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| IN THE NEWCASTLE UPON TYNE COUNTY COURT | No. E75YX370 |
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Newcastle Upon Tyne Combined Court Centre

The Law Courts

Quayside

Newcastle Upon Tyne NE1 3LA

Friday, 20 December 2019

Before:

HIS HONOUR JUDGE FREEDMAN

BETWEEN:

 JUSTIN JACK Claimant/Appellant

- and -

 GREGORZ BORYS Defendant/Respondent

\_\_\_\_\_\_\_\_\_

MR A. HOGAN (instructed by Winn Solicitors) appeared on behalf of the Claimant.

MR H. EAST (instructed by DWF LLP) appeared on behalf of the Defendant.

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**JUDGMENT**

JUDGE FREEDMAN:

1. This is an application for permission to appeal the decision of District Judge Phillips, made on 8 August 2019, whereby he declined to allow the claimant to recover the costs of a hire vehicle. The matter has been listed in this way, that if permission is granted then the court will hear the substantive appeal. In the result, having reviewed all of the papers in this case, I concluded at the outset of the hearing that permission should be granted on the basis that there is, in my judgment, a real prospect of the appeal succeeding.
2. The background is this. A road traffic accident occurred on 1 March 2018. The defendant’s insurers admitted liability for the accident. There was, arising from the accident, various claims, including a claim for damages for personal injuries as well as losses incurred in relation to damage to the claimant’s vehicle. He was driving a Vauxhall Combo van at the time. I am told that it was written off as a result of the accident. There were the usual claims for vehicle storage and recovery, but at the heart of this appeal is the claim for the cost of hiring an alternative, replacement van over the period before the decision was reached that his vehicle should be written off; and the third party insurers making recompense for the pre-accident value of his vehicle.
3. He was, it seems, impecunious in the context of ‘credit hire’, and accordingly he entered into a credit hire agreement for the cost of the hire vehicle. Those costs are what are the subject of this appeal.
4. The unusual feature and the matter which caused the Judge to disallow the claim for hire of an alternative vehicle was the fact that the claimant’s Vauxhall van did not have a valid MOT certificate at the time of the accident; indeed it had expired four-and-a-half months earlier on 18 October 2017. The claimant in his witness statement said that he had not been aware that it did not have a valid MOT, that it was due to oversight on his part, and had it been brought to his attention, he would have remedied the matter straight away. Be that as it may, in defence of the claim the defendant submitted and argued that the claim for hire charges should be dismissed on the basis of the principle *ex turpi causa* *non actio oritur*. It is a novel proposition that somebody who does not have an MOT certificate for their car which they are driving is thereby guilty of a serious criminal offence, for *ex turpi causa* will only be properly invoked in circumstances where there is serious criminality. Failure to have an MOT certificate due to an oversight could possibly give rise to a fine, but that is not what one would describe as criminal behaviour, in the true sense of the word. I am staggered that it was pleaded. I am even more staggered that it was argued before the District Judge. The District Judge would have none of it, however, and said that *ex turpi causa* had no part to play in this case. He was unquestionably right about that.
5. But he went onto find that the defendant’s submission that the claimant was placing himself in a better position by hiring a vehicle which had a valid MOT certificate should deprive him of the cost of that hire. I read verbatim from the Judge’s judgment:

“The secondary submission on behalf of the defendant was at the time of the incident Mr Jack was effectively driving a vehicle which ought not to be on the road. Mr Mugliston submitted that by taking out a hire vehicle, a roadworthy vehicle with a valid MOT, the claimant was placing himself in a better position.

The claimant clearly has been able to drive that hire vehicle when, immediately prior to the incident, he had use of a vehicle that ought not to have been on the road within the meaning of the relevant regulations.

In my judgment, this is a case where Mr Jack should not be entitled to claim for hire charges in the circumstances whereby he has been placed in a better position than he previously enjoyed.

Boiling this matter down to the basic elements – immediately prior to the incident
Mr Jack did not have a roadworthy vehicle. Immediately after the incident he acquired one as a result of the credit hire agreement. He has clearly placed himself in a vastly improved position as a result.”

Then he concluded by saying:

“I shall deprive him of this element of his claim and dismiss his claim for damages for credit hire.”

1. I am bound to say that I have come to the conclusion that that reasoning is flawed for this reason; the Judge has effectively dismissed the claim for hire charges on a basis of betterment, on the grounds that the claimant was in a better position in driving a hire vehicle because it had a valid MOT certificate. However, in my judgment that is not the proper approach. The approach is to start with what remedy the claimant is entitled to, having been the innocent party in a road traffic accident. It is of course well established that a driver whose vehicle is damaged in an accident such that it cannot be used post-accident is entitled to hire an alternative vehicle until such time as he is in a position to either have his vehicle repaired or obtain an alternative vehicle. That much is trite law, and it is not suggested by Mr East, who appears today on behalf of the respondent, that that is incorrect, as a fundamental proposition.
2. If one starts from that standpoint, that Mr Jack was entitled to have a vehicle to replace the vehicle that he could no longer use because it had been damaged in the accident, then one has to ask what else could he do but hire a vehicle which had a valid MOT certificate. There was no other option available to him. If one then says: but actually because he did not have a valid MOT certificate he is deprived of having a vehicle, or should be deprived of having a vehicle which had a valid MOT certificate, effectively that is going down the route of *ex turpi causa* because it is saying by his failure to obtain an MOT certificate he is not, following an accident, entitled to hire a car with a valid MOT certificate. That, to my mind, would be an absurd result
3. In so far as there is betterment, and it is marginal, that does not mean that he should be precluded from obtaining an alternative vehicle and recovering the hire charges. That is just an incident of something that has occurred following an accident. It is often the case that a driver whose vehicle has been damaged actually is given a somewhat better vehicle than he owned. That will not in normal circumstances amount to any significant betterment. It may be a slight improvement on his position, but it does not mean that he should be precluded from recovering the cost of the hire. What is said on behalf of the defendant/respondent is that he did not have a roadworthy vehicle before the accident and therefore he should not be allowed the costs of a roadworthy vehicle following the accident. That is unsustainable, in my judgment, because he had a vehicle which was capable, and was being driven on the road. *De facto* it was a vehicle that he could use; *de facto* it was a vehicle which he used. What he was entitled to following the accident was a vehicle which he could use on the road. What he did was all he could have done in those circumstances.
4. The minor infringement of the regulations not having an MOT certificate does not mean necessarily, or at all, that he did not have a roadworthy vehicle. I do not know what condition it was in, but it does not render it a non-roadworthy vehicle in the sense that
I understand roadworthiness; roadworthiness means a vehicle that can be driven on the road.
5. The argument, or the reasoning of the Judge, does seem to be based on betterment, because he accepted the proposition that the claimant was placing himself in a better position by obtaining a vehicle with an MOT certificate. That could only be properly upheld if the claimant had an alternative option open to him.. If I look at a situation where a claimant has hired a vehicle which was far better and more powerful than the vehicle that he drove at the time of the accident, then that would be deliberate betterment and he would not be entitled to recover the hire charges. That is not the situation here. He had no choice, and he hired, as I understand it, a vehicle that was comparable to the Vauxhall Combo van that he was driving at the time of the accident.

11 I think what has happened is that the Judge has approached the matter from the wrong standpoint. He has looked at it from the perspective of what the claimant failed to do rather than looking at what was the claimant’s entitlement, which was to have a vehicle which he could use on the road. If you start from that proposition it is not difficult to come to the conclusion that he should recover the hire charges notwithstanding the absence of the MOT certificate. As Mr Hogan says in his written argument, with force, effectively if it is the case that he cannot recover his hire charges, then by a different route the same outcome has been reached as would have been the case with *ex turpi causa*. That cannot be acceptable. I am entirely satisfied that the appellant here should recover his hire charges, and to that extent the decision of the Judge should be overturned. It seems that there was no argument about impecuniosity; that therefore he was entitled to enter into a credit hire agreement; and there were no alternative figures suggested for the cost of hire. That being the case the appellant is entitled to the additional sum of £6,582.48.

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**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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**This transcript has been approved by the Judge.**