



Neutral Citation Number: [2019] EWCA Civ 1934

Case No: B3/2018/2349

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM Winchester County Court**  
**HH Judge Iain Hughes QC**  
**DO0AF649**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 12 November 2019

**Before :**

**LORD JUSTICE HAMBLÉN**  
**LORD JUSTICE HOLROYDE**  
and  
**LORD JUSTICE BAKER**

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**Between :**

**WICKES BUILDING SUPPLIES LIMITED**  
**- and -**  
**WILLIAM GERARDE BLAIR**

**Appellant**

**Respondent**

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**Grace Cullen** (instructed by **BLM Solicitors**) for the **Appellant**  
**Sarah Robson** (instructed by **Bakers Solicitors**) for the **Respondent**

Hearing date: 24 October 2019  
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**Approved Judgment**

## **LORD JUSTICE BAKER:**

1. This appeal concerns the interpretation of one aspect of the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims (hereafter "the Protocol").
2. The aspect of the Protocol in issue concerns the procedure to be followed if a claimant seeks to rely for the purpose of the Stage 3 Procedure of the Protocol on evidence served out of time, and in particular whether this is a matter to be dealt with by the court under paragraph 7 of Practice Direction 8B (as District Judge James held at first instance in this case) or whether it leads to automatic dismissal of the claim under the Protocol under paragraph 9 (as HHJ Hughes held on appeal).
3. As explained in the editorial introduction to the Protocol at paragraph C15A-001 of the White Book 2019, the Protocol was introduced following the undoubted success of the Pre-Action Protocol in Road Traffic Accident claims to provide a relatively inexpensive and speedy process for the resolution of employer's liability and public liability claims valued at no more than £25,000 where liability is admitted by the defendant. The aims of the Protocol, as set out in paragraph 3.1 are:

“... 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.”

4. The structure of the Protocol is broadly the same as for RTA claims and can be summarised briefly as follows.
5. The process is divided into three stages. At Stage 1, the claim is made by sending a form, known as the Claim Notification Form (“CNF”) to the defendant's insurers, if known, or, if not known or the defendant is known not to hold an insurance certificate, to the defendant's registered office or principal place of business. Under paragraph 5.1, where the Protocol requires information to be sent to a party it must be sent via the on-line Portal, save that under paragraph 6.2 if the CNF cannot be sent to the defendant via that address, it must be sent by first-class post. The defendant must complete the “Response” within the time limit prescribed in the Protocol (paragraph 6.11). If the defendant does not admit liability, or alleges contributory negligence, or raises other objections specified in paragraph 6.13 of the Protocol, or fails to complete the Response, the claim will no longer continue under the Protocol but, instead, will proceed under the relevant Pre-Action Protocol and the CNF will serve as the letter of claim (6.15). If, on the other hand, the defendant admits liability, the claim stays within the Protocol and moves on to Stage 2. Unless the claimant is a child, where liability is admitted the defendant must pay the Stage 1 fixed costs under CPR 45.18 within a prescribed time period (6.16). If he fails to do so, the claimant may give written notice that the claim will no longer continue under the Protocol (6.17).

6. The aim of Stage 2 is to try to resolve the claim by agreement. The claimant collates the evidence needed to prove the claim. Section 7 of the Protocol contains detailed provisions regarding medical reports and other evidence. Under the heading “Submitting the Stage 2 Settlement Pack to the defendant”, paragraphs 7.30 and 7.31 provide:

“7.30 The Stage 2 Settlement Pack must comprise

- (1) the Stage 2 Settlement Pack Form;
- (2) a medical report or reports;
- (3) evidence of pecuniary losses;
- (4) evidence of disbursements (for example the cost of any medical report);
- (5) any non-medical expert report;
- (6) any medical records/photographs served with medical reports; and
- (7) any witness statements.

7.31 The claimant should send the Stage 2 Settlement Pack to the defendant within 15 days of the claimant approving

- (1) the final medical report and agreeing to rely on the prognosis in that report; or
- (2) any non-medical expert report,

whichever is later.”

The Stage 2 Settlement Pack Form includes a schedule to be completed by the claimant setting out the initial offer. The Protocol prescribes the procedure for consideration of offers and counter offers (7.32 to 7.42). There is a prescribed time for the defendant to consider the settlement pack and accept the claimant’s offer or make a counter-offer on the Stage 2 Settlement Pack Form (7.32). There is provision for the claim to leave the Protocol in certain circumstances, for example if the defendant withdraws the admission of causation or fails to respond within the consideration period (7.36 and 7.37). There is provision for further consideration and negotiation. Any offer to settle at any stage by either party must include certain items, including the Stage 1 and Stage 2 fixed costs in rule 45.18 (7.41). There are provisions governing the settlement of the claim during Stage 2 (7.44 and 7.45).

7. If the parties do not reach an agreement on damages through the Stage 2 procedure, the case moves on to Stage 3, the determination of the claim by the court. By way of preparation, the claimant must send to the defendant the Court Proceedings Pack, comprising two parts – Part A, containing the final schedule of the claimant’s losses and the defendant’s responses, together with supporting comments and evidence from both parties on any disputed heads of damage, and Part B, the final offer and counter-

offer from the Stage 2 Settlement Pack Form (7.48). Comments in the Court Proceedings Pack (Part A) Form must not raise anything that has not been raised in the Stage 2 Settlement Pack Form (7.49). Except where the claimant is a child, the defendant must now pay to the claimant the final offer of damages, plus other sums defined in the Protocol, including any unpaid Stage 1 fixed costs and the Stage 2 fixed costs (7.53).

8. Under paragraph 7.59:

“Where the claimant gives notice to the defendant that the claim is unsuitable for this Protocol (for example, because there are complex issues of fact or law or where claimants contemplate applying for a Group Litigation Order) then the claim will no longer continue under this Protocol. However, where the court considers that the claimant acted unreasonably in giving such notice it will award no more than the fixed costs in rule 45.18.”

9. The Stage 3 Procedure is set out not in the Protocol but in Practice Direction 8B under CPR Part 8 which provides the alternative procedure for claims. Under r.8.1(2)(b) and (6), a practice direction may, in relation to a specified type of proceedings, require or permit the use of the Part 8 procedure and disapply or modify any of the rules set out in Part 8. Under r.8.1(3), the court may at any stage order the claim to continue as if the claimant had not used the Part 8 procedure and, if it does so, the court may give any direction it considers appropriate. Practice Direction 8B sets out the Stage 3 Procedure for the Protocol and the RTA Protocol. Paragraph 2.1 provides that the claim is made under the Part 8 procedure as modified by the Practice Direction and subject to paragraph 2.2 which stipulates that the claim will be determined by the court on the contents of the Court Proceedings Pack. As permitted by r.8.1(6), paragraph 2.2 also disapplies several rules within Part 8, although not r.8.1(3).

10. Paragraph 5.1 of the Practice Direction provides that an application to the court to determine the amount of damages must be started by a claim form. The contents of the claim form are prescribed by paragraph 5.2. They include whether the claimant wants the claim to be determined by the court on the papers or at a Stage 3 hearing.

11. Paragraph 6.1 identifies the documents which must be filed with the claim form, which in claims of the sort under consideration in this case are as follows:

- (1) the Court Proceedings Pack (Part A) Form;
- (2) the Court Proceedings Pack (Part B) Form (the claimant and defendant’s final offers) in a sealed envelope;
- (3) copies of medical reports;
- (4) evidence of special damages; and
- (5) evidence of disbursements.

Paragraph 6.1A makes further provision for medical reports. Paragraph 6.3 provides:

“Subject to paragraph 6.5 [which relates to 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 6.4 provides:

“The claimant’s evidence as set out in paragraph 6.1 must be served on the defendant with the claim form.”

12. Paragraphs 7, 8 and 9 of the Practice Direction are central to the issue in this appeal. They provide as follows:

“Evidence - general

7.1 The parties may not rely upon evidence unless -

- (1) it has been served in accordance with paragraph 6.4;
- (2) it has been served in accordance with paragraph 8.2 and 11.3 [which relate to certificates of recoverable benefits, not relevant to this case]; or
- (3) (where the court considers that it cannot properly determine the claim without it), the court orders otherwise and gives directions.

7.2 Where the court considers that -

- (1) further evidence must be provided by any party; and
- (2) the claim is not suitable to continue under the Stage 3 Procedure,

the court will order that the claim will continue under Part 7, allocate the claim to a track and give directions.

7.3 Where paragraph 7.2 applies the court will not allow the Stage 3 fixed costs.

Acknowledgement of Service

8.1 The defendant must file and serve an acknowledgement of service in Form N210B not more than 14 days after service of the claim form.

8.2 The defendant must file and serve with the acknowledgement of service, or as soon as possible thereafter, a certificate that is in force.

8.3 The acknowledgement of service must state whether the defendant -

- (1)
  - (a) contests the amount of damages claimed;
  - (b) contests the making of an order for damages;
  - (c) disputes the court’s jurisdiction; or
  - (d) objects to the use of the Stage 3 Procedure;
- (2) wants the claim to be determined by the court on the papers or at a Stage 3 hearing.

8.4 Where the defendant objects to the use of the Stage 3 Procedure reasons must be given in the acknowledgement of service.

....

Dismissal of the claim

9.1 Where the defendant opposes the claim because the claimant has -

- (1) not followed the procedure set out in the relevant Protocol; or
- (2) filed and served additional or new evidence with the claim form that had not been provided under the relevant Protocol,

the court will dismiss the claim and the claimant may start proceedings under Part 7.

(Rule 45.24 sets out the costs consequences of failing to comply with the relevant Protocol.)”

13. Paragraph 11, headed “Consideration of the claim”, includes the following:

“11.1 The court will order that damages are to be assessed -

- (1) on the papers; or
- (2) at a Stage 3 hearing, where
  - (a) the claimant so requests on the claim form;
  - (b) the defendant so requests in the acknowledgement of service (Form N210B); or
  - (c) the court so orders,

and on a date determined by the court.

11.2 The court will give the parties at least 21 days notice of the date of the determination of the papers or the date of the Stage 3 hearing.

....”

14. On 27 May 2015, now nearly four and a half years ago, Mr Blair suffered an accident at work when a plank of wood fell on his head. He sustained bruising and lacerations to his face and suffered recurrent headaches for several weeks. He also alleged that he suffered a recurrence of pre-existing psoriasis which lasted for two years. He did not suffer any pecuniary losses and thus made no claim for special damages.
15. On 20 April 2017, Mr Blair submitted a CNF under the Protocol against his employers, Wickes Building Supplies Ltd. On 25 April 2017, Wickes admitted liability. Thereafter, the parties entered Stage 2 of the Protocol but were unable to agree damages and the case therefore moved to Stage 3.
16. On 1 December 2017, Mr Blair filed a claim form under paragraph 5.1 of Practice Direction 8B, enclosing the documents required by paragraph 6.1. On 5 January 2018, solicitors for Wickes filed an Acknowledgment of Service in Form N210. That document was not included in the papers filed for the hearing of the appeal before us but filed at our request after the hearing. The solicitors ticked the box which states: “I intend to contest this claim”. They did not tick the box saying “I intend to dispute the court’s jurisdiction” or the box saying “I object to the claimant issuing under this procedure”. A Stage 3 hearing was then listed before District Judge James on 24 April 2018.
17. At the outset of the hearing, a preliminary issue arose about a statement, dated 23 November 2017, signed by Mr Blair which, according to Wickes, had not been served in accordance with the Protocol and which they therefore asserted should not be considered by the court. Having heard argument from counsel on the issue, the district judge delivered a short judgment in which he concluded:

“In all the circumstances, I think it is more likely than not that the defendants did not have the statement of evidence in time, in accordance with the Protocol or otherwise, and accordingly it would be wrong to permit the claimant to rely on that statement of evidence.”
18. The district judge then proceeded to hear submissions on the substantive issue, and delivered a further judgment ordering Wickes to pay the sum of £2000 by way of damages to Mr Blair, plus costs in the sum of £1080.
19. Solicitors on behalf of Mr Blair then filed a notice of appeal against the district judge’s order, putting forward the following grounds:

“There was a finding of fact that the claimant did not comply with the requirements of the [Protocol]. This finding was made based on a submission from the defendant’s counsel.

In accordance with CPR PD 8B 9.1(1) and 9.1(2) once the learned judge had made the finding of fact that the claimant had filed and served additional or new evidence with the claim form that had not been provided under the relevant Protocol the rules are clear that the court will dismiss the claim and the claimant may start proceedings under Part 7.

CPR 45.24 provides for the possible sanctions the court might invoke on the claimant in the Part 7 action.

The judge has therefore made a procedural error and as such the claimant appeals the order.”

20. The appeal was heard by HH Judge Hughes QC on 17 July 2018. The appeal was allowed. In his judgment, Judge Hughes drew attention to some passages in the transcript of the hearing before the district judge which suggested that the district judge had not been entirely familiar with the procedure under the Protocol. He also stated that, having excluded the disputed statement, the district judge in his second judgment on the substantive issue had made some oblique references to the contents of the statement when assessing damages. This led Judge Hughes to observe: “So it is apparent that the hearing went badly wrong.”

21. Judge Hughes then cited paragraphs 7.1 and 9.1 of the Practice Direction and reached this conclusion:

“17. Therefore, the sanction to a claimant that has not followed the procedure or has filed and served new evidence or additional evidence that had not been provided under the relevant protocol, is that the claim will be dismissed, which has cost consequences. If the claimant wishes to start proceedings, then the Limitation Act may or may not apply.

18. In her submissions [counsel for Wickes] says that opposing the claim is not the same as objecting to the evidence. I take the view that the Practice Direction is not inconsistent. In this case, the first stage is that the district judge found (and there is no appeal from this) that the witness statement was served late in the sense that it was not served with the Protocol. That then meant that the evidence could not be relied upon in accordance with 7.1.

19. There was then a choice for the claimant. The evidence could be simply abandoned and the Stage 3 procedure would proceed with damages awarded on whatever evidence there was before the court, or the claimant could retain the evidence. This would result in the defendant continuing to oppose, because it would be the defendant’s case right from the start, that there was opposition to this evidence, so the claim would be opposed on the grounds that this evidence should not be admitted. In that event, the court should then proceed as directed by 9.1. I

do not accept that there is some problem with using 7.1 and 9.1 in that fashion.

20. What happened in this case is neither the judge nor counsel applied themselves to the procedure that should be adopted in accordance with Practice Direction 8B. The entire proceedings became fatally flawed, and the adjudication was flawed, because it was not an adjudication in accordance with the Protocol. It was not an adjudication that abided by the terms, the mandatory terms, of the Practice Direction. It was instead, essentially, turned into a small claims case, and as such, the decision of the district judge cannot stand.”

22. At the conclusion of the appeal hearing, Judge Hughes made an order allowing the appeal, setting aside the district judge’s order, dismissing the claim under the Protocol pursuant to paragraph 9.1 of Practice Direction 8B, reserving all questions of costs under the Protocol until the conclusion of Mr Blair’s claim under Part 7, ordering Wickes to pay Mr Blair’s costs of the appeal summarily assessed at £4,500, and directing that Mr Blair give credit in his Part 7 proceedings for all sums received from Wickes in the Protocol proceedings.
23. On 27 September 2018, Wickes filed a notice of appeal out of time to this court. On 22 March 2019, my Lord, Hamblen LJ, extended time for appealing and, applying the second appeal test, granted permission to appeal, declaring that the appeal had a real prospect of success and raised issues as to the proper interpretation and application of Practice Direction 8B in relation to which authoritative guidance was desirable.
24. We were greatly assisted by the helpful submissions from counsel for whom, like many members of the junior Bar, the Protocol is a regular feature of their professional lives. In a clear and comprehensive skeleton argument on behalf of the appellant, Ms Cullen puts forward the following submissions in support of the appeal. Her principal argument was that Judge Hughes’ conclusion that the district judge had failed to comply with the mandatory terms of the Practice Direction was wrong in law. Contrary to the circuit judge’s view, paragraph 9.1 of the Practice Direction was not triggered by the attempted late service of a statement on behalf of Mr Blair at the Stage 3 hearing. The issue was properly dealt with by the district judge under paragraph 7.1 and there was no need for him to consider paragraph 9.1 at all. As Ms Cullen pointed out in oral submissions to us, paragraph 9.1 was not cited by either party at the hearing before the district judge. Raising an objection about the late service of a statement is not the same as opposing the claim on the ground that the claimant had failed to follow the Protocol. By resisting Mr Blair’s attempt to rely on the statement, Wickes were not seeking to “oppose the claim” within the meaning of paragraph 9.1 but rather objecting to the late service of evidence contrary to paragraphs 6.3, 6.4 and 7.1. By refusing to allow Mr Blair to rely on the late statement, the district judge was acting in accordance with paragraph 7.1 which prevents a party relying on evidence unless it has been served in accordance with paragraphs 6.3 and 6.4. If the court considered that further evidence was necessary, it was open to the court under paragraph 7.1(3) to make appropriate directions. If the court concluded that further evidence was required and that the claim was no longer suitable to continue under the Stage 3 procedure, the court was obliged under

paragraph 7.2 to order that the claim should continue under Part 7. In the event, however, the district judge rightly chose not to take either of those courses.

25. Ms Cullen further submits that, if Judge Hughes' interpretation is correct, it would hand the driving reins firmly to the claimant. Any objection by the defendant to the deliberate late service of evidence by the claimant would result in the claim being removed from the Protocol. A defendant served with a late statement would be left in the invidious position of either objecting to the document, which would result in the claim being taken out of the Protocol, or keeping quiet and running the risk of being found to have undervalued the claim for damages, thereby suffering a costs penalty. Such an outcome would be contrary to the aims of the Protocol to deal with simple, low-value claims without resorting to court proceedings, and also contrary to the overriding objective in CPR r.1.1 to deal with cases justly and at proportionate cost. Furthermore, on the facts of this case, Judge Hughes' order, if upheld, would unfairly allow Mr Blair to re-litigate the entire claim under Part 7 proceedings in the hope of getting a better result.
26. In her succinct skeleton argument in response, Ms Robson relies heavily on the scheme and structure of the Protocol. She describes it as strict, tightly bound and highly prescriptive. She points out that, whereas in the ordinary course of events, the Civil Procedure Rules are supplemented by Practice Directions and indirectly by pre-action protocols, in the case of claims submitted via the Portal, including those under this Protocol, the normal position is reversed. Ms Robson cites the following passage from the editorial introduction to Practice Direction 8B at paragraph 8BPD.0 of the White Book 2019:

“The RTA and EL/PL Protocols differ from all the other Pre-Action Protocols. Normally the rules themselves are paramount and are supplemented by Practice Directions and, pre-issue, by protocols. But here the process is reversed. The Protocols are paramount and PD8B should be seen as part of the process.”

The Protocol is a tightly drawn and stand-alone code with tight deadlines and draconian sanctions, all of which strongly encourage compliance.
27. As there are strict limits on the evidence which can be relied on at a Stage 3 hearing, Ms Robson submits that Judge Hughes was quite right to find that the sanction for an errant claimant who files and serves evidence which has not been provided under the Protocol is that the claim will be dismissed. She submits that his interpretation of paragraph 9.1 of the Practice Direction was correct. That paragraph applies where a defendant opposes the claim because the claimant has filed and served additional or new evidence. Ms Robson submits that is precisely what happened in this case. The fact that opposing the claim for non-compliance or late evidence results in the claim leaving the Protocol is perfectly in keeping with the other Protocol rules and sanctions. She described it as forming part of the “sticks and carrots” which drive towards ensuring compliance with the Protocol and are designed to ensure that claimants follow Stage 2 conscientiously.
28. In oral submissions, Ms Robson cited the decision of this court in *Phillips v Willis* [2016] EWCA Civ 401. In that case, brought under the RTA Protocol, by the time of the Stage 3 hearing the parties had agreed the damages except for car hire charges.

The district judge ordered that the action should proceed under CPR Part 7 on the small claims track. An appeal to a circuit judge was dismissed on the grounds that the district judge had made a case management decision in the exercise of his powers under paragraph 7.2 of Practice Direction 8B with which an appellate court could not interfere. The Court of Appeal allowed an appeal against the circuit judge's decision and set aside the district judge's order. Giving the lead judgment, with which Floyd and Macur LJ agreed, Jackson LJ concluded (at paragraph 34) that:

“...this case did not fall within the ambit of para 7.2 of PD8B. The district judge had no power under that paragraph to direct that the case should proceed under Part 7.”

He added (at paragraphs 37-8):

“37. [Counsel for the respondent] submits that rule 8.1(3) enables the court to transfer a protocol case to Part 7 even if para 7.2 of the practice direction does not apply. I am bound to accept that the language of rule 8.1(3) is wider than the language of para 7.2 of the practice direction. On the other hand, CPR 8.1(3) cannot be used to subvert the protocol process.

38. In the present case, I do not think that the district judge was relying upon rule 8.1(3). Like the circuit judge, I believe that the district judge was relying upon para 7.2 of the practice direction. If I am wrong, however, then in my view it would have been an impermissible exercise of the power under CPR rule 8.1(3) to transfer the present case out of Part 8 and into Part 7 of the CPR.”

Ms Robson submits that this is an illustration of the principle that the Protocol takes precedence over the rules.

29. In my view, this appeal succeeds for the reasons articulated so clearly by Ms Cullen. The provisions of the Protocol are regrettably not drafted in a way which makes interpretation entirely straightforward. I am sure, however, that Ms Cullen's submissions are correct.
30. When, at the hearing before the district judge, Wickes objected to the court reading the additional statement filed by Mr Blair, it was not opposing the claim because the claimant had filed and served additional evidence, but, rather, objecting to the new evidence being considered by the court. I agree with Ms Cullen that paragraph 9.1 of Practice Direction 8B was not “triggered” in the situation at all. The district judge quite properly dealt with the matter by reference to paragraph 7 of the Practice Direction.
31. Paragraph 9 addresses the situation where a defendant in his acknowledgement of service, or at a later stage, objects to the claim proceeding under the Protocol because the claimant has failed to comply with the procedure under the Protocol or has filed and served additional evidence with the claim form which has not been provided in accordance with the Protocol. But a defendant served with an additional statement not

filed in accordance with the Protocol is not obliged to oppose the claim continuing under the Protocol. That situation must arise not infrequently in a process used by litigants in person. If all claims in those circumstances were removed from the Protocol process, it would deprive litigants of the benefits of the relatively inexpensive and speedy resolution of their claims which the Protocol provides. In my judgment, a defendant served with an additional statement not included in the material served under Stage 2 has the choice of opposing the claim proceeding under the Protocol or continuing with the process but objecting to the evidence being considered by the court. In this case, Wickes plainly chose the second option. It is crystal clear from the Acknowledgment of Service that Wickes was opposing the claim but not objecting to the use of the Stage 3 Procedure.

32. In those circumstances, the issue fell to be considered by the district judge under paragraph 7 of the Practice Direction. Under that paragraph, the court at the hearing must disregard any evidence not served in accordance with the Protocol and the Practice Direction unless the court considers that it cannot properly determine the claim without it. If it does conclude that the proper determination of the claimant requires the evidence to be admitted, the court may allow the party to rely on the evidence and, if so, will give appropriate directions under paragraph 7.1(3). In this case, the district judge simply concluded that the statement should be disregarded and proceeded to make a decision on the level of damages. In taking that course, he was acting in accordance with the terms of the Practice Direction and the aims of the Protocol.
33. I agree with Ms Cullen's submission that, if Judge Hughes' interpretation of paragraph 9.1 was correct, it would mean that, whenever a defendant objected to the late filing of evidence, the claim would be removed automatically from the Stage 3 Procedure. The court would essentially be deprived of any discretion to deal with the late service of evidence as it considers appropriate. Such a consequence would be contrary to the aims set out in paragraph 3 of the Protocol and may unfairly disadvantage the defendant. By contrast under paragraph 7.1, whilst the default position is that the evidence may not be relied upon, the court has a discretion to order otherwise under 7.1(3) if it considers that it cannot properly determine the claim without it.
34. In this case, by appealing to the circuit judge, the claimant was seeking to overturn the order on the grounds that the district judge should have dismissed his claim as a result of his own failure to comply with the Protocol. As Ms Cullen says, this would allow the claimant to re-litigate the entire claim under Part 7 in the hope of getting a better result.
35. The decision in *Phillips v Willis* is of no assistance to Ms Robson's argument. Paragraph 8.1(3) is not disappplied from claims under the Practice Direction. Jackson LJ did not say that a judge conducting a Stage 3 hearing could not exercise the power under paragraph 8.1(3) to order the claim to continue as if the claimant had not used the Part 8 procedure. Rather, he said that, on the facts of that case, it would have been an impermissible exercise of the power to transfer the case out of Part 8 and into Part 7.
36. In my judgment, the correct interpretation of these various provisions is as follows.

- (1) At a Stage 3 hearing of a claim where the parties have followed the Protocol but are unable to agree the amount of damages, they may only rely on evidence as permitted under paragraph 7.1 of the Practice Direction.
  - (2) In the circumstances described in paragraph 9.1 of the Practice Direction, the court is under a duty to dismiss the claim under the Protocol. The claimant may then start proceedings under Part 7, provided the limitation period has not expired. If the claimant is ultimately successful in the Part 7 proceedings, the court under CPR r.45.24 may order the defendant to pay no more than the fixed costs in r.45.18 plus disbursements allowed under r.45.19.
  - (3) In the circumstances described in paragraph 7.2 of the Practice Direction, the court is under a duty to order that the claim will continue under Part 7. In that event, the claimant is not at risk of his claim being time-barred but under paragraph 7.3 the court will not allow the claimant to recover the Stage 3 fixed costs.
  - (4) In all other circumstances, the court considering a claim under the Stage 3 Procedure has a discretion under CPR paragraph 8.1(3) to order the claim to continue as if the claimant had not used the Part 8 procedure, but in exercising that power the court must comply with the overriding objective and the aims of the Protocol.
37. The arguments before us were focused on the interpretation of the Protocol and Practice Direction summarised above which was the reason for Judge Hughes' decision to allow the appeal from the district judge. Although Judge Hughes mentioned "oblique references" to the excluded statement in the district judge's judgment, that point did not feature in Ms Robson's argument to this court. For my part, I can see nothing in the district judge's judgment to suggest that he relied on that statement in reaching his decision on the quantum of damages.
38. For these reasons, I would allow the appeal and restore the order of the district judge.

**LORD JUSTICE HOLROYDE**

39. I agree.

**LORD JUSTICE HAMBLÉN**

40. I also agree.