Neutral Citation Number: [2022] EWHC 211 (QB)

Case No: CF010_2021CA

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 28 January 2022

Before :

MRS JUSTICE FOSTER DBE

- -

Between :

MARVA GREYSON

Claimant

- and -

RYAN FULLER

Defendant

- -
- -

Oliver Moore and Ms Kriti Upadhyay (Junior) (instructed by Admiral Law Ltd) for the Claimant
Jonathan M Lally (instructed by BLM Law) for the Defendant

Hearing date: 19 April 2021

- -

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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MRS JUSTICE FOSTER DBE

MRS JUSTICE FOSTER DBE:

INTRODUCTION AND THE ISSUE

1. This is an appeal from a decision of HHJ Petts on the interpretation of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the RTA Protocol") version in force for claims arising on or after 31 July 2013 and before 31 May 2021.

2. It concerns a preliminary issue in the Claimant's claim for damages for personal injury arising from a road traffic accident on 28 June 2017. The claim is a "soft-tissue injury claim" under the RTA Protocol, and the dispute has arisen over medical reports disclosed to the Defendants in a manner different from that set out in the Protocol.

3. The Claimant's first and a number of subsequent medical reports were disclosed together to the Defendant in what is known as the Stage 2 Settlement Pack, and (unsuccessful) settlement negotiations took place on the basis of them. An offer was made by the Defendant in the usual course and rejected. The matter then proceeded to a Stage 3 hearing where, as a preliminary point, the Defendant argued the Judge was obliged to rule the Claimant could not rely upon the subsequent reports because their disclosure, being simultaneous, and not sequential, was outwith the letter of the RTA Protocol.

4. The Judge described the issue succinctly as follows:

> *"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?"*

5. What had happened was the following.

6. The Defendant admitted liability for the accident promptly. In early August 2017 a report was obtained from the Claimant's GP concerning pain and injury, finding that it was likely to resolve in four months. That report was not immediately disclosed to the Defendant. The Claimant did not recover speedily as anticipated and she visited a specialist who examined her in January 2018. This orthopaedic consultant produced a report in April 2018 indicating that her symptoms were ongoing but full recovery of accident-related symptoms was expected by June 2018. An August report from the same consultant indicated the symptoms continued. Another October 2018 report showed that there was still lower back pain, and, on reviewing an MRI scan in January 2019, that consultant suggested review by a pain expert, because the MRI did not explain the presence of low back pain, two years post-accident. A report by the pain

consultant dated 13 September 2019 attributed 50% of the low back pain to the accident with a prognosis period of 9 to 12 months from the date of examination.

7. The Stage 2 Settlement Pack together with all of the medical reports was submitted to the Defendant via the MOJ Portal on 13 March 2020. No point was taken at that stage that the first report and subsequent reports were disclosed simultaneously.

8. Offers and counteroffers were made but the case did not settle. Special damages were all agreed; the remaining dispute was as to damages for pain suffering and loss of amenity. The matter then proceeded from Stage 2 to Stage 3 and on 6 May 2020 the Stage 3 court proceedings pack was submitted, and a claim issued by the Claimant on 8 June 2020. An interim payment was made by the Defendant, according to the Protocol, of the sum offered by the Defendant. Further sums were paid in May 2020 towards disbursements.

9. Then, the day before the Stage 3 hearing in December 2020 the Defendant took issue for the first time with the Claimant's failure on 13 March 2020 to comply with the Protocol, during the Stage 2 process, namely the requirement in paragraph 7.8B(2) which states (with emphasis added):

> "***Soft tissue injury claims – medical reports*** ...
>
> *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.*
>
> ..."

10. The Defendant argued below that the further reports were not "justified" under the RTA Protocol paragraph 7.8B because the initial report was not "*first disclosed to the defendant*" which meant the further reports were automatically inadmissible and could not be relied upon at all in the Stage 3 hearing. That analysis had been accepted by another County Court in the case of *Mason v Laing* [20 January 2020] on which the Defendant relied.

11. The relevant Part of CPR 8BPD which governs Stage 3 proceedings including for a soft tissue claim such as this provides:

> "***5.1*** *An application to the court to determine the amount of damages must be started by a*
>
> *claim form.*
>
> ...
>
> ***Filing and serving written evidence***
>
> ***6.1*** *The claimant must file with the claim form –*
>
> *(1) the Court Proceedings Pack (Part A) Form;*
>
> *(2) the Court Proceedings Pack (Part B) Form (the claimant and defendant's final offers) in a sealed envelope...*
>
> *(3) copies of medical reports;*
>
> *(4) evidence of special damages; and*
> *(5) evidence of disbursements (for example the cost of any medical report) in accordance with rule 45.19(2).*
>
> ***6.1A*** *(1) In a soft tissue injury claim, the claimant may not proceed unless the medical report is a fixed cost medical report. Where the claimant includes more than one medical report, the first report obtained 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...*
>
> *(2) The cost of obtaining a further report from an expert not listed in paragraph (1)(a) to (d) is not subject to rule 45.19(2A)(b), but the use of that expert and the cost must be justified.*
>
> ***6.2*** *The filing of the claim form and documents set out in paragraph 6.1 represent the start of Stage 3 for the purposes of fixed costs.*
>
> ***6.3*** *Subject to paragraph 6.5 the claimant must only file those documents in paragraph 6.1 where they have already been sent to the defendant under the relevant Protocol.*
>
> ***6.4*** *The claimant's evidence as set out in paragraph 6.1 must be served on the defendant with the claim form.*
>
> ***6.5*** *Where the claimant is a child...*" [not relevant]

12. The Defendant argued that "justified" in the Protocol, meant, (as *Mason* had decided), that the rules had been exactly followed as intended under the prescriptive terms of the Protocol – not where they had been broken. Accordingly, the argument went, because there had been a breach of the Protocol it could not be said that the filing requirements of Stage 3 proceedings under 8PD 6.1 could be met for the later reports. This was because 8PD 6.1 required service of certain documents including medical reports, but 6.1 was qualified by 6.3 to the effect that nothing could be served under 6.1 unless "*sent to the defendant under the relevant Protocol*". The words "*under the relevant*

Protocol" imported the notion of sending to the Defendant strictly in accordance with the Protocol rules - which had not happened. Accordingly, the material could not form part of the Part 3 documentation served under 6.1. In *Mason* the argument that paragraph 7.1 of the Protocol could be used in such situations to disallow the costs of wrongly filed reports was rejected: 7.1 was to be used only where there was a refusal to pay for a report that was technically compliant.

13. The Claimant's case before HHJ Petts was that the reference to sanctions in the relevant part of the Protocol was a reference to costs, not to admissibility. She noted that the word "justified" appeared only twice in the applicable rules and PDs, namely at r.45.19 and 6.1A (2) (above) and in each case it was used in respect of costs. That argument is repeated by the Claimant as Respondent here.

14. The costs provision in CPR 45.19 is as follows (emphasis added):

> "*Disbursements*
>
> ***45.19***
>
> *(1) Subject to paragraphs (2A) to (2E), the court –*
>
> *(a) may allow a claim for a disbursement of a type mentioned in paragraphs (2) or (3); but (b) will not allow a claim for any other type of disbursement.*
>
> ...
>
> *(2A) In a soft tissue injury claim to which the RTA Protocol applies, the only sums (exclusive of VAT) that are recoverable in respect of the cost of obtaining a fixed cost medical report or medical records are as follows –*
>
> *(a) Obtaining the first report from an accredited medical expert selected via the MedCo Portal: £180;*
>
> *(b) Obtaining a further report where justified from an expert from one of the following disciplines –*
>
> *(i) Consultant Orthopaedic Surgeon ...*
>
> *... [etc]*
>
> *(2C) The cost of obtaining a further 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.*"

15. Whilst in *Mason v Laing* it was held there was no jurisdiction to give any relief from the sanction of keeping the evidence out altogether, HHJ Petts in the present case decided he did have a discretion whether or not to exclude the materials. Applying *Denton* criteria, he allowed it in. In the case of *Mason* it appears the learned Judge did not have the benefit of argument on the provisions of 8BPD nor the recent case of *Wickes Building Supplies Limited v William Gerarde Blair* [2019] EWCA Civ 1934.

THE JUDGE'S JUDGMENT

16. The Judge's reasoning (contained in paragraphs 27 – 42) was in summary as follows. (I take the gist of this synopsis with gratitude from the skeleton of the Claimant.)

i) Paragraph 7.8B(2) sets out two conditions that the claimant must meet in order for further medical reports to be 'justified': that it is recommended in the first expert's report, and secondly, that the first medical report has first been disclosed to the Defendant. The second condition was not satisfied, and therefore the further 5 reports obtained after the first one, were not 'justified'.

ii) Where a medical report is disclosed 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. HHJ Petts agreed with HHJ Gosnall in the *Mason* case on this interpretation.

iii) As the further reports were not 'justified', the default position is that the Claimant cannot rely on them without the court's permission under PD8 paragraph 7.1(3). This the Judge held was similar to the position in the case of *Wickes* dealing with a failure to serve a witness statement in accordance with the EL/PL Protocol 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 over which the court has a discretion. Therefore, medical reports not being 'justified' goes to the admissibility of the reports as the default sanction for a breach of paragraph 7.8B of the RTA Protocol.

iv) "Justified" is not a word solely relating to costs considerations, in spite of its use in CPR 45.19(2C).

v) HHJ Gosnell was wrong in *Mason* to decide that a judge has no discretion to admit a report that was not served in accordance with the protocol (neither *Wickes* nor PD8B 7.1 (3) were referred to in *Mason*). Therefore, medical reports that are not 'justified' are not 'irremediably inadmissible.'

vi) The appropriate route when considering whether and if so what sanction should be applied, is to consider PD8B paragraph 7.1(3), and ask whether the Claimant's claim '*cannot be properly determined*' without the further medical reports. It is not correct to look for assistance to the Practice Direction - Pre-action Conduct and Protocols ("the PDPACP") or to the recent case of *Cable v Liverpool Victoria Company Limited* [2020] EWCA Civ 1015 which indicated the interconnected nature of the RTA Protocol and the CPR.

g. '*Properly determined*' involves wider considerations than whether it is technically feasible to assess damages without a particular piece of evidence; the three stage approach of *Denton v TH White* [2014] EWCA Civ 906 was to be used in determining whether relief from sanction should be given.

h. All the necessary points relevant to a relief from sanctions application had already been ventilated during the hearing. The absence of an application for relief filed by the Claimant was not to be held against the Claimant.

i. It was a clear case for granting relief from sanctions and permitting the Claimant to rely upon all the medical reports. In summary: (1) the breach was not serious or

significant; (2) the Defendant *"has seized, opportunistically and belatedly, on a previously unnoticed breach by the Claimant of the RTA Protocol"*; (3) the breach had not affected compliance in practice with the aims of the RTA Protocol paragraphs 3.1 and 3.2; (4) an inference that the breach was deliberate was not justified on the evidence; (5) in all the circumstances, particularly where the breach had caused no prejudice to the Defendant, enforcing the sanction would be wholly disproportionate to the severity of the breach which has not had any impact on the efficient conduct of the claim or the proportionality of costs.

j. The Court did need to look at all the medical reports in order to properly determine the claim.

AUTHORITY AND GUIDANCE

17. In deciding the case, there was no direct assistance to the Judge below from higher authority on the interpretation of the relevant words. However, there were two relatively recent Court of Appeal decisions that concerned Protocols. *Wickes*, decided just before *Mason* but not referred to in it - or before HHJ Petts in this case, but upon which the Judge invited submissions after the hearing and before giving judgment. The second case, *Cable* post-dated *Mason*; the facts were very different, but the Claimant relied on it to support the submission that the PDPACP was of relevance on questions of Protocol compliance, as was the outcome of the case. HHJ Petts considered both authorities and on the basis of *Wickes* came to a different conclusion from the judge in *Mason*.

18. *Wickes* was a decision on the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ("the ELPL Protocol") which has many similarities to the RTA Protocol.

19. The issue there (per Baker LJ) who gave the only judgment was:

> *"...the procedure to be followed if a claimant seeks to rely for the purpose of the Stage 3 Procedure of the Protocol on evidence served out of time, and in particular whether this is a matter to be dealt with by the court under paragraph 7 of Practice Direction 8B (as District Judge James held at first instance in this case) or whether it leads to automatic dismissal of the claim under the Protocol under paragraph 9 (as HHJ Hughes held on appeal)."*

20. In *Cable* the court was considering a submission about an alleged abuse of process involving egregious delays and misuse of the RTA Protocol and the eventual striking out of the subsequent Part 3 proceedings.

21. The following was explained in that case by Coulson LJ as a guide to the nature of the RTA Protocol and provides important context.

> *"6. The RTA Protocol operates in conjunction with the MOJ portal. It provides a structured methodology in which the emphasis is on the resolution of low value RTA claims in a proportionate and cost-effective way.*

> *7. The RTA Protocol involves three stages. Stage 1 is concerned with liability. If liability is admitted, the process moves to Stage 2, where the parties seek to agree quantum. If liability is disputed, the claim drops out of the RTA Protocol altogether and proceedings must be commenced under part 7.*
>
> *8. Many claims are settled at Stage 2 when, following service of the Stage 2 Settlement Pack containing the claimant's evidence and any account of the accident by the defendant, the parties agree the quantum of the claim. But where that does not happen, the process moves to Stage 3, which is the resolution of the quantum of the claim at a court hearing. For that purpose, the claimant is obliged to issue a claim pursuant to Part 8, and the process laid down by Practice Direction 8B. No PAP process stops time running for limitation purposes.*
>
> ..."

22. Reference was made to the PDPACP as dealing generally with pre-action conduct and the PAPs in the context of an argument as to whether abuse of process might be articulated under the Protocol (the Court held it could). The paragraphs upon which the Claimant relies include Coulson LJ's description of the Protocol's relationship with the CPR:

> "*58. ...the RTA Protocol is a detailed set of rules designed to streamline the civil justice process and to ensure that many of these claims never even reach the stage of a formal commencement of proceedings. It would be counter-intuitive if non-compliance with those rules could be dismissed as being irrelevant to the court's overall control of civil business (including the ability to strike out for abuse of process) simply because they related to a period before the formal commencement of court proceedings.*
>
> *59. Thirdly, the RTA and EL/PL Protocols are expressly interwoven into the CPR themselves. Claims under these low value protocols are the subject of specific provisions in Section II of CPR Part 36, concerned with offers to settle, and Section III of CPR Part 45, concerned with fixed costs. In addition, of course, Practice Direction 8B is expressly referable to these low value PAPs. They cannot therefore be divorced from the CPR, and the ``process of the court.*"

23. The PDPACP contains the following paragraph, also referred to in *Cable:*

> "*16. The court will consider the effect of any non-compliance when deciding whether to impose any sanctions which may include—*
>
> *(a) an order that the party at fault pays the costs of the proceedings, or part of the costs of the other party or parties;*
>
> *(b) an order that the party at fault pay those costs on an indemnity basis;*

> *(c) if the party at fault is a claimant who has been awarded a sum of money, an order depriving that party of interest on that sum for a specified period, and/or awarding interest at a lower rate than would otherwise have been awarded;*
>
> *(d) if the party at fault is a defendant, and the claimant has been awarded a sum of money, an order awarding interest on that sum for a specified period at a higher rate, (not exceeding 10% above base rate), than the rate which would otherwise have been awarded.*"

24. The Claimant refers to this passage to support the submission that the clear primary sanction for PAP non-compliance is in costs, and argues in effect that that message is woven through the CPR, the guidance and the RTA Protocol, properly read.

25. The Defendant by contrast relies upon the fact that the White Book also notes that a particular difference in the RTA and EL/PL Protocols is that normally the rules are supplemented by a Protocol, whereas here "the process is reversed". The Defendant submits that no assistance may be gained from any references in the CPR generally or contained in the PDPACP. His submission was in effect that the RTA Protocol is a self-contained and often draconian set of stipulations that trumps such considerations of fairness or justice as might otherwise arise under the overriding objective.

26. It should be noted that immediately before the citation above, the two previous paragraphs in *Cable* emphasise the importance of abiding by the requirements of the PAPs:

> "*56. First, the Practice Directions and the Rules themselves make plain that the court expects the parties to comply with the PAPs. Thus the Practice Direction concerned with Pre-Action*
>
> *Conduct and Protocols at paragraph 13 states that the court will expect the parties to have complied with the relevant pre-action protocol or this Practice Direction. The court will take into account non-compliance when giving directions.... Similarly, CPR r.3.1(4), dealing with the court's general powers of case management, provides that where the court gives directions it may take into account whether or not a party has complied with any relevant pre-action protocol.*
>
> *57. These provisions are a reflection of the importance given to PAPs generally by the CPR. Lord Woolf MR said in the Access to Justice Final Report (2006) at Chapter 10, paragraph 6, that PAPs were an important part of the system and were to set out codes of sensible practice which parties are expected to follow when faced with the prospect of litigation. The court expects parties to comply with these rules, so it seems to me to follow that non-compliance can, in an extreme case, amount to an abuse of process.*"

27. A further flavour of the context is gained from the introduction to the Protocol in the White Book (paragraph C13A-007 "practical points"). It describes the practicalities of the RTA Protocol in the following way:

> *"The portal process is designed to cope with over 500,000 claims a year. But in the first three years of the Protocol over 2,250,000 claims were notified through the portal. Of these, over 600,000 settled in Stage 2. The percentage of claims proceeding to Stage 3 is very low at just 1.3% (which suggests that reasonable offers are being made and accepted, that being the main purpose of the protocol). The remaining claims are either not pursued or proceed as standard cases under Pt 7."*

Importantly, it also states (emphasis added):

> *"If a claimant has wrongly failed to comply with the Protocol and/or has inappropriately exited the scheme, the sanction is costs; see r.45.24. It is not appropriate for an insurer to seek to have the Pt 7 claim struck out for non-compliance with the protocol. However, when filing the Directions Questionnaire, it would be appropriate to alert the court to the fact that the defendant intends to argue that the claim has been issued inappropriately and to order, for example, "If it is found that the claimant has not complied with the PreAction Protocol for Low Value Personal Injury Claims in Road Traffic Accidents, the defendant's liability for costs (if any) shall be limited in accordance with r.45.24 and the issue of whether the extra costs incurred by the defendant should be paid by the claimant is reserved to the trial judge."*

28. It also states that the RTA Protocol:

> *"describes the behaviour the court expects of the parties prior to the start of the proceedings...The Civil Procedure Rules 1998 enable the court to impose costs sanctions where it is not followed."*

THE APPEAL

29. The Defendant argued that the Judge misinterpreted the terms of the RTA Protocol and, wrongly, had regard to the PDPACP when analysing the position favourably to the Claimant. The approach taken was he said inconsistent with the stringent scheme of the Protocol and had the effect of "nullifying" the true intent of paragraph 7.8B. The scheme did not allow for relief from sanction in the manner afforded by the Judge who, the Defendant said, had misinterpreted the scope of the discretion under 8BPD paragraph 7.1(3) and the phrase "*properly determine the claim*". Whilst acknowledging that, following *Wickes*, paragraph 7.1(3) may afford relief for a witness statement, he submits the same does not apply to obtaining medical reports which are more tightly controlled. His argument is that 7.8B of the Protocol is dealing with obtaining medical evidence at all – and whether that "obtaining" is justified. He postulates a scenario in which it would be possible for a Claimant to amass a large body of evidence, without serving any of it, knowing that at Stage 3 they could seek to rely upon it. This would mean a Defendant could make no offers and would not know the case made against it.

30. As to the use of 7.1(3) – this is a narrow provision in the Defendant's submission not allowing of the implication "fairly" and "justly" as found elsewhere in the CPR and imported improperly by the Judge into the *Denton* exercise of discretion he carried out

in this case. He points to those parts of the commentary on the Protocol that emphasise the volume of users, the speed and simplicity of the Protocol itself and the need to safeguard it by clear and stringent discipline. These laudable aims together with the minimisation of cost comes at the expense of more refined justice, he submits. Narrow interpretations should be put on the meaning of 7.1 (3) and the scope of what was required to "properly determine" a claim.

31. A further point is made that in seeking to construe the Protocol the Court should not look beyond it to the general PDPACP, and to be wary that the more general parts of it and indeed the general provisions of the CPR, which did not apply to the RTA Protocol. The Claimant's exhortation to consider further materials was inappropriate.

32. Further, the Defendant supported the approach of HHJ Gosnall in *Mason* arguing that HHJ Petts here wrongly had regard to CPR 3.9 (relief from sanction), and, even if not falling into error in this regard, then was wrong in his application of the principles in *Denton v White* in that he allowed the materials to be relied upon. He argues this also as a matter of discretion and procedural fairness since there ought to have been exchanges of evidence upon which the Judge could base his application of CPR 3.9 and here there was none: the Judge decided the question on the material already before him.

33. The Claimant has raised a Respondents' Notice where, as her primary case, she seeks to uphold the outcome below but on different grounds. I deal with those grounds in the consideration in the next section.

CONSIDERATION

The meaning of "justified" in 7.8B(2)

34. The starting point is to seek to understand what the wording of Paragraph 7.8B(2) of the Protocol means. As was said by Baker LJ in *Wickes* at paragraph 29 "*The provisions of the Protocol are regrettably not drafted in a way which makes interpretation entirely straightforward.*" Whilst appreciating that the Protocol is not a statute to be construed according to classic principles it is helpful to look for the plain meaning of the words in their context. On a plain reading of the RTA Protocol, it is difficult to construe what the draughtsman intended with the word "justified" in the phrase "*a further medical report ... will only be justified where ... it is recommended in the first expert's report ... and that report has first been disclosed to the defendant.*"

35. The plain meaning of the word "justified" is generally "supported by reasoning" or "proven to be of utility" or "proven to be correct". It carries with it the idea of having been shown to be allowed, or acceptable. With respect to the Judge below, I do not believe that the word relates, as he held, to the admissibility of the evidence under the Protocol. In my judgement it is intended to mean, although clumsily expressed, that medical reports that are disclosed to the Defendant outside the strict provisions of the Protocol at Stage 2 are not to be treated without more (i.e. without the permission of the court) as automatically coming within "justifiable" costs, and to be paid for. In other words, if the Claimant discloses reports via the Portal in an unorthodox manner they run the serious risk of not recovering that cost from the Defendant: the Claimant will have to persuade the Court that the Defendant properly should pay - if the

Defendant takes the point. The emphasis in 7.8B, (which of course, deals only with Stage 2), but also throughout the Protocol, is the prompt payment of properly incurred, ascertainable costs. The emphasis is upon informed, prompt and cost-efficient settlement of low-value cases. It is relevant that the use of "justified" elsewhere in the framework is in terms of items being necessary/defensible in order to arrive at a just settlement (and so, in the end to be paid for). Evidence and its use is on the basis of strict requirement (see 7.2), or ("justified" in non-soft tissue injury cases). I accept what the Defendant says about the stringent nature of process under the Protocol, to this extent it is reflected in the all the materials to which I have referred. For reasons that follow, I disagree with the Defendant that the corollary of a stringent system is his preferred interpretation of the relevant provisions.

36. Whether the word "justified" has any more special meaning here falls to be judged in its context and it is certainly relevant, as the Claimant pointed out on appeal, that the use of the word "justified" elsewhere in the relevant rules dealing with medical reports, personal injury actions and the Protocol, refers to the costs implications of steps in such litigation. For example in 8BPD governing Stage 3, it is stated (with emphasis added):

> *"6.1A) (1) In a soft tissue injury claim, the claimant may not proceed unless the medical report is a fixed cost medical report. Where the claimant includes more than one medical report, the first report obtained 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...*
>
> *(2) The cost of obtaining a further report from an expert not listed in paragraph (1)(a) to (d) is not subject to rule 45.19(2A)(b), but the use of that expert and the cost must be justified."*

37. It is relevant to look to the wider context of the RTA Protocol and understand how it is intended to work and what rules apply to that procedure at the later stages of litigation, for example, in those cases which proceed beyond Part 2 into Part 3 or fall out of the RTA Protocol. Rule 45.19 supplements The RTA Protocol and PD8B is also supplemented by CPR Part 45 (III), with the applicable costs rules for claims that have been, or should have been, begun under Part 8 in accordance with PD8B (the Stage 3 Procedure). In my judgement it is clear that the overall structure of the RTA Protocol is, as both parties acknowledge and submit, to provide a disciplined and self-contained process that achieves its aims of the speedy and proportionate resolution of lower value claims by imposing, pre-eminently, a financial discipline. That is clear from the general words of paragraph 16 of the PDPACP and clear in the particular area of medical evidence under the disbursement provisions. Central to the system is the fact that the default position is that restricted costs are payable. Any report obtained that is not the initial report (whose source and nature and cost is closely controlled) will not be paid for – unless it is "justified". In other words, cogent reasons are given (and accepted) for its necessity in the process.

38. In light of that, in my judgement the meaning of "justified" must be ascertained by reference to the fact that the sanction of failing to recover costs, is written through every part of the scheme as the default sanction for compliance failures.

39. Where materials are not "justified" – necessary for the claim – then the recovery of costs incurred in obtaining them in the usual way under the Protocol is in my judgement at risk. Otherwise, the Claimant is entitled as a matter of course to costs as per the incorporated provisions.

40. The extracts from the White Book cited above and from the Court of Appeal cases show that the important features of the RTA Protocol include:

    i) The emphasis on proportion and cost-effectiveness (per Coulson LJ in *Cable* at [6].

    ii) The intention to streamline process and to ensure that many claims never even reach the stage of a formal commencement of proceedings. [ibid.58]

    iii) The interconnection of the RTA and EL/PL Protocols with the CPR themselves [*passim* the materials] although it is the case that the Protocol replaces the general rules on occasion with particular provision.

    iv) Particular provision is made with regard to the use of materials that have not been presented in conformity with the Protocol restrictions in Stage 2 by reference to costs and at Stage 3 (where forensic reliance on material is in issue) by excluding it or, if so contended, dismissing the Claim. [*Wickes*, 7 and 9]

    v) The *leit motiv* through the RTA Protocol and particularly at Stage 2, is the discipline imposed by limitation on recoverable costs: see particularly the disbursements provisions of CPR 45.17 and 45.24, the statements in paragraph 16 of the PD.

Failure to Serve under 8BPD 6

41. In the present case the Defendant had all the reports within the Stage 2 pack, was able to consider them, did so, raised no point, and made an offer on the basis of them. These reports were all "disclosed" as the Protocol requires. Only the sequence of disclosure was in error. Further, there is provision in 7.31 of the Protocol for an objection at the end of Stage 2 to a proliferation of expertise: whether from more than one counsel or more than one expert. The Claimant should explain why they have more than one report, and the Defendant is given an opportunity to object to paying for it.

42. When the case proceeded to Stage 3 from Stage 2, here, all the reports were served upon the Defendant under the provisions that govern Stage 3 - namely CPR 8BPD. The requirements of 6.4 were in my judgement fulfilled: all the reports ("the evidence") to which no objection had been taken, had been served as required under the rules, with the claim form on the Defendant. The rules provide an opportunity to challenge the admission of new, previously undisclosed evidence. Indeed *Wickes* was a case where the evidence was not disclosed until service at Stage 3. Accordingly I reject the interpretation advanced by the Defendant in support of the Judge's decision below to the effect that there was any service failure here.

43. With respect to the Judges below (whose familiarity with these provisions is much greater than mine), I cannot accept that the meaning of "*sent to the defendant under the relevant Protocol*" means as they have held it to mean so vitiating proper service under

8BPD 6. The PD contains clear mechanisms elsewhere for dealing with evidence not disclosed and the consequences of it: and they are stringent - see the Protocol paragraph 7.31, and 8BPD 7 and 9, containing express provisions regarding evidence defalcations at Stages 2 and 3. The convoluted and yet draconian reading of 8BPD 6 within the Practice Direction is in my judgement unwarranted. The Claimant is correct in her submission made by Respondent's notice that so draconian an outcome cannot be read into the wording. Nor is it a natural or clear meaning to take from the wording. It is notable that where the Practice Direction gives power to exclude or include evidence, its terms are clear.

44. The appropriate sanction where there is an "ambush" at Stage 3 was considered by the Court of Appeal in *Wickes* a case that is in my judgement *a fortiori* the present case. In *Wickes* the Claimant sought to rely on new evidence at Stage 3 that had not been included in the material disclosed at Stage 2 (not the instant case). The Court held (rejecting an argument that the Defendant was seeking to put an end to the Protocol Claim under 9.1) as follows (emphasis added):

> "*31 ...In my judgment, a defendant served with an additional statement not included in the material served under Stage 2 has the choice of opposing the claim proceeding under the Protocol or continuing with the process but objecting to the evidence being considered by the court. In this case, Wickes plainly chose the second option. It is crystal clear from the Acknowledgment of Service that Wickes was opposing the claim but not objecting to the use of the Stage 3 Procedure.*
>
> *32. In those circumstances, the issue fell to be considered by the district judge under paragraph 7 of the Practice Direction. Under that paragraph, 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. If it does conclude that the proper determination of the claimant requires the evidence to be admitted, the court may allow the party to rely on the evidence and, if so, will give appropriate directions under paragraph 7.1(3). In this case, the district judge simply concluded that the statement should be disregarded and proceeded to make a decision on the level of damages. In taking that course, he was acting in accordance with the terms of the Practice Direction and the aims of the Protocol.*"

45. The provisions allow even "ambush" evidence, in if the Court concludes proper determination requires it. This suggests that the Stage 2 requirement for "justification" under the Protocol refers to the risk the Claimant will not be paid for that evidence; (a significant burden), but not exclusion of the evidence itself. Paragraph 7.2 of the Protocol refers to the fact that one report is usual in a protocol claim but additional reports may be obtained "*where the injuries require reports from more than one medical discipline ...*" In non-soft tissue cases the Protocol at 7.8 deals with subsequent reports that may be "justified" in circumstances (perhaps understandably) where more time for a prognosis is necessary, or continuing treatment is being received or recovery is not as expected. This is a wholly unexceptional use of "justified" as meaning reasonably necessary [and therefore likely to be paid for]. It is difficult to see that the meaning should be different in 7.8B.

46. The fact that justification connotes need is reinforced by Protocol 7.12, also under Stage 2, and providing that where a "claimant needs" a subsequent report the parties should agree a stay in the process - and an interim payment request can be made. This last provision gives a rationale to the sequential disclosure approach enjoined by the Protocol: if disclosure is sequential, the process is transparent, and may be stayed by agreement to the advantage of both sides while the new material is obtained. All of this conduces to the effective and inexpensive resolution of such cases.

47. Further, as the Claimant again emphasises, failures by a Claimant within the RTA Protocol to abide by its strictures, ultimately may result in the inability to recover the costs for materials obtained, or even the requirement to lose the protections of the Protocol, and to have to start the Claim again using CPR part 7 – but recovering only the restricted costs appropriate to the RTA Protocol.

48. Accordingly I agree with the Claimant that a medical report not being 'justified' per paragraph 7.8B(2) of the RTA Protocol goes to the risk of penalty in costs rather than admissibility of the medical report.

49. The Claimant further argues that the provisions of 8BPD 7.1 and 7.2 give a clear discretion to include materials (including evidence) not provided according to the Protocol where "*the court considers that it cannot properly determine the claim without it*". It would be extraordinary if, before that stage, the Court were compelled to exclude mis-disclosed materials. I agree.

50. The hypothetical situation postulated by the Defendant of a Claimant failing to disclose a plethora of reports and then ambushing the Defendant is not the current issue. In any event – Stage 3 provisions deal with that problem if necessary.

51. I accept the Defendant's submissions about the character of the Protocol – including that limiting medical evidence is clearly a part of the aim. I do not agree that the Protocol "trumps" the overriding objectives of a just determination of cases, but I accept the Rules are applied strictly. However, I disagree that that context compels the construction of those rules that he advances. I further do not accept that the Protocol compels abandonment of the overriding objective, although I accept the rules are to be strictly applied (the case law supports these propositions: see especially *Wickes*.)

52. I accept that time for consideration at Stage 2 is limited as he submits, but again, that does not mean the sanction for simultaneous service is to be read as encompassing exclusion of the evidence before even the claim is issued.

53. The Defendant argued that *Wickes* was not relevant to medical evidence – the provisions of 7.3 are used – and to be used for less important matters than medical evidence. I disagree. The provision is clear and the heading "Evidence General" could not be clearer. Similarly, the Defendant's submission that the discretion under 7.1(3) is particularly narrow is not, to my mind, supported by the drafting of the subparagraph in my mind. In my judgement what the words "properly determine" mean will vary from case to case. The phrase imports a high bar for a Claimant to surmount: it excludes material that is merely "desirable". The lack of the relevant evidence must mean the tribunal is so handicapped it would be forced to say, "I cannot properly decide this without those reports". This will produce no difficulty in practice: setting out examples

as notional parameters will not assist. Indeed, given my decision that the materials were properly served, I need not consider this section, nor the *Denton* submissions, further.

54. I should add that I am fortified in my overall construction of the Scheme by the fact that as from 31 May 2021 a new version of 8PBD 7.8B(7) is in force. It is as follows:

> *"(b) paragraph (2) below applies in place of paragraph 7.8B(2).*
>
> *(2) A further 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;*
>
> *(b) the first medical report recommends that further time is required before a prognosis of the claimant's injuries can be determined;*
>
> *(c) the claimant is receiving continuing treatment; or*
>
> *(d) the claimant has not recovered as expected in the original prognosis."*

It thus presents none of the difficulties posed by the present appeal.

CONCLUSION

55. The result of this appeal and cross-appeal is therefore:

(i) The sanction for simultaneous rather than sequential disclosure of the reports gives rise to the risk of sanction in costs, at the end of the process, not exclusion of the evidence.

(ii) There was no failure properly to serve the Defendant under 8BPD 6 by reason of the simultaneous service of reports.

(iii) It was not necessary to invoke 8BPD 7(1)(3) in order to rely upon the Claimant's extra reports.

56. Whilst the Protocol is, as described, a particular and stringent process, nothing in it or in its context compels a different outcome. The Appeal is dismissed and the Claimant's Appeal is allowed.