified as the defendant and not the insurance company there would have been no alternative open to the learned judge but to strike out the claim.

44. On the first ground of appeal, therefore, I have no difficulty in coming to the conclusion that whilst for the purposes of the definition the insurer steps into the shoes of the defendant within the protocol in order to deal with a claim, this does not mean that Mr Mullen was not otherwise the defendant for the purposes of the portal settlement. There is no sense in any other interpretation, in my judgment, for the most obvious reason that it was his breach of duty as a road user which entitled the portal claimant to bring the protocol claim. It was not the breach of duty of the insurer, and accordingly when the insurer admits “the accident was *caused by the defendant’s breach of duty*” it can be referring to no other breach than that of Mr Mullen the driver. I agree with the reasoning provided by HHJ Simpkins in **Chibwana**, that an interpretation of the protocol does not allow any other conclusion, in that whilst some sections of the CNF refer to the role of the insurer, not least in providing the RTA 1 response, there are several other sections which make it abundantly clear that the person referred to is the defendant driver (or in this case the employer, the bus company); for instance on the first page of the CNF, where the defendant’s details are to be supplied, and in the response information at section C where there is a clear distinction made between the insurer and the defendant.

45. I do not believe that the Claimant is in any way assisted by the fact that CPR 14.1 B facilitates the withdrawal of an admission only by a defendant within a protocol claim, the effect of which clearly precludes Mr Mullen because within the Part 7 proceedings he is now a claimant. It appears to have been suggested on his behalf that this should enable an interpretation by the court that he was never a defendant, because he never made such an admission. I do not accept such an interpretation, and it seems to me that this provision is intended to bring into line with the balance of CPR 14 all pre-action admissions that are made on the basis that the protocol process is clearly *pre-action*, and what is envisaged is the kind of situation where the portal claimant in a claim which has exited the portal is the same as the part 7 claimant, perhaps in circumstances where the damages claimed now exceeds the protocol limit, and defendant insurer now wishes to resile from an admission made when the claim was considered to be of insignificant value. That is but one example of the circumstances in which reliance might be placed on CPR 14.1B.

46. I turn now to deal with the second ground of appeal, which has Mr Dawes says is his fallback position. In this respect I again find myself entirely in agreement with the reasoning provided by HHJ Simkins in **Chibwana**, and in particular paragraphs 65 and 70 highlighted above. I cannot accept the proposition that what starts in the portal remains in the portal, because this is predicated on the concept that the protocol is designed for some form of

alternative dispute resolution with its own set of rules and practices. That is only true to a very limited extent, because the CPR, and in particular the fixed cost regime in CPR 45 is dovetailed to the use of the protocol, and in numerous instances rules are constructed on the basis that for low value personal injury claims (and not just in RTAs) use of protocol is compulsory, and failure to follow the requirements can end up in significant cost penalty or in some cases striking out of a claim. I do not accept that any assistance can be derived from first instance decisions which appear to have disappplied common law rules such as mistake to the protocol provisions. The protocol is self-contained, it seems to me, but only to the extent that compliance with its provisions, will prevent the need for any court involvement.

47. However, the most compelling reason, in my judgment, for concluding that the admission made within the portal by the “the defendant” through his insurer should be binding outside the portal is that were it otherwise there would be no finality to road traffic accident litigation involving low value personal injury. If an insured was free to pursue his own claim notwithstanding an admission made by his insurer through subrogation in respect of a portal claim by a third party, this would leave open, as Ms Robson says, the prospect of inconsistency in decision, applications to withdraw admissions by insurance companies on the basis of subsequent factual findings, huge uncertainty and worse still a significant diminution in the efficacy of the protocol. That is sufficient, in my judgment, to determine this second issue in favour of the respondent, and to find that there was no error of law in the deputy district judge’s conclusion that the admission was binding in the subsequent litigation, thus following the decision of HHJ Simpkins in **Chibwana**.

48. Accordingly, this appeal is dismissed.

49. In respect of the cross-appeal, it must follow that if the decision is upheld that the claim was properly struck out under CPR 3.4 on one or other of the first two limbs, by the operation of CPR 44.15 there is no discretion in respect of the application of the exception to QOCs protection. Mr Dawes appeared to accept this in the course of exchanges with the Court, and therefore the Respondent’s appeal should be allowed, and the order of the deputy district judge reversed in relation to costs.

50. I invite counsel to draw up an appropriate order before we handing down of this judgement, but if agreement cannot be reached in relation to the finer details, I will hear further representations.

HHJ Wood QC

2nd October 2020