Case No: (1) NW11/2021
(2) NW15/2021

IN THE WREXHAM COUNTY COURT

On appeal from the Prestatyn County Court
(1) District Judge Owen G00RL352
(2) District Judge Japheth G00RL691

Wrexham Law Courts
Bodhyfryd
Wrexham
LL12 7BP

Date: 29/09/2021

Before :

HIS HONOUR JUDGE JARMAN QC

- -

Between :

(1) MOHAMMED AKRAM	**Appellant**
AVIVA INSURANCE LIMITED	**Respondent**
- and -	
(2) NASSER MAHMOOD	**Appellant**
EVE TILLOTT	**Respondent**

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- -

Mr Nick Thornsby (instructed by **DAC Beachcroft**) for the **appellant** in each appeal
Ms Sarah Robson (instructed by **Kaizen Law Solicitors**) for the **respondent** in each appeal

Hearing dates: 20 and 23 September 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE JARMAN QC

HH JUDGE JARMAN QC:

1. In two recent decisions, two district judges in Prestatyn County Court have held in two separate claims by taxi drivers for credit hire charges in respect of the replacement of their vehicles following an accident, that it is sufficient to set out the justification for claiming such charges, rather than loss of profit, in an email from their solicitor rather than in a witness statement. The defendant in each case, represented by the same solicitor, seeks to appeal those decisions, essentially on the same basis, namely that such an email was not admissible or should not have been accorded such weight, and that instead a witness statement should have been required.

2. Each of the claims was started in the Ministry of Justice Portal for Low Value Personal Injury Claims in Road Traffic Accidents (the portal), which is governed by a similarly entitled pre-action protocol, the current version of which applies from 31 July 2013 (the protocol). The personal injury claim in each case was agreed, but because the credit hire charges and other vehicle related damages could not be agreed, those issues under the protocol fell to the district judges to determine, on the basis of documentation which had been lodged on the portal under the protocol.

3. The first decision in time was that of District Judge Owen on 6 April 2021 in the case of Mohammad Akram v Aviva Insurance Ltd (Aviva). The second is that of District Judge Japheth on 13 July 2021 in the case of Nasser Mahmood v Eve Tillot, the latter being insured by Aviva. I shall refer to each respectively as the first and second decision or case or appeal as appropriate. In respect of the first decision, by notice dated 22 July 2021, Her Honour Judge Howells gave permission on three interlinked grounds. In doing she said that the district judge may have misdirected herself in relying upon the email from the claimant's solicitor as evidence in support of the claimant's case or may have placed too much evidential weight upon it.

4. That appeal came on before me on Monday 20 September 2021 when each party was represented by counsel. By then permission in respect of the second decision had not been considered, but an application made by the defendant to have the two appeals managed and listed together was listed before me on the following Thursday. Mr Thornsby for Mr Akram, at the outset of the appeal hearing applied for an adjournment to have that application considered. However, as the parties were present before the court and ready to proceed in the first appeal and having regard to the overriding objective, I decided to hear that appeal and to revisit the way forward at the end of submissions.

5. In the event, mainly because of time, I indicated I would reserve judgment. After some discussion as to what was the best way forward in respect of the application in the second appeal, I decided having regard to the overriding objective that that application should be treated as a rolled-up permission hearing in the second appeal so that if permission were appropriate then the substantive appeal would follow at the same hearing. Both counsel agreed that three of the four grounds in the second appeal were materially indistinguishable from the three grounds which had been the subject of submissions in the first appeal, although there was a fourth ground which may need further short submissions. It was agreed, as I understood it, that the appropriate way forward would then be for me to give one written judgment in both appeals.

6. The same counsel appeared before me in the second appeal by telephone. By then ground four of the second appeal had been abandoned, Mr Thornsby having seen the transcript of the judgment of District Judge Japheth in the meantime. I gave to each counsel an opportunity to make further submissions, at the end of which it was agreed to proceed as envisaged at the end of the hearing of the first appeal.

7. Accordingly, I shall set out the principles and facts common to both appeals, before turning to any necessary observations upon them individually.

8. It was common ground that where an income producing vehicle is damaged in an accident and needs repair that the usual measure of damages is loss of profit during the time it takes to effect repairs. In *Humayum Hussain v EUI Ltd* [2019] EWHC 2647 (QB) Pepperall J, after summarising the authorities set out the general rule at paragraph 16.5 as follows:

> "a) where a claimant acts reasonably in hiring a replacement vehicle at about the same cost as the avoided loss of profit, the court will not count the pennies and hold the claimant to the hypothetical loss of profit if it turns out to be a little lower; but
>
> b) where the cost of hire significantly exceeds the avoided loss of profit, the court will ordinarily limit damages to the lost profit."

9. However, in the following paragraph, he observed that even where the cost of hire significantly exceeds the avoided loss of profit, the claimant may still succeed in establishing that he or she acted reasonably in certain circumstances which he then set out as follows:

> "a) First, any business must sometimes provide a service at a loss in order to retain important customers or contracts. For example, a chauffeur might not want to let down a regular client for fear of losing her. Equally, a self-employed taxi driver might risk being dropped by the taxi company that provides him with most of his work. Properly analysed, these are not, however, exceptions to the general rule since in such cases the claimant is really saying that, but for his or her actions in hiring a replacement vehicle, the true loss of profit would not have been limited simply to the pro rata loss calculated on the basis of the period of closure but that future trading would itself have been compromised. Again, claimants are not required to weigh these factors precisely, and a claimant who reasonably incurs what at first might appear to be disproportionate hire costs in order to avoid a real risk of greater loss, will usually be entitled to recover such hire costs from the tortfeasor.
>
> b) Secondly, many professional drivers use their vehicles for both business and private purposes. Where such a claimant proves that he or she needed a replacement vehicle for private and family use, a claim for reasonable hire charges, even if in excess of the loss of profit that was avoided by hiring the

> replacement vehicle, will ordinarily be recoverable in the event that a private motorist would have been entitled to recover such costs.
>
> c) Thirdly, it might be reasonable for a professional driver to hire a replacement vehicle even though the cost of doing so was significantly more than the loss of profit because he simply could not afford not to work. The tortfeasor takes his victim as he finds him and impecunious self-employed claimants cannot be expected to be left without any income and forced to look to the state to provide for their families on the basis that they might eventually recover their loss of profit some months or years later."

10. It was common ground before me that it is for claimants to show that they acted reasonably in such a way or ways. In proceedings under Part 7 of the Civil Procedure Rules 1998 (CPR), the usual way of doing so would be by filing one or more witness statements, the maker or makers of which may then be subject to cross-examination at the hearing.

11. However claims commenced in the portal are not subject to such rules in respect of evidence but to the protocol and a modified court procedure if that becomes necessary. The broad aims of the protocol are set out in paragraph 3.1 as follows:

> "The aim of this Protocol is to ensure that—
>
> (1) the defendant pays damages and costs using the process set out in the Protocol without the need for the claimant to start proceedings;
>
> (2) damages are paid within a reasonable time; and
>
> (3) the claimant's legal representative receives the fixed costs at each appropriate stage."

12. The procedure of the protocol was described by Jackson LJ, giving the lead judgment in the Court of Appeal in *Phillips v Willis* [2016] EWCA Civ 401. The purpose is to minimise costs in what are usually modest claims. The upper limit of protocol claims is £25,000. Three stages are provided for. In Stage 1 the claimant submits a claim form. If the defendant admits full liability, the case stays within the protocol and proceeds to Stage 2, during which the claimant submits a settlement pack, comprising a pack form, medical reports, evidence of pecuniary losses, and evidence of disbursements.

13. The pack form runs to some four pages. The first page deals with details of the parties representatives. The second deals with the initial claim offer from the claimant, and the corresponding initial response from the defendant. There are columns in each case setting out the heads of loss, the evidence relied upon and the value. In each of the present cases, car hire was given as a head of loss with evidence submitted and the value given. The documentary evidence submitted in each case made clear that the claimant was a taxi driver and the damaged vehicle was being used as a taxi. No witness statements were included.

14. There is no requirement in the protocol that the settlement pack should be accompanied by a statement of truth. However, on the portal the pack form contains such a statement immediately above the signature supporting it, to the effect that the claimant or their representative believes that the facts stated in the claim form are true. That was amended on the portal screen as from 25 May 2020 to reflect the amendments to the form of the statement of truth in CPR 22PD.2 so as to include a reference to contempt proceedings in respect of false statements.

15. Witness statements during this stage are dealt with in paragraph 7.11 of the protocol, in which there is no express reference to a separate statement of truth for any witness statement, as follows:

> "In most cases, witness statements, whether from the claimant or otherwise, will not be required. One or more statements may, however, be provided where reasonably required to value the claim."

16. Paragraph 7.23 provides that claims for vehicle related damages will ordinarily be dealt with outside the provisions of the protocol under industry agreements between relevant organisations and insurers. However, where the claimant has paid for the vehicle related damages, the sum may be included in a request for an interim payment under paragraph 7.16.

17. Under paragraph 7.35 the defendant has an initial period of 15 days to accept the claimant's offer or submit a counter-offer. There is a 35 day total consideration period for further offers. As indicated in *Phillips*, this is designed to narrow the issues or to achieve agreement of all heads of claim. Under paragraph 7.36 these periods may be extended by agreement.

18. Under paragraph 7.39, it is provided, so far as material, that the claim will no longer continue under the protocol where the defendant gives notice to the claimant within the initial consideration period (or any extension agreed) that the defendant considers that, if proceedings were started, the small claims track would be the normal track for that claim. Under paragraph 7.40 it is provided that where the defendant does not respond within the initial consideration period (or any extension agreed) the claim will no longer continue under this protocol and the claimant may start proceedings under Part 7 of the CPR.

19. If settlement is achieved, then the defendant must pay prescribed fixed costs which cannot be altered. If it is not, then the claimant sends to the defendant a court proceedings pack setting out the claimed losses, the defendant's responses, the evidence which both sides have submitted during Stage 2 and the final offers of both sides. The defendant then pays to the claimant the amount of the defendant's final offer together with all fixed costs due up to the end of this stage. The case then proceeds to the third stage.

20. Paragraph 7.64 provides that where the parties do not reach an agreement the claimant must send to the defendant the Court Proceedings Pack (Part A and Part B) Form which must contain (a) in Part A the final schedule of the claimant's losses and the defendant's responses comprising only specified figures together with supporting comments and evidence from both parties on any disputed heads of damage; and (b) in Part B, the final

offer and counter offer from the Stage 2 Settlement Pack Form and, where relevant, the offer and any final counter offer.

21. Stage 3 is governed by Practice Direction 8B, which requires the claimant to issue proceedings in the county court under CPR Part 8. Paragraph 2 modifies the Part 8 procedure as it applies to such proceedings. Of particular importance in the present appeals is paragraph 2.2(3) which provides that rule 8.5 dealing with the filing and serving of witness evidence and rule 8.6 dealing with evidence in general do not apply to a claim under PD 8B.

22. Rule 8.5 sets out the timetable for the filing and service of any written evidence upon which the parties intend to rely. Rule 8.6(1) provides that no written evidence may be relied upon at the hearing of the claim unless served in accordance with rule 8.5 or the court gives permission. Rule 8.6(2) provides that the court may require or permit a party to give oral evidence at the hearing, and (3), that the court may give directions requiring the attendance for cross-examination of a witness who has given written evidence. Accordingly these rules do not apply in proceedings brought under PD 8B, so that in respect of a Stage 3 hearing the court may not require or permit a party to give oral evidence and no directions may be given requiring that attendance of a witness to be cross-examined.

23. Jackson LJ in paragraph 9 of his judgment in *Phillips* described the purpose of this modified procedure:

> “This modified procedure is designed to minimise the expenditure of further costs and in the process to deliver fairly rough justice. This is justified because the sums in issue are usually small, and it is not appropriate to hold a full blown trial. The evidence which the parties can rely upon at Stage 3 is limited to that which is contained in the court proceedings pack. A court assesses the items of damages which remain in dispute, either on paper or at a single "Stage 3 hearing".”

24. Paragraphs 6.1-6.4 of PD 8B deal with the filing and serving of written evidence for such a hearing. Paragraph 6.1 provides that the claimant must file with the claim form such evidence including evidence of special damages. Paragraph 6.3, so far as material, provides that the claimant must only file those documents within paragraph 6.1 where they have already been sent to the defendant under the protocol.

25. However, where the court considers that further evidence must be provided by any party and that the claim is not suitable to continue under the Stage 3 procedure, paragraph 7.2 of PD 8B provides that the court will order that the claim will continue under CPR Part 7, allocate the claim to a track and give directions. Where that applies, then under paragraph 7.2, the court will not allow fixed costs.

26. That is the order made by the district judge in *Phillips.* The charges in issue in that case were very small, under £500, and neither party sought an order under the above provisions, and yet the matter was adjourned, allocated to the small claims track and directions given including the filing of witness statements. As the Court of Appeal observed, this involved further costs of complying with the directions and of attending a further hearing, when the wining party as a result of the allocation to the small claims

track would recover virtually no costs. The court held that in those circumstance there was no power to make an order that the claim would continue under CPR Part 7. It declined to give guidance where it may be appropriate to do so, although gave as an example a case where the credit hire charges were very high and which might involve complex issues of law or fact not suitable for a Stage 3 hearing.

27. In each of the cases presently under consideration, the credit hire charges claimed were substantially more, some £15,439.50 in the first case and some £9,539.16 in the second.

28. In each case, the defendant had made an offer in Stage 2 in respect of this head, and requested in the event of refusal disclosure of further documents. In each case, the same solicitor for the claimant in question replied by email. I shall set out the relevant passages in the email in the first case, dated 20 April 2019. There is no material difference in the relevant passages in the email in the second case dated 21 August 2020, only minor changes of phraseology and personal detail. Indeed, Mr Thornsby relies on the similarity in each email as to the key points in relation to domestic use but more importantly as to the need to continue driving the taxi, even though the two taxis were being driven in two different cities, namely Leeds and Birmingham. He submits that this casts doubt on the account set out in the emails.

29. Accordingly I only set out the email in the first case:

> "Our client advised that he required a hire replacement taxi vehicle and that claiming for loss of earnings would neither be suitable for him nor appropriate. Our client advised that the index vehicle was the only vehicle within his household and he does not have access to any other vehicle and he, his wife and children are dependant on the vehicle for social, domestic and pleasure purposes such as dropping off and collecting the children from school, shopping, commuting to social outings, medical appointments and visiting friends and family. Our client also needed to continue to make his services available to his taxi base. He could not take any time off without pre-planning this with his taxi base as they have to maintain a certain number of drivers to adhere to customer demand and if he were to take time off unplanned, they would replace him with another driver and it could take him months to be able to rejoin. Our client also has a number of financial commitments that he needed to continue to honour such as his mortgage, Council tax and other utility bills. Our client is also currently claiming working tax credits and if he were to stop working, these would be stopped and he could not claim for job seekers allowance as he would not actually be seeking a job and an application for universal tax credits can take 4 weeks or more to be processed."

30. In each case, the defendant raised the issue of *Hussain,* but in neither case did they exit the portal, or cease to engage so that the claim did not continue under the protocol, or request written statements to support the reasons set out in the email. Accordingly each case continued to Stage 3 and to a hearing under PD 8B on the basis of the documents already sent to the defendant under the protocol.

31. The defendant was represented by counsel in each of the Stage 3 hearings (not Mr Thornsby). In neither case was it suggested that the court should order that the case should continue under Part 7. In the first case, District Judge Owen raised this possibility, but both parties submitted that this was not appropriate. In each case, the point was simply taken by the defendant that the email of the claimant's solicitor was inadmissible or that no weight should be attached to it. In each case, the district judge rejected that argument. In each appeal, the defendant submits that the district judge was wrong in law to take into account the matter set out in the email, or to attach any weight to it.

32. In considering those submissions I make some initial observations. First, it is not in dispute that in each case the claimant entered into a credit hire agreement for a replacement car to be used as a taxi within a short time of the accident. Second, as Pepperall J observed in *Hussain,* the circumstances in which taxi drivers may be able to claim charges under such an agreement is not an exception to the usual rule that the correct measure of loss when an income producing vehicle is damaged is loss of profit. It is a question in each case whether the claimant acted reasonably in entering into such an agreement rather than stopping work and seeking loss of profit. Third, the circumstances set out by Pepperall J where such action may be reasonable are not unusual or surprising or limited to the particular facts of that case. His observations were expressed generally, that taxis drivers by stopping work may risk being dropped by the company which provides the work, and that many such drivers use their vehicles for social or domestic purposes as well as business purposes. Fourth, these are not issues where defendants would often be able to produce contradictory evidence. Fifth, such issues will not usually involve complex issues of fact or law, and do not do so in either of the present cases. Sixth, each of the emails was sent by the claimant's solicitor, an officer of the court, and the information therein set out was expressly stated to be on instruction by the claimant.

33. Mr Thornsby accepts that in Stage 2 a witness statement will not always be required, but submits that where the claimant is a taxi driver and must show the circumstances set out in *Hussain* to be able to claim credit hire charges, such a statement is necessary for a number of reasons. First, the legal and evidential burden is on the claimant to show such circumstances. Second, whilst the protocol is a stand alone process, once Stage 3 is reached there will be a determination of the court and some forensic standards must be maintained. Third, both sides need to know what that standard requires. He points to the fact that District Judge Owen in her judgment said that it was her practice ordinarily to accept was what said in the solicitor's email, that she saw no reason to change her practice, that PD 8B does not require witness statements and the one rarely sees witness evidence in Stage 3 hearings. Fourth, it is desirable that the claim stays in the protocol rather than dropping out with a view to saving costs. That aim can be achieved by a claimant lodging a witness statement in Stage 2 confirming the circumstances said to justify entering into a credit hire agreement. Finally, he submits that the statement of truth in the Stage 2 settlement pack expressly applies to the facts stated in the claim form. Here, in relation to the credit hire charge, the charges made were set out, and the supporting evidence comprised the credit hire agreement and invoice. These are not in dispute. Mr Thornsby submits that the statement of truth does not extend to the emails in question.

34. Ms Robson for the claimants submits that the defendants' submissions ignore the sharp distinction between the modified PD 8B procedure on the one hand, which seeks to minimise costs by fairly rough justice, and a full blown Part 7 claim on the other. She submits that the statement of truth in the settlement pack must apply to all evidence relied upon in support, including the emails in question, and to say otherwise would be to give an opening for false evidence.

35. On the latter point, in my judgment, given the serious potential consequences of stating false facts, the statement of truth must be interpreted strictly to apply to the facts stated in the settlement pack form. This includes the figures set out, but also to the stated evidence in support of those facts. This meets to some extent Ms Robson's point about false evidence. In the present cases however it is not said that the invoice or agreement in relation to the credit hire charges are false. Rather it is said that the facts stated in the emails from the claimants' solicitor should have been supported by a witness statement with a statement of truth. In my judgment the statement of truth in the settlement pack form is not stated widely enough to include the information set out in the emails.

36. In my judgment it is not surprising, given the observations made in paragraph 32 above, that defendants who are sceptical about the accuracy of information set out in such an email should nevertheless continue with the Stage 2 procedure, and then to a Stage 3 hearing even though that means that the claimant will not be cross-examined. I accept Mr Thornsby's point that it is desirable that dropping out of the protocol and facing a Part 7 claim with a risk of increased costs should be avoided. I also accept that it is open to defendants at Stage 3 hearings to submit that such information is not reliable. For example, it may be inherently implausible or inconsistent with other information relied on by the claimant.

37. However, that is not the case here. In my judgment, defendants are faced with a choice at Stage 2. Either they proceed as the defendants did in this case, or they choose not to engage further with the protocol and face a Part 7 claim with the risk of increased costs. If they wish to challenge the information such as that set out in the emails in question, then the later course is appropriate. As a further example, although this may be unusual, they may have evidence to suggest that a claimant has other vehicles available for social and domestic purposes, or that the taxi company in question would keep his or her place open for the time it takes to effect repairs. In the event of such a dispute, even if a defendant did not adopt the course of disengaging from the protocol and facing a Part 7 claim, the court make well take the view that the claim is not suitable to continue under Stage 3 procedure and order under PD 8B 7.2 that the claim continue under Part 7.

38. If the claim does proceed to a Stage 3 hearing, then having regard to the modified Part 8 procedure set out in PD 8B, it is in my judgment somewhat artificial to speak of the admissibility of the emails in question. In any event, even in proceedings not subject to the modified procedure, the failure to verify a witness statement with a statement of truth does not necessarily render the statement inadmissible. Under CPR 22.3 the court retains a discretion in that in the event of such a failure "the court may direct that it shall not be admissible as evidence."

39. In my judgment, it was open to the district judges in the present two cases to take into account the information in the emails in the circumstances set out in paragraph 32 above. That being so, in the absence of such information being inherently implausible,

or inconsistent with other information relied upon by the claimant, or contradicted by information relied on by the defendant, it is somewhat difficult to see why a low grade of weight should be applied to it.

40. I next deal with specific points of criticism which Mr Thornsby makes of the respective judgments. He submits that District Judge Owen was led into error by counsel for the claimant who pointed out that PD 8B did not deal with witness statements but did not refer the district judge to paragraph 7.11 of the protocol which does deal with them. However, it is clear from her judgment that she was alive to the possibility of such witness statements although unsurprisingly she indicated that such statements were rare.

41. As for the judgment of District Judge Japheth, at paragraph 5, she said that the email in question was entirely appropriate in that case, and that a witness statement from the claimant was not necessary "particularly given that the pack itself does not refer to the defendants pursuing this point." Mr Thornsby submits that there was such a reference. I am not sure that that is clearly the case, but even if it were, in my judgment that takes the case no further. Although the district judge referred to this point "particularly," she also found that the email in question was "entirely appropriate" and in my judgment she was entitled to so find.

42. The outcome, therefore, is that the first appeal is dismissed. Permission is given in respect of the three grounds in the second appeal, but that is also dismissed. Counsel helpfully indicated that any consequential matters which cannot be agreed can be dealt by written submissions. A draft order, agreed if possible, and any such written submissions should be filed within 14 days of hand down.