



Neutral Citation Number: [2022] EWCA Civ 1242

Case Nos: CA-2021-000483 and CA-2021-000614

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM:
HHJ Hellman in Case No: G00ED857; and
HHJ Sykes in Case No: F05BI456

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 September 2022

Before :

SIR ANDREW MCFARLANE, PRESIDENT OF THE FAMILY DIVISION
LADY JUSTICE NICOLA DAVIES
and
LADY JUSTICE ELISABETH LAING

Between :

(1) LONDON BOROUGH OF ISLINGTON

**Appellant/
Defendant**

- and -

(1) SAID BOUROS

**Respondent/
Claimant**

(2) SAMANTHA DAVIS

**Appellant/
Defendant**

- and -

(2) KHALIL YOUSAF

**Respondent/
Claimant**

Dominic Bright (instructed by **Islington Legal Services**) for the **(1) Appellant**

Montclare Campbell (instructed by **Advantage Solicitors Limited**) for the **(1) Respondent**
and
Jamie Carpenter QC and David Fardy (instructed by **DAC Beachcroft Claims Ltd**) for the
(2) Appellant
Benjamin Williams QC and Shannon Eastwood (instructed by **Bond Turner**) for the **(2)**
Respondent

Hearing dates : 21 and 22 June 2022

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 10.30am on 16 September 2022.

Lady Justice Elisabeth Laing :

Introduction

1. These two appeals have been joined because they raise similar issues. The claimant in each case is a taxi driver who was injured in a traffic accident. Each made a claim under the Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ('the RTA Protocol'). Each succeeded in the county court. The issue concerns the circumstances in which a claimant who makes a claim under the RTA Protocol for personal injuries can recover for damages to reflect the losses he suffers because the vehicle he uses to earn his living was damaged or written off, and he could not use it until it had been repaired or replaced. The Appellants in both cases (who were the defendants in the county court) are, in effect, the insurers.
2. Both Appellants suggest that their appeals raise points of wide importance about the scope and interpretation of the RTA Protocol. For the reasons I give below I disagree. I consider, on the contrary, that each appeal turns on what, in the framework of the RTA Protocol, was actually in issue in each claim at the Stage 3 hearing before the Deputy District Judges and before the Circuit Judges who heard the appeals from decisions of the Deputy District Judges.
3. I will refer to *London Borough of Islington v Bourous* as 'appeal 1'. I will refer to the parties in appeal 1 as 'A1' (London Borough of Islington) and 'R1' (Mr Bourous). I will refer to *Davis v Yousaf* as 'appeal 2'. I will refer to the parties in appeal 2 as 'A2' (Ms Davis) and 'R2' (Mr Yousaf).
4. In appeal 1, A1 was represented by Mr Bright, and R1 by Mr Campbell. In appeal 2, A2 was represented by Mr Carpenter QC and Mr Fardy. R2 was represented by Mr Williams QC and Mr Eastwood. I thank counsel for their written and oral submissions.
5. Paragraph references are to the RTA Protocol, the relevant judgment below, or to the relevant authority, unless I say otherwise.
6. It may be easier for the reader to understand the issues and the arguments if I start by summarising the RTA Protocol and the relevant authorities. I will then summarise the litigation in each case which has led to these appeals. I will then consider the issues on these appeals in order to decide, in each case, whether the appeal should succeed or not.

A summary of the relevant provisions of the RTA Protocol as it applied at the relevant times

7. The version of the RTA Protocol which applied in these cases applied to all relevant claims issued on or after 31 July 2013. It had to be used in all claims which arose from a road traffic accident, and which included a claim for damages for personal injury, and which the claimant valued at less than £25,000, and for which the small claims track would not have been the normal track if proceedings were issued (paragraphs 1.2(1) and 4.1). Damages claimed in relation to a vehicle (including credit hire charges) did not count towards the £25,000 total (paragraphs 1.1(18) and 1.4 of the RTA Protocol).
8. At the relevant times, the most a claimant could claim in the small claims track as damages for personal injury was £1000, with an overall limit of £10,000 (CPR 26.6(1)(a)). The claim limit for the fast track was £25,000 (CPR 26.6(4)(b)(i)). The

RTA Protocol therefore covered what would otherwise have been fast-track claims. Paragraph 6.4 (see paragraph 12, below) acknowledges an expectation that claims for vehicle-related damages will be dealt with outside the RTA Protocol; but claimants were entitled to bring them under the RTA Protocol. In the rest of this section of the judgment I will use the present tense when describing the relevant provisions of the RTA Protocol, but the reader must bear in mind that I am not describing its current provisions.

9. Paragraph 3.1 of the RTA Protocol states its aims. They are to ensure that the defendant pays damages and costs without the need for a claimant to start proceedings, to ensure damages are paid within a reasonable time, and to limit the claimant's recoverable costs to the costs fixed for each stage. R2 submits, further, that the process is designed to deal with a large volume of low value cases quickly, at proportionate cost, and with limited court resources, in accordance with the overriding objective.
10. Paragraph 5.1 provides that where the RTA Protocol requires information to be sent to a party, it must be sent via the relevant Portal, and that communications not required by the RTA Protocol should be by email.
11. Section III of the RTA Protocol is headed 'The Stages of the Process'. Paragraphs 6.1-6.19B deal with Stage 1. Stage 1 begins when the claimant sends a completed Claim Notification Form ('CNF') to the defendant's insurer and a 'Defendant Only CNF' to the defendant. The claimant must complete all the boxes marked 'Mandatory' before sending the CNF. The claimant must also make a 'reasonable attempt to complete the other boxes' (paragraph 6.3).
12. Paragraph 6.4 provides that a claim for 'vehicle-related damages will ordinarily be dealt with outside the provisions of [the RTA Protocol] under industry agreements between relevant organisations and insurers'. 'Vehicle-related damages' are defined in paragraph 1.1(18) as including damages for vehicle hire. Where there is a claim for such damages, the claimant must state in the CNF that the claim is being dealt with by a third party, or explain in the CNF that the legal representative is dealing with their recovery and attach any relevant invoices and receipts to the CNF, or explain when they are likely to be sent to the defendant.
13. If the defendant decides that inadequate mandatory information has been provided in the CNF, that is a valid reason for the defendant to decide that the claim should no longer continue in the RTA Protocol (paragraph 6.8(1)).
14. The defendant must complete the 'Insurer Response' section of the CNF within 15 days (paragraph 6.12). Paragraph 6.15 provides for other circumstances in which the claim will not proceed in the RTA Protocol. They include where the defendant makes an admission of liability but alleges contributory negligence (other than a failure to wear a seatbelt), the defendant does not complete or send a CNF response, the defendant does not admit liability, or notifies the claimant of its view that there is inadequate mandatory information in the CNF or that if proceedings were issued, the small claims track would be the right track for the claim.

15. The defendant must, in general, pay the Stage 1 fixed costs where it admits liability (or alleges contributory negligence, but only in relation to a failure to wear a seatbelt) (paragraph 6.18).
16. Paragraphs 7.1-7.76 are headed 'Stage 2'. Paragraphs 7.1-7.8B make prescriptive provision about medical reports, and paragraph 7.9 for other expert reports. Paragraph 7.10 deals with specialist legal advice, where that is 'reasonably required to value the claim'.
17. In general, claimants are not expected to prepare a witness statement. 'One or more statements may, however, be provided where reasonably necessary to value the claim' (paragraph 7.11).
18. Paragraphs 7.13-7.23 deal with interim payments. Paragraph 7.23 repeats that claims for vehicle-related damages 'will ordinarily be dealt with outside the provisions of [the RTA 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'. The defendant must pay something, in accordance with paragraph 7.19(1), (2), or (3), within 15 days of receiving the Interim Payment Settlement Pack. Paragraphs 7.28-7.30 deal with disputes about interim payments.
19. Paragraph 7.32 prescribes the contents of the 'Stage 2 Settlement Pack Form' ('the SP') which paragraph 7.33 requires the claimant to send to the defendant. It must contain 'evidence of pecuniary losses'. Paragraph 7.32 does not say expressly that the SP must contain an offer by the claimant, but this is clearly implied by paragraphs 7.34 and 7.38.
20. Paragraph 7.35 gives the defendant 35 days to consider the SP, made up of 15 days in which the defendant considers the SP and makes an offer ('the initial consideration period' – 'period 1') and 20 days for negotiation ('period 2'). The parties can extend both periods by agreement. Paragraph 7.37 provides in certain circumstances for the 35-day period to be extended by five days, referred to as the 'further consideration period' ('period 3').
21. In period 1, the defendant must either accept the offer made by the claimant in the SP form, or make a counter-offer using that form (paragraph 7.38). In the counter-offer, the defendant must propose an amount for each head of damage, and may make an offer which is higher than the total of the amounts proposed for all heads of damage. The defendant must explain why it has reduced any head of damage. 'The explanation will assist the claimant when negotiating a settlement and will allow both parties to focus on those areas of the claim which remain in dispute' (paragraph 7.41).
22. The claimant has until the end of periods 1 and 2 (and of period 3, if relevant) to accept or refuse the counter-offer (paragraph 7.43). Paragraph 7.44 prescribes the sums which are automatically included in any offer made by either party, such as costs.
23. There are several circumstances in which a defendant can choose to opt out of the RTA Protocol. Paragraphs 7.39 and 7.40 prescribe three circumstances in which, at the defendant's option, the claim will not continue under the RTA Protocol. An example is that the defendant can opt out by simply not responding during period 1 (paragraph

7.40). See also paragraph 14, above. Either party can move the claim out of the RTA Protocol under paragraph 7.46, which provides that where a party withdraws an offer made in the SP after the end of periods 1 and 2, or after the end of periods 1, 2 and 3, as the case may be, the claim will no longer continue under the RTA Protocol, and the claimant may start proceedings under Part 7.

24. Paragraphs 7.47 and 7.48 provide for the consequences of a settlement in Stage 2.
25. Paragraph 7.51 is headed 'Vehicle-related damages'. It applies where, at the end of periods 1 and 2 (and of period 3, if relevant) the claim has not settled and a claim for vehicle-related damages ('additional damages') is being dealt with by a third party separately from the claim. Where paragraph 7.51 applies, the claimant must tell the defendant that this claim is being considered, get all the relevant information from the third party and make a separate offer by amending the SP (paragraph 7.52). The defendant must then, within 15 days either agree the offer, or make a counter-offer (paragraph 7.53). The counter-offer must explain 'why a particular head of damage has been reduced to assist the claimant when negotiating a settlement and to allow both the parties to focus on those areas of that claim that remain in dispute' (paragraph 7.54).
26. Paragraphs 7.55-7.58 provide for the consequences when the original damages and the additional damages are agreed, and for when the additional damages but not the original damages are agreed. Paragraphs 7.59-7.60 provide for the consequences when the original damages are agreed but the additional damages are not. The claimant then has an option, but not an obligation, to bring a Part 7 claim (paragraph 7.60(2)). Where the original damages and additional damages are not agreed, paragraphs 7.70-7.75 apply (paragraph 7.61).
27. Paragraphs 7.64-7.69 are headed 'Failure to reach agreement – general'. Where the parties do not agree the original damages and, where relevant, the additional damages, the claimant must send the defendant a Court Proceedings Pack (Part A and Part B) Form ('the CP'). Part A must contain the final schedule of the claimant's losses, and the defendant's comments 'comprising only the figures specified' (that is, the figures for the original damages and the additional damages) 'together with supporting comments and evidence from both parties on any disputed heads of damage', and in Part B, the final offer and counter-offer from the SP, and where relevant, any final counter-offer made under paragraph 7.53. Comments in Part A of the CP 'must not raise anything that has not been raised in the [SP]' (paragraph 7.66).
28. Paragraph 7.67 invites the defendant to check whether the CP complies with paragraphs 7.64-7.65. If the defendant considers that it does not, the defendant must return it to the claimant with an explanation (paragraph 7.67). If the defendant fails to return the CP within five days of the date when the claimant sent it, the claimant should assume that the defendant has no further comment to make (paragraph 7.69).
29. Paragraphs 7.70-7.74 explain what the defendant must pay to settle the claim. If the defendant does not do so, the claimant has the option, but is not obliged, to give written notice that the claim will no longer proceed under the RTA Protocol and to start proceedings under Part 7 (paragraph 7.75).

30. Under the heading ‘General provisions’ paragraph 7.76 provides that where the claimant gives notice to the defendant that the claim is unsuitable for the RTA Protocol ‘(for example, because there are complex issues of fact or law) then the claim will no longer continue under this [RTA Protocol]’. There is a costs sanction if the court considers that the claimant has given such a notice unreasonably; the claimant will only be able to recover fixed costs (that is, as if the claim had stayed in the RTA Protocol).
31. Under the heading ‘Stage 3 Procedure’, paragraph 8.1 provides that the Stage 3 Procedure is ‘set out in Practice Direction 8B’ (‘PD 8B’). Paragraph 2.1 of PD 8B says that the claim is made under the Part 8 procedure as modified by PD 8B, and subject to paragraph 2.2. Paragraph 2.2 provides that the court will decide the claim on the contents of the CP. It also provides that rules 8.2A, 8.3, 8.5, 8.6, 8.7, 8.8 and 8.9(c) do not apply.
32. An application to the court to decide the amount of the damages must be started by a claim form (paragraph 5.2). It is a skeletal document, as all that the rules prescribe is that it must include the five statements listed in paragraph 5.2. They include the value of the claim and whether or not the claimant would like the damages to be decided on the papers or at a Stage 3 hearing. Paragraph 3.4 defines ‘Stage 3 hearing’ as ‘a final hearing to determine the amount of damages that remain in dispute between the parties’.
33. Paragraph 6.1 lists what the claimant must file with the claim form. The list includes Parts A and B of the CP, and evidence of special damages. Subject to paragraph 6.5 (which concerns child claimants), the claimant ‘must only file those documents in paragraph 6.1 where they have already been sent to the defendant under the relevant Protocol’ (paragraph 6.3). Paragraph 6.4 requires the claimant to serve the evidence listed in paragraph 6.1 on the defendant.
34. Paragraph 7.1 is headed ‘Evidence – general’. The parties may not rely on evidence unless it has been served in accordance with paragraph 6.4, filed in accordance with paragraphs 8.2 and 11.3 or (where the court considers that it cannot properly decide the claim without it) the court orders otherwise. If the court decides that further evidence must be provided by either party and that the claim is not suitable to continue under the Stage 3 Procedure, it will order the claim to continue under Part 7 and will give directions (paragraph 7.2). Where the court does so, it will not allow Stage 3 fixed costs (paragraph 7.3).
35. The editorial note in paragraph 8BPD.7.1 of the White Book says that *Phillips v Willis* [2016] EWCA Civ 401; [2017] RTR 4, ‘illustrates that transfer out of the Protocol Stage 3 procedure to Part 7 will be rare and for exceptional cases only’. The parties in appeal 2 submitted that that note is not accurate. I will return to that note at the end this judgment (paragraph 156, below).
36. Paragraph 8.1 requires the defendant to file and serve an acknowledgment of service within 14 days of the service of the claim form. This must say whether the defendant disputes the amount of the claim, or the court’s jurisdiction, or objects to the use of the Stage 3 procedure, and whether the defendant would like a hearing or a decision on the papers (paragraph 8.3). If the defendant objects to the Stage 3 procedure, it must say why in the acknowledgment of service (paragraph 7.4).

37. Paragraph 9.1 is headed ‘Dismissal of the claim’. It gives the defendant the option of opposing the claim on two grounds: that the claimant has not followed the procedure in the relevant Protocol or that the claimant has filed and served additional or new evidence with the claim form which was not provided under the relevant Protocol. If the defendant does object, the court will dismiss the claim. The claimant may then start proceedings under Part 7.
38. A party may only withdraw an offer with the court’s permission. If the court gives permission, the claim will no longer continue under Stage 3. The court will give directions. The court will only give permission where ‘there is good reason for the claim not to continue under’ Stage 3 (paragraph 10.1).
39. The court will order the damages to be assessed on the papers unless the claimant or the defendant asks for a hearing, or the court orders a hearing (paragraph 11.1). The court must give reasons for its decision on the papers (paragraph 11.4). The court will not set aside a decision given on the papers. A party must appeal to the relevant appeal court if that is what it seeks (paragraph 15.1). Paragraph 16 makes provision for cases in which the limitation period is about to expire.

The relevant authorities

The RTA Protocol

40. The most significant authority, perhaps, on the general aims and operation of the RTA Protocol is *Phillips v Willis*, in which the lead judgment was given by Jackson LJ, who, in effect, designed the RTA Protocol. At that stage, about 800,000 cases a year were dealt with under it (paragraph 1) (the current figure, according to A2’s skeleton argument, is about 700,000 cases). The claimant appealed against a decision by a District Judge, which had been upheld by the Circuit Judge on appeal.
41. The District Judge had declined to make a decision at a Stage 3 hearing, and, had instead, of his own motion, transferred the claim to Part 7 (to the small claims track), and had given ‘elaborate’ directions for its future progress. Neither party had asked him to do that. By that stage, the amount in dispute was £462 (paragraph 28). That amount was the difference between hire charges incurred by the claimant, and the rate which Avis would have charged (paragraph 24). The judgment refers to a potential issue about whether the claimant was impecunious (paragraphs 25 and 29). It seems from the directions set out at paragraph 29 that the claimant was not a self-employed taxi driver, and that the car hire charges were not credit hire charges.
42. Jackson LJ made ten general points about the RTA Protocol which are significant for these appeals.
 - i. Stage 2 leads, or should lead, to a narrowing of the issues (paragraph 6).
 - ii. PD 8B ‘substantially modifies the Part 8 procedure so as to make it suitable for low value RTA claims where only quantum is in dispute’ (paragraph 9).
 - iii. That procedure is designed to minimise costs (paragraph 9).
 - iv. It delivers ‘fairly rough justice’ (paragraph 9).
 - v. That is justified because the sums are small and a ‘full-blown trial’ is not appropriate (paragraph 9).

- vi. The evidence the parties can rely on at Stage 3 is limited to what is in the CP (paragraph 9).
 - vii. The RTA Protocol has ‘an inexorable character’. If a case is in it, the parties ‘follow the designated steps or accept the consequences’ (paragraph 11).
 - viii. The rules specify when a claim stays in the RTA Protocol and when it may or must drop out (paragraph 11).
 - ix. The costs which District Judge imposed on the parties were ‘totally disproportionate to the sum at stake’ (paragraph 29).
 - x. The RTA Protocol is ‘carefully designed to whittle down the disputes between the parties as the case passes through the various stages. By Stage 3, the amount in dispute should be much smaller than it is at Stage 1 (paragraph 33).
43. This Court held that the District Judge’s decision that further evidence was needed was ‘irrational’ (paragraph 31) and that he did not have power to transfer the case from the RTA Protocol to Part 7, whether under paragraph 7.2 of PD 8B or CPR 8.1(3).
44. This Court did not need to decide in what circumstances it might be appropriate to transfer a case to Part 7 under paragraph 7.2 of PD 8B. Jackson LJ pointed out that some cases might involve very high car hire charges. Those cases might involve complex issues of law or fact which are not suitable for a Stage 3 hearing. He did not need to speculate about what order a court might make in such a case. That case was not such a case (paragraph 35). Jackson LJ did not say, or imply, that transfer into Part 7 was for rare and exceptional cases only.

Car hire charges

45. This Court was referred to many cases about car hire charges and about credit hire charges. Some were cases in which a claim was brought under the RTA Protocol, and others were not. For obvious reasons, cases which were not brought under the RTA Protocol cast no light on that process at all. Statements in such cases, on which Mr Bright, in particular, relied, about what claimants have to plead and prove in such cases are not directly relevant to the issues in these appeals. The principles of substantive and procedural law which apply to all cases are the same, but their significance for the progress of a case will depend, crucially, on the formality of the process under which a claim is brought. In particular, it will depend both on the precise extent of the opportunities which that process gives the parties to rely on those principles, and on whether the parties take the opportunities which are available. As a result, it is not necessary for me to refer to all the cases to which the parties cited.
46. In *Lagden v O’Connor* [2003] UKHL 65; [2004] 1 AC 1067 the defendant negligently damaged the claimant’s car. He was unemployed, and made a credit hire agreement for a replacement car, on the understanding that the hire company would recover the charges from the defendant’s insurers. Those charges were more than the sum, which the Appellate Committee referred to as the ‘spot rate’, which would be charged by a traditional car hire company. The issue was whether the judge and this Court were right to hold that, in the circumstances, the claimant was entitled to recover the credit hire costs. The House of Lords (Lords Nicholls, Slynn and Hope) held that the wrongdoer should take his impecunious victim as he found him, and if the fact that he could not

afford to pay to hire a replacement car meant that he had to make a credit hire agreement, the defendant was liable for those higher charges, if it was reasonably foreseeable that the claimant would have to incur them. Lord Hope gave the leading speech but neither Lord Nicholls nor Lord Slynn expressly agreed with it. Lord Slynn agreed with the speech of Lord Nicholls. The minority (Lords Scott and Walker) held, consistently with *Dimond v Lovell* [2002] 1 AC 484, that only the spot hire rate (or 'BHR': see paragraph 48, below) could be recovered, because that decision barred the recovery, as special damages, of the costs of the credit which was advanced to the claimant and of the claims handling service which was part of the service offered by the credit company.

47. This Court was also referred, among other cases, to *Pattni v First Leicester Buses Limited* [2011] EWCA Civ 1384. It is not directly relevant to the issues in this case because, as in many of the cases which the parties cited, the claims were not claims to which the RTA Protocol would have applied, had it been in force, and neither claimant was impecunious, or a taxi driver. This Court was referred to one case in which a taxi driver's claim to be 'impecunious' was rejected because he had not complied with directions about how he should plead and prove that fact (*Diriye v Bojaj* [2020] EWCA Civ 1400). That case is not relevant because, again, the claim was not brought under the RTA Protocol.
48. One relevant point emerges from *Pattni*, however. Aikens LJ, giving a judgment with which Moore Bick LJ and Pill LJ agreed, reviewed the authorities in paragraphs 29-41. In paragraph 34, he explained why the term 'spot rate' was a misnomer. It would be better if, in credit hire cases, the term 'basic hire rate' ('BHR') were used instead.
49. In his submissions, Mr Bright repeatedly described *Hussain v EUI Limited* [2019] EWHC 2647 (QB); [2020] RTR 7 as 'the governing authority', even though the claim in that case was not brought under the RTA Protocol. Mr Hussain was a self-employed taxi driver. His car was damaged in an accident. Its private hire licence was suspended while it was repaired. Mr Hussain hired a replacement from a credit hire company. His claim against the driver of the other car succeeded, but he did not recover the credit hire charges. His damages were limited to the profit he had lost while his car was being repaired. He appealed against that decision. Mr Hussain could not rely on an argument that he was impecunious, because he had failed to comply with a relevant case management order (paragraph 14).
50. In paragraph 16, Pepperall J summarised the principles which apply to a claim for financial losses incurred by a self-employed driver whose damaged vehicle is off the road while it is repaired, or pending its replacement.
 - i. The starting point is that the vehicle is a profit-earning chattel and the true loss is the loss of profits suffered during the period when the driver is unable to use it (*Commissioners for Executing the Office of Lord High Admiral of the United Kingdom v Owners of the Steamship Valeria* [1922] 2 A.C. 242 HL).
 - ii. If a claimant chooses to hire a replacement vehicle instead, in order to continue trading (which is a cost incurred in mitigating his loss: see, for example, *Lagden v O'Connor*), he may recover that cost if it is less than the loss of profits.

- iii. He cannot recover any additional costs he suffers by not taking reasonable steps to mitigate his loss.
 - iv. A claimant cannot be expected precisely to weigh his losses, particularly if the tort puts him in a difficult position, as long as he acts reasonably.
 - v. If a claimant acts reasonably in hiring a replacement vehicle at about the same cost as the avoided loss of profit, he will not be held to that loss if the cost of hire is a little higher.
 - vi. If the cost of hire is significantly more than the avoided loss of profit, damages will usually be limited to the lost profit.
 - vii. Nevertheless, even if there is a significant difference, a claimant may be able to prove that he acted reasonably by showing that
 - a. he had to continue trading at a loss in order to keep important customers or contracts (that is, in order to keep his business viable in the longer term, and so to avoid a bigger loss); or
 - b. he also used the vehicle for domestic purposes, in which case, a claim for hire charges may be recoverable, if a private driver could have recovered them; or
 - c. he simply could not afford not to work; self-employed claimants cannot be expected to be left without any income and to rely on the state until they eventually recover their loss of profit many months later.
51. In paragraph 17, Pepperall J said that cases in the third category raise issues similar to those which arise when a private motorist claims for what would otherwise be disproportionate credit hire charges in line with *Lagden v O'Connor*. He added that any claimant who wished to recover such charges as damages 'will have to comply with the directions given by the court in respect of the disclosure of documents as to his or her income, outgoings, assets liabilities, and access to credit. Even where the claimant's income is low, the court will not simply accept an assertion that he or she could not afford not to work without proper evidence of impecuniosity'.
52. The claimant had not, in that regard, fully complied with the District Judge's directions. It was conceded at trial that he could not argue that he was 'impecunious'. There was no appeal from the finding that he could not rely on that argument. That concession was the end of any argument on appeal which was, in reality, an argument that the claimant was 'impecunious' (paragraph 19).
53. Pepperall J made some obiter observations about what might be the correct approach to the calculation of lost profits in paragraphs 23-24.

Appeal 1: the facts

54. R1 is a licensed taxi driver. He claimed that, while he was parked, on 17 January 2019, A1 turned right and crashed into the front of his vehicle. He was hurt and his taxi was damaged. He could not use it and hired a replacement. A1's insurers admitted liability for the accident on 13 March 2019.

Appeal 1: procedure under the RTA Protocol

55. R1 sent the Court Proceedings Pack (Part A and Part B) to A1 on 27 December 2019. In Part A, he claimed £11,825.49 for car hire. He also claimed damages for the cost of storing his vehicle while it was repaired. The hire cost was the largest element of his claim. A1 offered £6,747.84. A1's comment was 'We can only consider a rate of £151.36 inc VAT per day'.
56. R1 then issued a Part 8 Claim Form on 4 June 2020. He asked the court to decide his claim at an oral hearing. In its acknowledgment of service dated 19 July 2020, A1 objected to the use of the procedure in PD 8B on the grounds that the case was not suitable for that procedure. A1 asked the court to transfer the case to Part 7 so that A1 could 'file and serve a Defence and evidence in relation to the need, period, rates and impecuniosity'. A Part 3 hearing was listed for 21 July 2020. On 20 July 2020, at 21.36, A1's solicitor emailed R1's solicitor. She attached a copy of the decision of Pepperall J in *Hussain v EUI Limited* [2019] EWHC (QB). She apologised for its late service. She said that A1 submitted that the case should be transferred 'to Part' [sic] and that A1 should have liberty to file and serve a defence and supporting evidence. She said that R1 had not served any evidence about loss of profit. A1 submitted that the claim had been incorrectly pleaded. The claim for hire charges should be dismissed or transferred to Part 7.

Appeal 1: the hearing in front of the District Judge

57. DDJ Evans ('DDJ1') held the Part 3 hearing. The parties were represented by the counsel who represented them on this appeal. There is no transcript of that hearing.
58. I have read the transcript of DDJ1's ex tempore judgment. DDJ1 said that A1 had raised a legal issue based on *Hussain*. That decided that if a claimant uses his vehicle for profit, the proper basis for a claim would be for the loss of his profit. A1 argued that R1 had not made a claim for loss of profit and so was not entitled to make a claim for hire charges and in the alternative to transfer to Part 7. R1 argued that DDJ1 should transfer the claim to Part 7 and give directions for a trial of that issue. A1's response to that argument was that if DDJ1 did that, he would be giving R1 a 'second bite of the cherry'. R1's riposte that this was 'litigation by ambush' as A1 should have taken this point at an earlier stage. A1's answer was that the court cannot allow something which is irrecoverable.
59. DDJ1 said he sympathised with R1's position, but could not see that a transfer to Part 7 would help, unless R1 was given leave to file a further pleading. There was no claim for loss of profit and no evidence in support of such a claim. *Hussain* was not new law. There was no alternative but to dismiss the claim for hire charges. DDJ1 refused to transfer the claim to Part 7. He gave judgment for R1 in the sum of £4076.00, as damages for R1's personal injuries, and for storage and recovery. He gave R1 permission to appeal.

60. R1 appealed.

Appeal 1: the appeal to the Circuit Judge

61. The appeal was heard by HHJ Hellman ('CJ1'). The parties were again represented by the counsel who represented them on this appeal. There is no transcript of that hearing.

62. CJ1 described ‘the nub of the appeal’ as follows, in paragraph 5:
- ‘[R1]...appeals against the dismissal of a claim for hire charges. He argues that as the Defendant did not take the loss of profit point at Stage 2 it was not open to them to do so at Stage 3. Had the point been taken when it should have been, then he could have adduced evidence to meet it’.*
63. In paragraphs 6-7, under the heading ‘Measure of damages’, CJ1 quoted paragraph 16 of *Hussain*. He described this paragraph as setting out ‘the principles applicable to claims for financial losses suffered by self-employed drivers, such as [R1], when their vehicles are off the road pending repair or replacement’. He summarised the principles in paragraph 7, as follows:
- ‘Thus, in order to recover damages for loss of hire, [R1] would have either had to claim for loss of profit or to bring himself within one of the exceptions identified by Pepperall J.’*
64. In paragraphs 8-24, CJ1 gave a ‘simplified’ account of the RTA Protocol. He said that it was ‘helpful’ to do that in order to evaluate R1’s submissions (paragraph 8).
65. He described the documents in paragraphs 25-28, including Part A (see paragraph 55, above). He commented that there was no claim for loss of profit. He also commented that there was no suggestion by A1 that the claim for car hire ‘should be disallowed in principle’ (paragraph 25).
66. A1 had completed the acknowledgment of service (dated 19 July 2020). A1 did not tick the box saying ‘I intend to contest the amount of damages claimed but not the making of an order for damages’. Instead, A1 ticked the box saying ‘I object to the use of the Procedure in Practice Direction 8B’. A1 said the case was unsuitable for Stage 3 and should be transferred to Part 7 so that A1 could file and serve a defence and evidence about need, period, rates and impecuniosity (paragraph 27).
67. CJ1 said that it appeared from the transcript of the hearing in front of DDJ1 that A1’s solicitors first took the loss of profit point in an email on the day before the hearing (paragraph 28).
68. In his judgment CJ1 considered the authorities about taking a new point at the Stage 3 hearing (paragraphs 29-48). He decided that R1 could cite *Mulholland v Hughes* (18 September 2015, unreported; HHJ Freedman) consistently with the Practice Direction (Citation of Authorities) [2001] 1 WLR 1001 (‘the Practice Direction’), and that he could rely on it. Although it was decision of the county court, it was authority, at that level, on a point on which there was no authority at a higher level. He considered that the two decisions of this Court to which he had been referred, *Phillips v Willis* and *Blair v Wickes Building Supplies Limited* [2019] EWCA Civ; [2019] 4 WLR 148, did not decide the point at issue. That point was whether a party could run a new argument at Stage 3 (whether or not it involved new evidence) (paragraphs 40 and 43).
69. HHJ Freedman had decided in *Mulholland* that if a defendant wanted to raise an issue such as the need for hire, he had to do that when he made his counter-offer. For a defendant to raise it for the first time at Stage 3 ‘runs entirely contrary to the notion that

at the end of Stage 2 the parties should have clarity as to what remains in dispute' (paragraph 45). CJ1 cited HHJ Freedman's conclusion (paragraph 48): '...to make an offer in respect of hire charges is not to admit the need for hire but not to challenge the need at Stage 2 is equivalent to saying that the claimant does not need formally to prove it...'

70. CJ1 summarised the parties' arguments in paragraphs 49-52.
71. R1 invited the court to apply *Mulholland*. That case concerned the defendants' failure to raise the need for hire at Stage 2, but its reasoning applied equally to a case in which a defendant had not objected in principle to the claim for hire charges at Stage 2. It had not been open to DDJ1 to consider *Hussain*. It was too late for A1 to raise the point, and *Hussain* was therefore irrelevant.
72. A1 submitted that, whatever had happened at Stage 2, R1 had to prove his case at Stage 3. He had not done so, as, on the evidence before DDJ1, he was not entitled to claim damages for vehicle hire and had failed to claim, or to evidence, any loss of profit. A1 was not relying on new evidence, but highlighting deficiencies in R1's evidence. *Mulholland* was wrong, or, at best, only persuasive. A litigant is not obliged to point out mistakes by his opponent, he submitted, referring to paragraph 22 of *Barton v Wright Hassall* [2018] 1 WLR 1119.
73. CJ1 gave his decision and the reasons for it in paragraphs 53-62. He summarised paragraphs 7.41 and 7.66 of the RTA Protocol and the relevant provisions of Practice Direction 8B in paragraph 53. It was clear from those provisions, on both a literal and a purposive interpretation, that a defendant cannot object, at Stage 3, to a claim under a particular head of damage except on grounds raised at Stage 2 (paragraph 54). Dicta in *Phillips v Willis* and in *Blair v Wicks* supported the view that defendants 'must comply with the clearly expressed requirements of [the RTA Protocol] and that they will not be permitted to gain any forensic advantage from their failure to do so'. *Barton v Wright Hassall* was a very different case. It did not support a departure from that approach (paragraph 55).
74. A1 did not, at Stage 2, object in principle to the claim for car hire. A1 only objected on the ground that the amount claimed was too high. It was therefore too late, at Stage 3, for A1 to object in principle to the claim for car hire. DDJ1 should not have considered the issue at Stage 3, as it was not properly before him. For that reason, *Hussain* was irrelevant. CJ1 reached that decision independently of *Mulholland*, albeit for similar reasons. CJ1 agreed with paragraph 38 of HHJ Freedman's judgment in that case.
75. CJ1 allowed the appeal. On the appeal, CJ1 had all the powers of the DJ (CPR 52.20). He then considered A1's application in the acknowledgment of service to transfer the case to Part 7 in order to allow A1 to file and serve a defence and evidence about 'need, period, rates and impecuniosity'. Apart from rates, none of those issues was raised at Stage 2. It was too late to raise them. A1 had the chance to file evidence about rates at Stage 2, and did not do so. This was 'quite a high claim for car hire', but it did not involve any complex issues of law or fact which could not be resolved at a Stage 3 hearing. CJ1 dismissed the application for transfer, and remitted the claim for a Stage 3 hearing before a different DJ. His or her task would be 'to determine the amount of

damages to be awarded for car hire on the basis of the issues, and only the issues, raised in the Court Proceedings Pack (Part A)'.

76. Holroyde LJ gave A1 permission to appeal.

Appeal 1: the grounds of appeal

77. There are five grounds of appeal.

- i. CJ1 directed himself correctly in paragraph 7 (see paragraph 63 above), but CJ1 did not hold that one of the three exceptions applied. CJ1 should have held that R1 should have made a claim for loss of profit, or have claimed and evidenced an exception, and failing those, should have dismissed the claim.
- ii. CJ1 was wrong in paragraph 55 to imply that A1 had not complied with the Protocol. CJ1 should have held that claimants with the burden of proof must claim and prove their cases in accordance with authority and will not be allowed to gain any forensic advantage from failing to do so.
- iii. In paragraph 54 (see paragraph 73, above) CJ1 wrongly equated the Court Proceedings Pack with formal pleadings. He should have held that a defendant's failure, at Stage 2, to object that a claim has not been made and evidenced in accordance with the governing authority does not stop a defendant from doing so at Stage 3, and the advocates were under a duty to draw the court's attention to such authority.
- iv. By implication, CJ1 held in paragraph 5 (see paragraph 62, above) that A1 was obliged to point out R1's mistakes at Stage 2 so that R1 could adduce evidence in response. He should have held the authorities cited to him applied and that as long as A1 had done nothing to mislead or to obstruct, 'she' [sic] could not be criticised 'if she decided to follow Napoleon's advice not to interrupt an enemy when he is making a mistake'.
- v. CJ1 was wrong (at paragraph 43; see paragraph 68, above) to hold that in the absence of higher authority, he would follow a decision of the county court. He should have held that there was higher authority, the decision of the county court could not be cited and that he was not permitted to read, follow or apply it.

A1's submissions

78. A1 invited this Court to restore the decision of DDJ1.

79. On ground 1, Mr Bright explained in his skeleton argument, the relevant principle, for which two authorities are cited in paragraph 16 of *Hussain*, is 'The starting point is that the professional driver's vehicle is a profit-earning chattel and that the true loss is the loss of profit suffered while the damaged vehicle is reasonably off the road pending its repair or replacement'. One of those authorities is *Clerk & Lindsell on Torts*. Paragraph 27-122 of the current edition says that a claimant may recover what his chattel would have earned if it had not been damaged, not such out-of-pocket expenses as he may actually have incurred. If the cost of hire exceeds the profit which could have been earned, only the lost profit can be recovered.

80. In this case, there was no claim for loss of profits and no evidence about any such loss. It was, therefore, not possible for R1 to show that he acted reasonably in hiring a replacement vehicle (or that its cost was the same as the avoided loss of profit). Nor did he show that his case was covered by one of the exceptions described in *Hussain*. DDJ1 was therefore right to dismiss the claim for hire charges.
81. A1 submitted, on ground 2, that CJ1 looked ‘at the wrong end of the telescope’. CJ1 was wrong, in paragraph 5, about the ‘nub of the appeal’. Mr Bright added ‘The issue was not the stage at which a point was taken by [A1]. The issue was whether [R1] claimed and evidenced his claim in accordance with governing authority’. If R1 did not do so, the claim should have been dismissed (paragraph 16). The court cannot allow a claim which is contrary to authority. If the defendant fails to take the point, and the claim is allowed, there will be an injustice. ‘A claim will have succeeded contrary to the law’. There is no authority which shows that ‘an incorrectly claimed and evidenced claim must succeed’.
82. If it were otherwise, ‘parties would not be on an equal footing. Claimants could force the court to rubber stamp a loss that was incorrectly claimed, incorrectly evidenced, and contrary to the governing authority. The system is adversarial, and claimants bear the burden of proof. If they do not discharge it, the claim must be dismissed’.
83. On ground 3, A1 submitted that the Settlement and Response Pack are not pleadings. A1 concede that ‘It may be desirable that a defendant sets out the precise nature of his defence in the Stage 2 Settlement and Response Pack’. But there is no specific sanction for not doing so. The sanction cannot be to prevent the defendant from relying on relevant and binding authority.
84. Paragraph 4 of the Practice Direction (Citation of Authorities) [2001] 1 WLR 1001 requires an advocate to draw the court’s attention to relevant authority not cited by an opponent which is adverse to the advocate’s case. R1 did not cite *Hussain*. Even if A1 was somehow estopped from relying on *Hussain*, R1 was obliged to draw it to the court’s attention. It is contrary to the overriding objective for a party to be prevented from referring the court to relevant authority, particularly if the authority amounts to ‘an absolute defence in law’.
85. Ground 4 concerned *Woodward v Phoenix Healthcare Distribution Limited* [2019] EWCA Civ 985, which, in turn cited *Barton v Wright Hassall*. A1 referred CJ1 and DDJ1 to both cases. A1 did not rely on the facts of *Phoenix*, or of *Barton*, which, A1 accepts, are different, but on the principle which they both illustrate.
86. A1 contended, finally, on ground 5, that CJ1 was wrong to consider *Mulholland*, for two reasons.
- i. There was a decision at a higher level on each of the relevant issues. *Hussain* governs claims by professional drivers for hire charges, and *Phillips* and *Blair*, to which CJ1 referred in paragraphs 32 and 37, govern transfers into Part 7.
 - ii. *Mulholland* was distinguishable.
87. A1 submitted, on the second point, that *Mulholland* is not about losses claimed by professional drivers. There was no issue about whether the correct measure of damages

was loss of profits or hire charges. The only possible claim was for hire charges, that was the only possible measure of damages, and there was no argument to the contrary. CJ1's reasoning in paragraph 45 (see paragraph 69, above) was irrelevant. The nub of the appeal was whether a claimant who had failed, contrary to binding authority, to make a claim, and to support it with evidence should nevertheless succeed. In any event, *Mulholland* did not bind CJ1 and does not bind this Court.

88. Mr Bright further submitted that R1 was treating A1 as a 'forensic scapegoat' for his own failure to plead and prove his case properly in accordance with *Hussain*. He attempted to challenge CJ1's failure to transfer the claim into Part 7, even though this was not one of his grounds of appeal, as Mr Campbell rightly pointed out in his oral submissions. The 'rough justice' meted out by this procedure, if CJ1 was right, was rough indeed, but only rough from A1's point of view.
89. Before the hearing, the Court had raised with the parties in appeal 1 an issue relied on by R2, that is, the role of evidence of the BHR (see *Lagden v O'Connor*, and see paragraph 137, below). A1 submitted that *Lagden* was distinguishable because it did not concern a profit-earning chattel; *Hussain* (which refers to *Lagden*) is the leading authority on that topic. In *Lagden*, the claimant's only method of mitigating his loss was to hire a car; in this case, R1 could have made a claim for lost profits. The burden is on the claimant to plead and prove a claim for loss of profits (see *Diriye*, paragraphs 4, 7 and 67, and *Zurich Insurance plc v Umerji* [2014] EWCA Civ 357, footnote 2 and paragraph 37). In this case, R1 was limited to a claim for his lost profits, because he had not pleaded or shown that he was impecunious, and there was no evidence about his lost profits. BHR evidence was, therefore, irrelevant.

R1's submissions

90. In a commendably succinct skeleton argument, Mr Campbell took issue with all A1's grounds of appeal. CJ1 was right to say that *Hussain* was irrelevant in this case.
91. Ground 1 is misconceived, because by Stage 3 there was no dispute about the 'need' or 'duration' of hire charges. The only dispute concerned the 'rates'. Indeed, A1 proposed an alternative rate to the rate claimed by R1. As CJ1 observed, in paragraph 25, it was not suggested that 'the claim should be disallowed in principle'.
92. His answer to ground 2 is that A1 had failed to identify, at Stage 2, that there was any dispute about the right to claim hire charges. The *Hussain* point was only raised on the day before the Stage 3 hearing. In those circumstances, CJ1 was entitled to find that A1 should not be able to 'gain any forensic advantage'.
93. Ground 3 is not supported either by the provisions of the RTA Protocol, or by the only persuasive authority which was available at the date of the hearing, *Mulholland*. CJ1 did not equate the Court Proceedings Pack with formal pleadings. Rather, he followed the provisions of the RTA Protocol. Mr Campbell relied on paragraphs 53 and 54 of CJ1's judgment.
94. The sanction if a defendant fails to raise a defence at the stage of the settlement and response pack is that it cannot be raised later pursuant to paragraph 7.66 of the RTA Protocol. The Part A form is what the court looks at in order to decide the claim.

Logically, the court cannot consider something which was not raised at Stage 2. Car hire, loss of use and loss of earnings are all in the same section of the court pack. A1's only comment was to offer a different rate. A1 did not object to hire as a matter of principle. CJ1 was right to rely (paragraph 55) on *Phillips v Willis* and *Blair v Wickes*.

95. CJ1 did not say that A1 had been obliged to point out R1's mistake, R1 contends in response to ground 4. To compound A1's problems, A1 had contested the hire charge at Stage 2, but had not disclosed any evidence about rates. A1 belatedly tried to raise a defence at Stage 3 when it had not done so at Stage 2. The only party who had made a mistake was A1.
96. Ground 5 is 'wholly inaccurate'. There is no higher authority which considers the issue in *Mulholland*. For example, *Blair v Wickes* deals with new evidence. The main issue in *Mulholland* is whether a new issue can be raised at Stage 2. It is not binding on this Court, but is well reasoned. In any event, CJ1 reached his conclusion 'independently' of *Mulholland*, even if he agreed with it (paragraph 57). CJ1 did not ignore *Hussain*. He considered, rather, that it was irrelevant (paragraph 56).

Appeal 2: the facts

97. R2 is about 68 years old. He is a taxi driver. On 31 December 2018, he was driving his car when it was hit on the offside by A2's car. It was soon written off. His neck, shoulders and upper back were injured. He then retired from taxi driving.
98. A2's insurer admitted liability two days after the accident.

Appeal 2: procedure under the RTA Protocol

99. On 15 January 2019, R2 started a claim for personal injury in accordance with the RTA Protocol by sending a Claim Notification Form to A2. R2 admitted liability. The next stage was Stage 2.
100. At Stage 2, R2 claimed, among other things, damages for credit hire charges which he had incurred between 3 and 22 January 2019. R2 relied on the hire agreement and witness statement dated '29 May 2017' (it was date-stamped '31 May 2019') in support of his claim. R2 initially asked for £3,724.45, perhaps as a negotiating tactic.
101. In his witness statement, R2 said that he could not afford to repair or replace his vehicle. He had to pay his bills and living costs from his income. He had no surplus income; it was all spent on outgoings (paragraph 6). In paragraph 12, he said that he was a self-employed licensed taxi driver when he had the accident. He needed a replacement vehicle to pay his bills.
102. On 4 June 2019, A2's insurer made a written offer, 'subject to the points made' in that letter.
- i. R2 was put to 'strict proof' of the dates of his retirement and of his signing the hire agreement.
 - ii. A2 denied the rate claimed on the grounds that R2 had not proved 'impecuniosity'.

- iii. He was therefore only entitled to recover credit hire charges at no more than the lowest reasonable rate quoted by a mainstream supplier in his local area. R2 referred to *Stevens v Equity* [2015] EWCA Civ 93.
 - iv. Under the heading 'Intervention' A2 referred to its offer of an alternative vehicle in a letter on 2 January 2019 and conversations on 2 and 4 January 2019. In not accepting that offer, R2 had failed to mitigate his loss. A2 referred to *Copley v Lawn* [2009] EWCA Civ 580; [2010] 1 All ER (Comm) 890.
 - v. R2 was also put to strict proof as to need (*Giles v Thompson* [1993] 3 All ER 321). R2 was asked to confirm in evidence that he had no alternative vehicle he could have used. He was also asked 'to evidence full and complete financial accounts, to demonstrate that their daily profit was higher than the daily rate charged and therefore why hiring a vehicle was more appropriate than pursuing a loss of profit claim'.
103. A2 'denied' the rate claimed by R12 (£274.49 plus VAT).
104. A2 offered £82.52 plus VAT for 19 days (£1,881.46 including VAT). That figure was based on the offer of a free replacement vehicle, made by A2's insurer on 2 June 2019. The cost to R2's insurer would have been £82.52 plus VAT. R2 did not disclose any accounts or other financial evidence at any stage.
105. The parties were not able to agree the claim at Stage 2. A Stage 3 hearing was listed.

Appeal 2: the hearing in front of the Deputy District Judge

106. The parties were both represented by counsel. The hearing was a telephone hearing, listed for 15 minutes. A2 says that argument at the hearing took 19 minutes.
107. I have read a transcript of the hearing. R2's counsel submitted that the offer did not say that the vehicle offered was licensed with the local authority and did not say when the vehicle would be available.
108. A2's counsel submitted that the correct period was 19, not 20 days. There was no evidence that the vehicle offered could not be used as a taxi. The charge incurred by R2 was not 'appropriate as a mitigation of loss'. It would amount to nearly £70,000 for a 48-week year. R2 was alleged to be an impecunious taxi driver. It would not be 'inappropriate' for him to pursue a loss of earnings claim rather than such an expensive and large claim for an alternative vehicle. That did not arise, however, because he was offered an alternative vehicle. The last financial accounts showed a 'loss of profit'. Neither that issue nor R2's retirement was properly dealt with in his witness statement. Impecuniosity had not been proven. R2's witness statement was not enough. He provided 'none of the other financial information on which any of those matters could be put forward'. A2's offer was generous and should have been accepted. R2 should have raised any difficulties with the offer in the conversation on 2 January 2019.
109. In his reply, R2's counsel said that the argument that R2 should have sat on his backside was an interesting one. A2 just could not show that it would have been able to put R2 in the position he would have been in had the accident not happened, which was 'their obligation'. A2 could not then 'shuffle backwards to say, oh well, it is stage 3 when

you have got the burden of proof the usual standards we expect of claimants doesn't apply to us, and unfortunately that is exactly what [R2] is doing here...'

110. In his judgment, DDJ Grosscurth ('DDJ2') said (paragraph 7) that the major issue was vehicle hire. A2 had offered £1,881.46. A2 referred to that in the pack, and also to 'the attached correspondence'. This was probably a reference to letters of 2 January and 4 June 2019. The latter referred to conversations on 2 and 4 January. R2's statement was dated 29 May 2017, so there was a question about its veracity.
111. DDJ2 had to make a decision 'under this system on the basis of the paperwork'. He was happy to accept both letters. The witness statement did not even appear to relate specifically to this accident. R2's position was that the letter was 'not Copley compliant because it did not deal with the elements'. The second letter did not say when A2 would have a vehicle available for R2 to drive. DDJ2 was not persuaded that the letter 'is adequate to negate [R2's] claim for damages'.
112. DDJ2 awarded R2 a 'revised figure' for credit hire of £7,091.76. He gave A2 permission to appeal.

Appeal 2: the appeal to the Circuit Judge

113. The parties were again represented by counsel, one of whom had appeared below. HHJ Sykes ('CJ2') said that the period of hire was 3 January 2019 to 22 January 2019. 22 January 2019 was seven days after R2 received a cheque from A2's insurers for the pre-accident value of the car.
114. CJ2 described the RTA Protocol. She said that, 'in summary, Practice Direction 8B sets out a prescriptive self-contained procedure with an emphasis on limited issues and limited evidence. The clear aim is for very focused evidence and very focused advocacy so that the procedure is quick, efficient, and proportionate in terms of time and cost'. She cited paragraph 33 of *Phillips* (paragraph 8). That was reflected in the 15-minute hearing in front of DDJ2. By contrast, on the appeal, there had been two and half hours of submissions on the question of car hire alone, with a 122-page bundle of documents and a bundle of authorities of over 200 pages (paragraph 9).
115. CJ2 considered three grounds of appeal. Ground 1 was that there was no evidence which established one of the exceptions described by Pepperall J in *Hussain*. A2 argued that she had notified R2 of this issue in the letter of 4 June 2019. R2 argued that there was enough in his witness statement to show that he needed a replacement vehicle. He had said that he could not afford to repair or to replace his vehicle. All his income was taken up with outgoings. He was a licensed taxi driver, was self-employed and he needed a replacement vehicle in order to work and to pay his bills.
116. R2 argued that the RTA Protocol was not designed to give the parties an opportunity to put in extensive evidence or for the disclosure of accounts.
117. CJ2 held that DDJ2 had understood that this claim concerned a taxi which would be used for work. She accepted, relying on *Phillips*, that this was not a rare case which should have been transferred to Part 7 with consequential directions for disclosure. In the context of this 'restricted, quick and proportionate' procedure, DDJ2 was entitled

to rely on R2's witness statement. CJ2 considered that the case fell within the category described in paragraph 16(c) of *Hussain*.

118. Ground 2 was that R2 had not acted reasonably, because he refused the offer of a free car from A2. A2 relied on the letter of 2 January 2019, and on *Copley v Lawn*. DDJ2 had correctly identified the issue. The offer needed to be 'Copley compliant and in time'. He had held that the offer did not cover 'plating with the local authority' or clearance for use in the area in which R2 operated (paragraph 34). DDJ2 was entitled to conclude, in paragraph 14, that the offer was not for 'a properly adequate useable vehicle which R2 could drive (paragraph 35). R2 had made a credit hire agreement on 3 January, and the vehicle was registered for hire on 4 January, some four days after the accident, which allowed R2 to go straight back to work. DDJ2 was entitled to find that R2 had not acted unreasonably.
119. Ground 3 was that there was no evidence that R2 was impecunious. R2 bore the burden of showing that he was impecunious and needed another vehicle. The RTA Protocol was not a forum for extensive disclosure of accounts (*Phillips*). The material in R2's witness statement entitled DDJ2 to find that R2 was impecunious and needed a car which he could use as a taxi.
120. CJ2 dismissed A2's appeal.
121. Bean LJ gave permission to appeal to this Court.

Appeal 2: the grounds of appeal

122. There are two grounds of appeal:
 - i. CJ2 was wrong to hold that an assertion by R2, unsupported by any disclosure or documents, discharged the burden of showing that he was impecunious.
 - ii. CJ2 was wrong to hold that the claim was bound to be dealt with at a Stage 3 hearing and could not be transferred to Part 7.

A2's submissions

123. A2 submits that appeal 2 raises an important point under the RTA Protocol in cases in which a claim for hire charges is based on assertion that the claimant is impecunious. It is said that CJ2's approach prevents defendants from scrutinising such claims, which will allow unmeritorious claims to succeed. That will be bad for insurers, and, ultimately, for the car drivers, because they will have to pay higher premiums. There are about 700,000 claims under the RTA Protocol every year. A2 asserts that 'A significant number of these will involve claims for credit hire where impecuniosity is in issue'. CJ2's approach creates 'a unique category of claims which are dealt with in this way, compared with claims of both higher and lower value'.
124. A2 accepts (skeleton argument, paragraph 3) that A2's two grounds of appeal were not considered by DDJ2. A2 contends that it is common ground that they should have been. R2 does not accept that (see paragraph 135, below). A2 says that the only judgment on these two points is that of CJ2. R2 does not accept that CJ2 dealt with what is now ground 2.

125. A2's 'fundamental submission' is that while the RTA Protocol is intended to minimise costs and to deliver 'fairly rough justice' it is not 'to deliver injustice'. It was not intended to relieve claimants of the burden of 'properly proving their claims or deprive defendants of the chance to challenge claims'. That is the consequence, however, of allowing a claimant who claims damages for credit hire to establish that he is impecunious simply by saying so, and without requiring him to produce documents in support or to be cross-examined.
126. A defendant cannot control in which cases this injustice will happen, and it will not happen in all cases (see paragraph 41 of A2's skeleton argument). The approach taken in this case 'creates an island of injustice, but one with a large population'. A2 asks, rhetorically, why this injustice only exists in relation to some claims under the RTA Protocol. The defendant's only way of protecting itself against this injustice is to contest liability or to allege contributory negligence, and thus ensuring that the RTA Protocol does not apply to the claim. That creates a perverse incentive to take claims out of the RTA Protocol, subverts the underlying purpose of the RTA Protocol, and will increase costs, as the fixed costs which apply to a claim under the RTA Protocol are substantially smaller than the fixed costs outside it. Indeed, where a claim is allocated to the multi-track, there are no fixed costs.
127. CJ2 should simply have held that R2 had not shown that he was impecunious. Outside the RTA Protocol, a bare assertion that a claimant is impecunious is not enough (*Hussain*, paragraph 17). It is not unjust to require a claimant in a claim in the RTA Protocol to show that he is impecunious in the same way as he would be required to show that outside the RTA Protocol. R2 knew that his claim to be impecunious was challenged at Stage 2, and it was not difficult to support it with documentary evidence. In paragraph 40, CJ2 confused disclosure and proof. A2 was not trying to introduce disclosure obligations, but to establish a 'minimum forensic standard which a claimant must meet before an allegation of impecuniosity can be accepted'.
128. R2 had failed to show an entitlement to more than his lost profit, and had not shown that that profit was (per *Hussain*). Had A2 not conceded that £1,881.46 was due, CJ2 should have awarded nothing.
129. If that was not right, CJ2 should have held that the claim was not suitable to continue under PD 8B, and should have transferred it Part 7 (pursuant to PD 8B paragraph 7.2). Nothing in *Phillips v Willis* prevented CJ2 from doing so. Jackson LJ did not hold that cases can only be transferred into Part 7 in 'rare' or 'exceptional' circumstances. That test is stated in paragraph 8BPD.7.1 of the White Book, but that is a gloss on the language of PD 8B and of Jackson LJ, and may be misleading judges who would otherwise transfer claims into Part 7.
130. In any event, *Phillips* does not establish a high bar for transferring a claim to Part 7 under paragraph 7.2. It should also be distinguished, on two grounds.
 - i. One of Jackson LJ's concerns about such a transfer was that it might mean that a claimant would not be able to recover some costs. That concern does not arise under the current version of the RTA Protocol, and would not, therefore, have arisen in this case.

- ii. The dispute in *Phillips* was very limited. The defendant was not alleging impecuniosity, the parties were only some £460 apart and were both content for the district judge to decide the claim at the Stage 3 hearing.

131. A2 submits that paragraph 7.2 is a safety valve. It ensures that justice is done in claims which need more scrutiny. Whether they do depends on the facts. If the defendant disputes that the claimant is impecunious, but the claimant has given full disclosure, it may be appropriate to decide the claim under PD 8B. Other cases may raise complex issues which are not suitable for decision under PD 8B.

R2's submissions

132. R2 submits that neither ground of appeal was taken before DDJ2 and that one was not a ground of appeal to CJ2 (see paragraphs 115-119, above). There were three grounds of appeal to CJ2.

- i. R2 should have been limited, as a matter of law, to a claim for loss of earnings rather than a claim for hire charges.
- ii. R2 should have accepted an offer by A2 to supply him with a replacement taxi.
- iii. R2 had not proved that he was impecunious and thus entitled to damages at a credit hire rate.

133. A2 now only pursues, as ground 1, what was the third ground of appeal in the appeal to CJ2, with an exclusive focus on the question whether R2 had shown he was impecunious. Ground 2, an argument that the claim should have been transferred into Part 7, was not argued in front of DDJ2, and was not a ground of appeal to CJ2. It is a new point which A2 needs the permission of this Court to argue: *Jones v MBNA International Bank Limited* [2000] EWCA Civ 514 at paragraph 38, per Peter Gibson LJ.

134. It is unlikely that Bean LJ realised that neither ground had been argued before DDJ2 and that only one had been argued before CJ2. The grant of permission to appeal should not, therefore, be construed as an implied permission to argue a new point or points, not least because it would have been wrong in principle to have given such permission without hearing from R2.

135. R2 does not accept that it is common ground that DDJ2 should have considered either issue.

- i. A2's counsel did not ask DDJ2 to decide whether R2 was impecunious, for good reason. There was no evidence to show that the hire rate claimed by R2 was more than the BHR for the vehicle. The BHR, according to the relevant authorities, is the cost of hiring a vehicle from a mainstream provider like Avis, as opposed to a specialist post-accident provider. Instead, A2's focus was whether R2 had reasonably refused A2's offer of a replacement vehicle.
- ii. A2 did not, at any stage, seek to transfer the claim into Part 7. A2 could have asked for such an order at any time. The premise of this ground of appeal is that DDJ2 and CJ2 were wrong not to make an order which A2 had not asked them to make.

136. The decision of DDJ2 is the focus of this appeal.
137. A2 claims that the issue on ground 1 is how the court should approach a disputed claim that the claimant is impecunious. R2 argues, however, that as there was no BHR evidence, neither party asked DDJ2 to decide whether R2 was impecunious: that was 'a moot point'. *Lagden v O'Connor* decides that a defendant bears the burden of showing that a claim for hire charges is excessive with evidence that the claimant could have hired a replacement vehicle for less. This principle has been relied on in later authorities (see paragraphs 31-35 of R2's skeleton argument, and paragraph 89, above). Analysis of the transcript of the hearing in front of DDJ2 shows that A2's counsel did not argue that R2 had not shown that he was impecunious. For the avoidance of doubt, R2's offer was not a BHR.
138. In any event, CJ2's treatment of the limited evidence necessary to show, at Stage 3, that R2 was impecunious was correct. Giving a detailed picture of a person's financial position is expensive (see the standard directions in relation to such issues which apply to Part 7 claims). Such an exercise is not feasible at Stage 3, not least because the fixed recoverable costs are so low. R2's witness statement was sufficient evidence for Stage 3. If A2 wanted to scrutinise this issue in detail, A2 should have asked for a timely transfer to Part 7.
139. The crucial point, in relation to ground 2, is that A2 could have sought a direction for transfer under paragraph 7.2 of PD 8B and did not do so. R2 does not contend that *Phillips* prevents the transfer of cases such as this into Part 7. *Phillips* was an extreme case. This Court criticised a district judge for transferring a claim to Part 7, without warning, on the day of the Stage 3 hearing, causing an adjournment and wasting costs, when neither side had asked for such an order. A2 is wrong to suggest that CJ2 found that the claim was bound to be dealt with at the Stage 3 hearing and could not be transferred out of Part 8.
140. CJ2's approach to this issue reflects the fact that neither party had asked for a transfer. This case was not so exceptional that DDJ2 should have transferred it out of Part 7 of his own accord. Given that neither side had asked for such an order, DDJ2 would have erred in making one. Any objection to DDJ2's failure to transfer the claim to Part 7 was untenable. CJ2's obiter comments about transfer to Part 7 reflected the fact that neither party had asked for such a transfer. If the case had been transferred to Part 7, A2's exposure to costs would have increased (see paragraphs 21 and 22 of R2's skeleton argument).
141. A2's appeal on ground 2 is hopeless. The point was not argued before DDJ2 and was not a ground of appeal to CJ2.

Appeal 1 and Appeal 2: discussion

142. I have summarised the relevant law, the procedural histories and the arguments at some length. The reasons for my decision can therefore be brief. As I foreshadowed in paragraph 2, above, these appeals turn on the uncontroversial application of the RTA Protocol to their own procedural facts and do not raise any wider points.

143. Defendants in these cases are almost always insurers, as they are in these two appeals. There are hundreds of thousands of these claims every year, and they are routine for insurers. Insurers can be assumed to be familiar with the provisions of the RTA Protocol and to have ready access to legal advice if an unusual or difficult issue arises in one of these cases. I have summarised the relevant provisions of the RTA Protocol and the decision in *Phillips v Willis*. The themes which emerge from both are that the RTA Protocol is intended to be a quick and cheap procedure to enable the parties to settle at a cost which is proportionate both to the sums at stake, and to the run of the mill legal issues which arise, and in a way which does not place an undue burden on the courts. The RTA Protocol is designed to enable the parties to narrow and limit the issues in dispute, so that if a decision by the court is necessary at Stage 3, that decision will only concern the narrow issue which the parties' exchanges under the RTA Protocol will already have defined for the court. As Jackson LJ observed, the RTA Protocol has 'an inexorable character'. If the parties do not observe its provisions, they bear the consequences: for example, if an issue is not raised, or evidence is not served when it should have been, it can (in general) not be raised later.

Appeal 1: decision

144. In his oral submissions, Mr Bright accepted that all his grounds of appeal were aspects of the same point. He also accepted, I think, that CJ1 was, at the very least, entitled to read *Mulholland*, if for no other reason than to consider whether its citation was consistent with the Practice Direction, or not. He further accepted, in effect, that his objections to *Mulholland* were a side issue: what mattered was whether CJ1's reasoning, which, admittedly, was similar to the reasoning in *Mulholland*, was correct.
145. He referred repeatedly to *Hussain* as 'the governing authority'. The main premise of his written and oral submissions, therefore, was that *Hussain*, which was a claim under Part 7 and was not decided under the RTA Protocol, is not only relevant to claims under the RTA Protocol, but governs the court's approach to such claims. He appeared, nevertheless, to accept that the court's approach would, or could, have been different if A1 had deliberately ambushed R1 with *Hussain* on the eve of the Stage 3 hearing.
146. Mr Bright was right to accept that his five grounds of appeal are different ways of putting the same argument. On analysis, he makes two linked points: a claim under the RTA Protocol must be pleaded and proved in the same way as a claim to which the RTA Protocol does not apply, and, further, that, if, as late as the Stage 3 hearing, the defendant argues that the claim has not been pleaded and proved in that way, a DJ is obliged to dismiss the claim. Each of those two points is based on a fundamental misunderstanding of the express provisions of the RTA Protocol, and of its purpose.
147. As HHJ Freedman rightly said in *Mulholland v Hughes*, '...to make an offer in respect of hire charges is not to admit the need for hire, but not to challenge the need at Stage 2 is equivalent to saying that the claimant does not need formally to prove it'. As CJ1 put it (paragraph 54), again rightly, on both a literal and a purposive interpretation, a defendant cannot object, at Stage 3, to a particular head of damages except on grounds raised at Stage 2. Here, as Mr Campbell pointed out, there was no dispute about the need for car hire at Stage 3, because A1 had, in effect, conceded the need for car hire by offering R1, at Stage 2, a different rate from the rate which R1 claimed. A1 did not identify any relevant dispute at Stage 2.

148. It is not open to A1 to argue, on this appeal, that CJ1 erred in not transferring the claim to Part 7. I accept Mr Campbell's submission that this was not a ground of appeal.
149. I agree with CJ1, for the reasons which he gave, that DDJ1 erred in law in dismissing the claim at the Stage 3 for the reasons relied on by DDJ1. I would dismiss the appeal against CJ1's decision, which I consider not only to have been open to him, but to have been clearly right. I thank the parties for their submissions on the issue I referred to in paragraph 89, above, even though, in the event, it was not necessary for me to express any view on that issue.

Appeal 2: decision

150. There is a dispute about whether the question of R2's impecuniosity was argued before DDJ2. The transcript suggests that it was raised in passing, but also that the focus of A2's argument was the *Copley* point. The question of impecuniosity was one of the grounds of appeal to CJ2, and CJ2 decided it, so I consider that this Court should decide ground 1.
151. I can see no error in CJ2's approach to this question. I consider that, in the context of the RTA Protocol, and if it was necessary for R2 to show that he was impecunious, the evidence on which R2 relied was sufficient for that purpose. I accept R2's submission that if A2 wanted to argue that the evidence was insufficient for that purpose, it was for A2 to ask, at an appropriate time, for a transfer to Part 7, so that the issue could be investigated further. I also accept the submission that it is simply not feasible for a DJ to investigate such an issue in the depth which A2 now demands in the context of a Stage 3 hearing.
152. I am not impressed by A2's argument that this approach is anomalous or unjust. Insurers must be taken to know about both the purpose and the detailed provisions of the RTA Protocol, and how it differs from other methods of deciding civil claims. The sheer number of these claims means that they are a form of bulk business. Insurers can take advantage of the economies of scale and cost created by the RTA Protocol for these claims. Insurers are not locked into the RTA Protocol. First, they can take advantage of the 'industry agreements' dealing with vehicle-related damages which are referred to in paragraphs 6.4 and 17.23 (see paragraphs 12 and 18, above). Second, there are many opportunities for a defendant to take a claim out the RTA Protocol (see paragraph 23, above) if a defendant considers that it is better suited to investigation and determination under Part 7 (with the costs risk which that entails).
153. I would dismiss ground 1.
154. I accept R2's submission that A2 needs the permission of this Court to argue ground 2, which was not taken before DDJ2 and was not a ground of appeal to CJ2. I also accept R2's submission that Bean LJ's grant of permission to appeal does not prevent R2 from making this submission.
155. A2 was represented both before DDJ2 and before CJ2. As this Court pointed out in *Jones v MBNA*, the parties are expected to advance their full cases at trial. There are very few cases in which it could be just to allow a party to run a wholly new point on

appeal. That argument applies with even greater force to this appeal, for three reasons. First, this is a second appeal. Second, this is not a pure point of law, as it concerns a case management discretion. Third, this new point is wholly theoretical, as it concerns the hypothetical exercise of a discretion which the DDJ2 was never in fact invited to exercise. Having heard full argument, I would refuse A2 permission to rely on ground 2 and would therefore dismiss ground 2.

Post-script: the note in the White Book

156. I consider that the note (see paragraph 35, above) is not an accurate statement either of the actual decision in *Phillips v Willis*, or of its implications. The power to transfer cases to Part 7 is not constrained in the way that the note suggests.

Nicola Davies LJ

157. I agree.

Sir Andrew McFarlane P

158. I also agree.