GREYSON V FULLER: WELCOME CLARIFICATION ON THE INTERPRETATION OF THE RTA PROTOCOL AND THE INTERPLAY BETWEEN THE LOW VALUE PI CLAIM PROTOCOLS AND THE CPR

After a long wait following an appeal hearing in April 2021, the High Court appeal decision in *Greyson v Fuller* [2022] EWHC 211 (QB) was handed down in February. Oliver Moore and Kriti Upadhyay acted successfully for the Claimant/Respondent in the appeal before Mrs Justice Foster. Kriti Upadhyay represented the Claimant in the first instance hearing before His Honour Judge Petts. In this article, Kriti discusses the judgment and its implications.

Summary

The High Court was asked to consider the interpretation of paragraph 7.8B(2) of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013, which required sequential disclosure of medical reports by claimants who seek to rely upon more than one expert report. Mrs Justice Foster held that the appropriate sanction for a failure to comply with 7.8B(2) was the risk of not recovering costs at the end of the process, and not the exclusion of the medical reports in question. There had not been a failure to properly serve the evidence in accordance with PD8B.6 of the CPR by reason of the simultaneous service of reports. It was not necessary to invoke 8BPD 7.1(3) in order to rely upon the Claimant's further reports.

The facts

The claim arose from a road traffic accident in 2017, in which the Claimant sustained soft tissue injuries. Liability was admitted promptly by the Defendant. The Claimant was initially seen by a GP expert in August 2017, who anticipated a full recovery from her injuries by around December 2017. As the Claimant failed to recover as anticipated, she was then seen by an orthopaedic surgeon and a pain management expert who produced further reports in 2018-19.

The Claimant's solicitors brought proceedings on her behalf through the MOJ Portal ('the Portal'), under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ('the RTA Protocol'). The Stage 2 Settlement Pack, together with reports from all three experts, were submitted to the Defendant through the Portal in March 2020. This was the first time that these reports had been disclosed to the Defendant. Both parties made offers in negotiation via the Portal, and were unable to settle, so the Claimant issued her claim in June 2020.

The Court listed the matter for a Stage 3 hearing in December 2020. The day before this hearing, the Defendant raised a procedural argument for the first time in a witness statement from a claims handler, arguing a breach of paragraph 7.8B of the RTA Protocol, which states (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..."

The Defendant relied upon this provision and the 2020 County Court decision of His Honour Judge Gosnell in *Mason v Laing* to argue that because the Claimant's initial GP report had not been disclosed to the Defendant before further reports were obtained, those further reports were not *'justified'* under the RTA Protocol, and were therefore automatically inadmissible and could not be relied upon by the Claimant in the Stage 3 hearing for the purposes of quantifying her damages.

The matter was adjourned to a hearing before His Honour Judge Petts for further submissions and judgment on this preliminary point.

The first instance decision of HHJ Petts: relief from sanctions

The Defendant argued that the use of the word 'justified' in the RTA Protocol meant that the rules had to be exactly followed as intended under the prescriptive terms of the Protocol. Where the strict rules had been broken in respect of the disclosure of the further reports, even though the Defendant had still been able to negotiate on the basis of those reports and could point to no actual prejudice, the Claimant should still be prevented from relying upon those reports and restricted to her GP report only. The Defendant submitted that the Court had no discretion in this matter to allow the subsequent reports.

The Claimant's case on this preliminary issue was that the reference to 'sanctions' in the relevant section of the Protocol, where there was a breach of the Protocol rules, referred to sanctions in costs, not admissibility. The decision in *Mason v Laing* appeared to have been made without reference either to Practice Direction 8B nor the Court of Appeal decision in *Wickes Building Supplies Limited v William Blair* [2019] EWCA Civ 1932. The Claimant also referred to the Court of Appeal decision in *Cable v Liverpool Victoria* [2020] EWCA Civ 1015 and submitted that the RTA Protocol was interconnected to the CPR, so the court therefore has discretion to deal with late service of the reports as in considers appropriate. The reports should be allowed in.

HHJ Petts held that where there had been a breach of paragraph 7.8B of the Protocol rules, he agreed with the approach taken in *Mason,* that default position was that the reports in question could not be relied upon, without the court's permission under PD8 paragraph 7.1(3). However, he went on to find that although there is a sanction in respect of admissibility for the failure to follow the Protocol, this was one over which the court has a discretion: the reports were not *"irremediably inadmissible."* He chose to apply the three-stage approach of *Denton v TH White* [2014] EWCA Civ 906 and granted the Claimant relief from sanctions. He concluded that the Defendant had *"seized, opportunistically and belatedly, on a previously unnoticed breach by the Claimant of the RTA Protocol."* The breach caused no prejudice to the Defendant, and the court needed to look at all the reports in order to determine the claim properly.

The Claimant was granted permission to rely upon all of her medical reports. The Defendant was granted permission to appeal on the basis that this was an important point of principle that would affect a large number of cases, on which there were now two competing decisions by two different circuit judges.

On appeal before the High Court

The Defendant appealed against the first instance decision of HHJ Petts primarily on the grounds that:

- The learned Judge wrongly concluded that he had the discretion to admit evidence that had not been 'justified' under the RTA Protocol;
- His decision had the effect of undermining the aims and intention of the Protocol and nullifying the effect of paragraph 7.8B of the Protocol;
- The relief from sanctions regime under CPR 3.9 did not apply to his application of CPR 8B PD7.1(3), and in any event relief should not have been granted.

The Claimant asked the court to uphold the first instance decision, but submitted that HHJ Petts had been wrong to find that the word 'justified' in the Protocol went to admissibility instead of costs, and therefore erred in his conclusion that a breach of paragraph 7.8B of the Protocol gave rise to a default sanction in respect of the admissibility of the further reports. In the alternative, the Claimant argued that HHJ Petts had been correct in exercising his discretion to permit the Claimant to rely on all her reports, but that he did not need to apply the 3-stage *Denton* test to grant relief from sanctions, as this discretion should be exercised with reference to the Overriding Objective of the CPR.

In her judgment, Mrs Justice Foster helpfully considered the relevant authorities and provisions of the CPR, including both the RTA and EL/PL Protocols, the Practice Direction for Pre-Action Conduct and Protocols, and Practice Direction 8B. She noted the crucial passage from the judgment of Coulson LJ in *Cable* at [59]regarding the relationship between the RTA Protocol and the CPR, referred to by the Claimant:

'59. …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." '

She also (at [27-28] of the judgment) noted that the introduction to the RTA Protocol in the White Book states that *"If a claimant has wrongly failed to comply with the Protocol and/or has inappropriately exited the scheme, the sanction is costs: see r45.24… The Civil Procedure Rules 1998 enable the court to impose costs sanctions where it is not followed…"*

Appeal decision and implications

Mrs Justice Foster dismissed the appeal, but upheld the decision of HHJ Petts for the reasons put forward by the Claimant. In summary, she concluded (emphasis added):

- The word 'justified' in 7.8B(2) of the RTA Protocol should not be held to relate to the admissibility of the evidence under the Protocol, at [35]:

"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.***"*

- While the overall structure of the RTA Protocol is there, as both parties accepted, to provide *"a disciplined and self-contained process"*, this process achieves its aims *"by imposing, pre-eminently, a financial discipline… 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."* The default sanction for compliance failures under the Protocol was by way of costs. Where reports were not 'justified', which she defined as *"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."*. [37-39]

- *The Defendant's argument that there had been a failure of service here under 8BPD.6 (the rules on filing and serving written evidence under Practice Direction 8B) by reason of the simultaneous service of the Claimant's reports was rejected, at [42-43]: "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 convoluted and yet draconian reading of 8BPD 6 within the Practice Direction is in my judgement unwarranted****. The Claimant is correct in her submission…that so draconian an outcome cannot be read into the wording."*

- This was not a hypothetical situation where the Defendant was being 'ambushed' by a Claimant *"failing to disclose a plethora of reports"*, and in any event, as noted in *Wickes*, the Stage 3 provisions exist to deal with that issue where it arises. The Defendant's contention that *Wickes* is not relevant to medical evidence was rejected.

- It was not necessary to invoke 8BPD.7(1)(3) in order to rely upon the Claimant's additional medical reports, as they had been properly served. At [53], Mrs Justice Foster also commented in respect of this provision that the meaning of the phrase *"properly determine"* would vary from case to case, but *"excludes material that is merely 'desirable'."*

In light of her findings on these points, Mrs Justice Foster concluded that she did not need to consider either the provisions of 8BPD 7.1(3) or the submissions in relation to the *Denton* test further.

The decision makes it very clear (at [48]) 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."* With detailed reasoning that will no doubt provide welcome clarity on the Protocols and how they interact with the wider CPR, Mrs Justice Foster also explicitly rejected the Defendant's contention that the Protocol 'trumps' the Overriding Objective, even though the rules of the Protocol are to be strictly applied: [51].

The decision certainly appears to have put *Mason v Laing* arguments to bed as far as the question of admissibility of further medical reports is concerned. In practice, might this now lead to more detailed costs arguments at the conclusion of Stage 3 hearings instead? That remains to be seen.

The Defendant has now applied to the Court of Appeal for permission to appeal. Readers will of course note that the permission to appeal test for second appeals under CPR 52.7 sets a high bar: the Court of Appeal will not give permission to appeal unless it considers that the appeal would have a real prospect of success and raise an important point of principle or practice; or unless there is some other compelling reason for the Court of Appeal to hear it.

Watch this space!

Kriti Upadhyay