Case No: 3YL72762

IN THE COUNTY COURT AT BIRMINGHAM

The Birmingham Civil Justice Centre
The Priory Courts, 33, Bull Street, Birmingham B4 6DS

Date: 27 March 2015

Before :

HHJ WORSTER

Between :

Edward Takwah Cheung	**Claimant**
- and -	
UK Insurance Limited	**Defendant**

Stuart Nicol (instructed by **True Solicitors LLP**) for the **Claimant**
Roisin Kennedy (instructed by **Keoghs LLP**) for the **Defendant**

Hearing date: 3 March 2015
Draft Judgment: 5 March 2015

Judgment Approved by the court for handing down (subject to editorial corrections)

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HHJ WORSTER:

1. This claim arises from a road traffic accident on 27 March 2012. There were five vehicles involved. Three were involved in a collision in front of the Claimant, but he managed to stop, only for the Defendant's insured to collide with the rear of his car and shunt him into the back of a lorry. Liability has been admitted. The Claimant's car was an Audi RS4 Quattro with a personalised registration number T44 WAH ("the RS4"). It was first registered in September 2007 and had done 44,578 miles. The Claimant bought it in 2011 for about £31,000 with the assistance of a finance agreement. Its pre accident value was in the region of £24,000. The Claimant used the car, amongst other things, to create a favourable impression with business clients.

2. The damage to the RS4 was serious and is illustrated in the photographs at [432] and following. The Claimant was injured, and took a taxi home. The cost was £53, and whilst not admitted, he is plainly entitled to recover that from the Defendant. The Police attended and the car was recovered. It appears that it spent 2 days at one garage and was then moved to Skyways, where it was stored pending inspection and disposal. The costs of recovery and storage are also claimed, and whilst they too were not admitted, the Claimant is entitled to recover the sum claimed of £684. The Claimant's claims for personal injury and the pre accident value of the RS4 have been settled. The central issue at trial was the claim for the cost of hire of a replacement car. These were hired on credit for 211 days at a total cost of £103,083.13.

3. The Claimant was the only witness who gave live evidence. In addition I had a witness statement from Erin Sims who set out extracts from the case management notes kept by Accident Exchange, who managed the claim for the Claimant. Those are notes of conversations and events relating to the hire, rather than a full record of all that was done or a verbatim account of the various conversations referred to. In addition I had rates evidence from both sides. The Claimant relied on witness statements from Stephen Evans and James Woodley. Mr Woodley had searched a data base for relevant hire rates, and exhibited the results. The Defendant relied upon a witness statement from Vivianne Lawson. She had carried out a search for rates evidence available on Google as at 10 July 2012. The rates evidence was taken as read, and neither party challenged the validity of the underlying information.

4. **The History**

Following the accident, the Claimant contacted his Audi garage and they put him in touch with Accident Exchange. They arranged for the storage of his car and for the hire of a replacement car. The Claimant's witness statement refers to this at paragraph 23 [85]. He says that Accident Exchange arranged for him "to be provided with alternative transport pending resolution of the claim for my damaged car". From the oral evidence he gave, that does seem to be how he regarded the provision of a replacement car. The Claimant says that he did not want his car returned following the accident because he knew that the damage was extensive and likely to be beyond economic repair.

5. On 27 March 2012, the same day as the accident, the Claimant entered into the first of a number of Vehicle Rental Agreements with Accident Exchange. He also signed the first of a number of "Mitigation Questionnaires". The document is pro forma and includes this:

> *Prior to agreeing to enter into the hire agreement my duty to keep my losses to a minimum has been explained to me ...*

The Claimant has signed the document. He has no recollection now of doing so, but accepted that he had. There is no reason to suppose that his duty to mitigate was not explained to him as the document records.

6. He hired a series of cars at the same daily rate until September 2012:

(i) an Audi Quattro S6 Saloon for a week or so;
(ii) then a Mercedes-Benz E Class Cabriolet until 21 May 2012; and
(iii) then an Audi Quattro S5 Coupe to 20 September 2012.

The details of the charges are set out in a statement at [285]. The rates are a little under the rates referred to in the agreements, but whilst the discrepancy is unexplained, it works in favour of the Defendant. The daily charges are as follows:

The car:	£355
Satnav:	£7.50
Basic Excess Waiver	£12.50
Residual Excess Waiver	£17.50
Windscreen etc waiver:	£3.00

That is a total of just under £400 a day.

7. From 24 September to 23 October 2012 he hired a Land Rover and then an Audi Quattro S5 Coupe Special Edition at a higher rate (about £90 a day more). The reason for that increase was not explored and, in the event, the issue is not one I need deal with.

8. Arrangements were made for the Defendant to inspect the RS4 at the storage yard. An inspection was arranged for 12 April 2012 and the engineer provided a report on 19 April 2012. It confirmed that the car was a write off. The pre accident value given was a little below the figure the Claimant was looking for. Accident Exchange was told that the inspection had taken place on 18 April 2012. The notes at [102] suggest that Accident Exchange knew that it was going to be a write off on 20 April 2012, and the Claimant was informed of the position on 25 April 2012. The note says that he wanted to keep the registration plate, which again confirms that the Claimant was well aware that the RS4 was not going to be repaired.

9. On 9 May 2012 the Defendant agreed full liability and accepted that it was a total loss claim, but a few days later on 14 May 2012 changed its position and would only accept liability for the damage to the rear of the RS4, valued at £1,500 or so.

That remained the position for some considerable time. Accident Exchange instructed an engineer to inspect in June. The Claimant was frustrated by the delay in resolving the claim. That much is apparent from the note of a conversation he had with a case worker at Accident Exchange on 20 August 2012, when he rather lost his temper. Even at that stage liability was heavily in dispute [108-9]. This is not a case of a Claimant dragging out the proceedings.

10. On 11 September 2012 the Claimant put a £1,000 deposit down on a new Audi Quattro A5 Cabriolet. On 20 September 2012 he signed a finance agreement with Audi Finance. The cash price on the agreement at [318] was said to be £49,293.40. There was an advance payment of £5,700 with monthly repayments over 4 years of £686.92. He took delivery of the new Audi on 23 October 2012, and returned his hire car. The total period of hire was 211 days.

11. In his evidence to me the Claimant explained that prior to his decision to buy a new car he had a conversation with Accident Exchange in which he was led to believe that the issue of the liability for the accident would be cleared up soon. Consequently he took steps to buy a new car. My understanding of his evidence is that he understood that when the Pre Accident Value was paid by the Defendant, the provision of credit hire would come to an end. My note of his evidence is that it was explained that matters should be cleared up quickly – in perhaps 2 or 3 weeks. He asked what would happen to the hire car and he was told he would have 7 days to return it. He said that he panicked – he needed a car and so he ordered the Audi.

12. His evidence about the timing of that conversation was not entirely consistent. He initially thought that it was sometime in early October. Later on he said that it would have been in August time. But I accept that this all happened some time ago, and it would be unrealistic to expect the Claimant to remember the exact dates of conversations or the precise detail of what was said.

13. The Claimant's reasoning for waiting so long before buying a new car was that he did not want to be paying two sets of finance charges at the same time. He thought that he could pay off the outstanding finance on the RS4 with the cheque for the RS4's Pre Accident Value which, he understood, would be coming soon. In fact the Defendant maintained its denial of liability for some considerable time. The Defendant made a payment in respect of the RS4's pre accident value in March 2014, and (as intended but rather later than planned) the Claimant used that money to pay off the outstanding finance on that agreement.

14. So far as the proceedings are concerned, there is only one matter of relevance to the issues I have to determine, but it is a matter of some considerable importance. By an order made on 17 September 2014 [39] DJ Shorthose ordered that:

> *The Claimant is debarred from relying upon impecuniosity* ***in relation to any issue.***
>
> *[emphasis added]*

15. By the start of the trial, the areas of dispute had reduced down to need, rate and duration. I find need established on the basis of the evidence the Claimant gave as

to the use of his RS4. He said that he did about 250 miles a week in it. That could be anything from 10 to 100 miles a day. He had a lorry for his business, but he used this car for domestic purposes and to impress his clients.

16. **Rate**

The parties both referred me to the decision of Stevens v Equity Syndicate Management Limited [2015] EWCA Civ 93. Kitchen LJ gave the leading judgment, with which the other members of the Court agreed. The decision was handed down on 26 February 2015. The case provides guidance on the issue I have to determine on the issue of rate.

17. The Claimant has hired on credit hire terms. He is not an "impecunious" Claimant and so is not entitled to recover more than the basic cost of the hire. The Court has to strip out the additional benefits and calculate the "basic hire rate". Aikens LJ summarised the questions to be asked in Pattni v First Leicester Buses; Bent v Highways and Utilities Construction and anor [2011] EWCA Civ 1384 at [73]:

> *[73] ...To summarise, the questions are: (i) did the claimant need to hire a replacement car at all; if so, (ii) was it reasonable, in all the circumstances, to hire the particular type of car actually hired at the rate agreed; if it was, (iii) was the claimant "impecunious"; if not (iv) has the defendant proved a difference between the credit hire rate actually paid for the car hired and what, in the same broad geographical area, would have been the BHR for the model of car actually hired and if so what is it; if so, (v) what is the difference between the credit hire rate and the BHR?"*

It is questions (iv) and (v) which I have to answer in this case.

18. Kitchen LJ provides guidance in Stevens at [34] – [36].

> *[34] The difficulty arises because credit hire companies do not routinely value such additional benefits. They quote and charge a single credit hire rate. It follows that any attempt to value the benefits at a later stage in a proportionate way must necessarily involve a degree of imprecision. The best that can be hoped for, absent a very expensive exercise of disclosure and analysis, is a reasonable approximation. Nevertheless, as Lord Hoffmann went on to explain in Dimond, a reasonable estimate could be arrived at by considering what Mrs Dimond would have been willing to pay an ordinary hire company for the use of a car. I do not understand Lord Hoffmann to have been saying that it was necessary to consider what Mrs Dimond would herself have been prepared to pay. The attitude of the driver who is not at fault must be irrelevant to the analysis. For example, it may be that, as in the present case, that person would never have hired a car at all. The analysis is, as Aikens LJ said in Pattni, an objective one and it is to determine what the BHR would have been for a reasonable person in the position of the claimant to hire a car of the kind actually hired on credit.*
>
> *[35] Here I think one finds the answer to the questions I have posed. The rates quoted by companies for the basic hire of a vehicle of the kind actually*

> *hired by the claimant on credit hire terms may vary. No doubt some are offered on very favourable terms. So also those at the top of the range may reflect particular market conditions which allow some companies to charge more than others. But it seems to me reasonable to suppose that the lowest reasonable rate quoted by a mainstream supplier for the hire of such a vehicle to a person such as the claimant is a reasonable approximation to the BHR. This is likely to be a fair market rate for the basic hire of a vehicle of that kind without any of the additional services provided to the claimant under the terms of the credit hire agreement.*
>
> *[36] It follows that a judge faced with a range of hire rates should try to identify the rate or rates for the hire, in the claimant's geographical area, of the type of car actually hired by the claimant on credit hire terms. If that exercise yields a single rate then that rate is likely to be a reasonable approximation for the BHR. If, on the other hand, it yields a range of rates then a reasonable estimate of the BHR may be obtained by identifying the lowest reasonable rate quoted by a mainstream supplier or, if there is no mainstream supplier, by a local reputable supplier. I would reject Mr Butcher's submission that in circumstances such as these it is permissible simply to look at the highest figure in the range and, if it is greater than or equal to the claimed credit hire rate, conclude that the defendant has failed to prove that the BHR is less than that rate. That, it seems to me, would be manifestly unjust particularly since the credit hire company is in the best position to elaborate upon and give disclosure relating to its charging structures but has not been required to do so in light of the modest size of the claim.*

19. The burden of proving the existence of a lower basic hire rate for the type of car actually hired by the Claimant in the relevant geographical area is on the Defendant.

20. The rates evidence from Ms Lawson's research is summarised at [277]. There are 3 possible hirers of cars in the same group as the replacement cars. The daily rates she found were £294.12, £235.65 and £116.09. Ms Kennedy submits that I should adopt the lowest and assess the recoverable rate accordingly.

21. The summary of the Claimant's rates survey at [151] shows that there are hire companies which charge just as much as Accident Exchange. However Stevens requires me to look for the lowest reasonable rate quoted by a local reputable supplier. Ms Kennedy referred me to the list of hire charges at [144]. Of the 37 hire companies referred to (excluding Accident Exchange from this review) 11 quote a basic hire rate for a car of the type the Claimant hired in Birmingham at the relevant time of £195. Ms Kennedy accepted that the availability status of all those cars was in question. They are marked "OR", which means that confirmation of availability would be provided in an unspecified time. If I were concerned about that she submits that of the 4 hirers with confirmed availability, the lowest charged £160 a day, and I should adopt that as the daily charge.

22. Mr Nicol's submissions focused on the differences between the Accident Exchange rate and the other rates the Defendant relied upon. Firstly he submitted

that it was reasonable for the Claimant to hire with a nil insurance excess. The Accident Exchange rates provided for the excess on the hire car to be paid down to zero, whereas the 3 hirers identified by Ms Lawson's evidence hired on the basis of excesses of £5,000, £2,500 and £2,500 respectively. There was no evidence as to whether those excesses could be reduced to nil, or at what cost. The hirers listed in the Claimant's rates evidence at [144] had "Non Waivable Excesses" of between £1,250 and £3,500 (and mostly between £2,000 and £3,000). It was not reasonable to expect an innocent Claimant to expose himself to that sort of risk; see Morrison J in Bee v Jenson [2006] EWHC 3359 (Comm) at [15]. Secondly the cars identified by Ms Lawson required the payment of a deposit of between £2,500 and £3,000. Accident Exchange required no deposit. The points he raised as to mileage limitations and geography in his skeleton argument were not pressed in his oral submissions. He was right not to do so in the light of the Claimant's evidence of his user, and the fact that cars such as these would probably be delivered.

23. In reply Ms Kennedy submitted that where an excess (or a deposit) equates to a week of hire, it would be reasonable for a Claimant to accept that liability if the daily rate were that much less. Mr Nicol submits that if the Defendant had come to court with but one rate which qualified then it could win the argument. But it had not, and so it lost. I agree with Mr Nicol's submission. The differences he identifies are significant. There is insufficient evidence for me to be satisfied that there is a lower basic hire rate.

24. **Duration**
A claim for the cost of hire of a replacement vehicle is a claim for expenditure incurred in the mitigation of the primary loss. Here that primary loss is the Claimants loss of his use of the RS4. The burden is on the Claimant to prove that such expenditure was reasonably incurred; per Underhill LJ in Zurich Insurance v Umerji [2014] EWCA Civ 357 at [37]. Umerji was also a case where there was an order debarring the Claimant from relying upon his impecuniosity for any purpose, and Underhill LJ held that he was debarred from asserting that he could not afford to buy a replacement vehicle. The same analysis applies in this case.

25. The test is an objective one. The reasoning of the particular Claimant is not determinative. A claim for damages will be reduced if and to the extent that the Claimant failed to take reasonable steps to mitigate his loss. The court is to have in mind the fact that the Claimant is the innocent party, but the tortfeasor is not to be exposed to an additional cost by reason of his victim not doing what he or she ought to have done as a reasonable person; per Beatson LJ in Opuku v Tintas [2013] EWCA Civ 1299 at [13].

26. Ms Kennedy accepts that it is reasonable for the Claimant to hire a replacement car and to stay on hire until the RS4 had been inspected by the Defendant. Thereafter, she submits, it was plain that he would need a new car and that it was not reasonable for him to continue to incur hire charges of just under £2,800 a week when he could have bought a new car at a cost of £686 a month.

27. Mr Nicol submits that the Claimant was acting reasonably in not wanting to enter into a second finance agreement until he could see that he would be able to pay off

the balance owed on the finance for the RS4. He was frustrated by the delay and anxious to get the matter sorted out. In the end he did buy a new car, and took a risk that the Defendants would settle in the near future. In the event he had to pay two sets of finance charges until March 2014. This all shows that he was acting reasonably. Mr Nicol submits that I can take this into account on the issue of reasonableness, and that it does not infringe the order debarring the Claimant from relying upon his own impecuniosity. He criticises the Defendant's approach for placing too onerous a duty on a Claimant. If I accepted Ms Kennedy's analysis, he submits that "the clock would be ticking" against the Claimant, and that would not in accordance with the principles underlying this area of the law.

28. Where the question of reasonableness is under consideration, each case will turn on its own facts. I must look at the situation as it would have been at the time and not with the benefit of hindsight. It was apparent to everyone by mid April 2012 that the RS4 was damaged beyond repair, and that the Claimant would have to buy another car at some point. He intended to buy it with finance. Leaving the debarring order aside for a moment, I can see that he would not want to sign up to another finance agreement until he had paid off the first (or that was in prospect). But he knows that he has to buy a new car, and that has to be paid for at some point regardless of anything else. The choice is as between:

    (i) buying a new car as soon as practicably possible, and paying out £686 per month for 4 years; or

    (ii) waiting until some future point, then paying out £686 per month for 4 years, and incurring a liability for something over £12,000 a month for hire charges in the interim.

The difference between the figures in this case is a stark one, and obvious to anyone in the Claimant's position who gives the issue any serious thought. Once it is apparent that a new car has to be bought, it cannot be reasonable to wait and incur an obligation to pay £12,000 plus a month, when the cost of your new car will be so much less. That is all the more so given that this Claimant is debarred from relying upon impecuniosity.

29. Ms Kennedy referred me to a case decided by the Court of Appeal for Northern Ireland called Clarke v McCullough [2013] NICA 50. The leading Judgment was given by Girvan LJ. At [17] he said this:

> *In the present case the plaintiff was found by the judge not to be impecunious. If we leave out of account the conduct of and the arrangements made by AX and consider what the respondent would have done if left to his own devices and protecting his own interest it is clear that as a reasonable person he would have repaired the car as quickly as convenient and hired a car in the intervening period. Without a guarantee of being reimbursed he would inevitably have considered it improvident and financially imprudent to hire a car on an open ended basis pending recovery of the costs of repairs from the third party at some indeterminate point in the future which could be a long time away.*

30. As that passage indicates, Clarke was a case of repairing a car. It is no more than the application of general principle. It is an example of a Court expecting a Claimant to act reasonably and leaving the role of the accident management company out of account. If the Claimant in this case had been acting reasonably in mitigating his loss, he would have proceeded to buy a new car "... as quickly as was convenient ...". I have no doubt that had he thought that he was ever going to have to pay these hire charges, he would never have waited as long as he did before buying his new car.

31. Ms Kennedy submits that the cut off for hire should be 2 May 2012, two weeks after 19 April 2012 (the date of the inspection report). She submits that would have given the Claimant sufficient time to buy a new car. I see the logic of that, but I am minded to allow the Claimant a little longer. He had to find a suitable replacement for the RS4, and would need some time to arrange the finance. In the circumstances a month is reasonable. In the event, he returned the Mercedes Benz on 21 May 2012, and that would have been about a month after he learned of the inspection. I allow hire charges to that point at the rate charged by Accident Exchange. The Claimant failed to mitigate his loss and acted unreasonably by continuing the hire beyond that point, and the balance of the claim is not to be recovered.

32. May I thank Counsel for their assistance.

General Form of Judgment or Order

In the County Court at Birmingham	
Claim Number	3YL72762
Date	27 March 2015

MR EDWARD TAKWAH CHEUNG	**1st Claimant** **Ref** CJ/287631
UK INSURANCE LTD	**1st Defendant** **Ref** MLM.REH.379350

Before His Honour Judge Worster sitting at the County Court at Birmingham, Civil Justice Centre, The Priory Courts, 33 Bull Street, Birmingham, B4 6DS.

Upon hearing Counsel for the Claimant and Counsel for the Defendant

Upon handing down judgement

IT IS ORDERED THAT

1. There is judgement for the Claimant in the sum of £51,137.35 including interest.

2. The Claimant gives credit for the interim payment received in the sum of £23,678.75 leaving a net balance of £27,458.60 to be paid within 14 days of the date of this order.

3. The Defendant shall pay the Claimant's costs of this action to be subject to a detailed assessment on the standard basis in default of agreement, and the Defendant pay an interim payment on account of the Claimants costs in the sum of £7,500.00 plus VAT on or before 10 April 2015.

4. The Defendant application for permission to appeal is refused.

5. This is a final order and the the route of appeal is to the Court of Appeal. An appellants notice must be filed with the Court of Appeal within 21 days of today.

Dated 27 March 2015