IN THE NEWCASTLE-UPON-TYNE COUNTY COURT (ON APPEAL FROM DISTRICT JUDGE HOWARD SITTING AT MORPETH COUNTY COURT)

Claim No. A01YX658

The Law Courts
The Quayside
Newcastle-upon-Tyne
NE1 3LA

12 June 2015

Before:

HIS HONOUR JUDGE FREEDMAN

Between:

MR WILLIAM LAWSON

Appellant/Claimant

-v-

MS NATASHA MULLEN

Respondent/Defendant

Counsel for the Appellant/Claimant: MS JOSEPHINE SCALLY

Counsel for the Respondent/Defendant: MR STEVEN TURNER

Hearing date: 15 May 2015

JUDGMENT

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INTRODUCTION

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1. Mr William Lawson seeks permission to appeal the decision of District Judge Howard made on 27th February 2015 in relation to the level of car hire charges which he allowed. The matter was listed as a permission to appeal and (if allowed) the appeal to follow. In the event, the application for permission to appeal and the appeal itself were rolled up into one hearing.

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BACKGROUND

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2. The claim arises out of a traffic accident which occurred on 15th July 2014. The appellant's wife was driving a Vauxhall Antara motor vehicle belonging to the appellant when, while stationary on the B6320 road in Wark, Northumberland, the respondent drove into the rear of the vehicle. Liability has never been an issue.

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3. The matter came before District Judge Howard for a determination of hire charges and other incidental expenses. The claim was for hire charges of £7,384.05 being the amount charged by ON Hire Limited under a credit hire agreement. There was no issue as to need for a replacement vehicle. The appellant did not seek to rely upon impecuniosity.

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DECISION OF DISTRICT JUDGE

4. Before the District Judge, there were two issues, namely the appropriate period of hire and the appropriate rate of hire. As to the former, the District Judge found that a 28-day period of hire was reasonable in all the circumstances. In relation to the rate of hire, the District Judge declined to award the amount charged by ON Hire Limited for

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the hire of a Toyota RAV4 motor vehicle. Instead, he relied upon the basic hire rate evidence produced by Rob Stone of TCF Corporate Limited on behalf of the respondent. He adopted the rates quoted by Enterprise for the hire of a Nissan X-Trail or Honda CRV, the total cost of hire being £2,500.12 for a 28-day period. In addition, the District Judge allowed the cost of excess reduction whereby the excess was reduced to £500 which amounted to £11.99 per day and the cost of an additional driver which amounted to £10 per day. The total of those figures was £3,115.84.

5. In the course of his brief *ex tempore* judgment, the District Judge noted that the rental from ON Hire Limited provided for a nil excess. This was to be contrasted with the £500 excess charged by enterprise. He went on to say this:

> *"It is up to this court to decide as to whether the sum of £500 excess is out of the ordinary in relation to this particular type of hire for this particular type of vehicle, and this court is satisfied it is not unduly unjust in the circumstances and that the defendants have provided sufficient information to enable this court to find that a car, which I find a Nissan X-Trail and/or a Honda CRV or similar, could have been provided at around that time for this family at a cost of £2,500 and coppers for the exact 28-day period as per the quotation and that for an additional sum of £615.72 that would then cover the excess and reduce it down to £500 and allow the additional driver to drive."*

6. Mr Turner, on behalf of the respondent, submits that although the District Judge did not specifically use the word *reasonable*, his decision was essentially based on notions of reasonableness. I think that submission is well founded. It seems to me that the

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District Judge in adopting and applying the rates quoted by Enterprise was determining what seemed to him to be a reasonable hire rate for an alternative vehicle.

GROUNDS OF APPEAL

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7. Two grounds for appeal are raised:

(1) As a matter of law, the District Judge was wrong to conclude that the vehicle which could have been hired from Enterprise was 'like for like' with the vehicle actually hired from ON Hire Limited because the basic hire rate did not provide for a zero excess waiver in the event of damage to the hired vehicle. It is argued, therefore, that the District Judge erred in law in substituting the basic hire rate for the credit hire rate.

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(2) The District Judge erred in law and/or in the exercise of his discretion in relying upon basic hire rates evidence which was confined to a single supplier of hire vehicles within the appellant's geographical area and provided for a fixed 28-day period of hire in circumstances where the evidence indicated that the actual period of repair would be much less than 28 days. It is submitted that a pre-planned 28-day rate will be subject to market discount compared to a daily or even a 14-day rate for basic hire. Absent any evidence as to what the daily rate would have been, it is argued that the District Judge should have ignored the comparators provided by Mr Stone.

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DISCUSSION

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Zero Excess Waiver

8. In support of her submission that, as a matter of law, a person whose vehicle is damaged as a result of an accident through no fault of his own is entitled to hire an alternative vehicle with nil excess, Ms Scally relies upon a number of cases which need to be considered. First, <u>*Marcic v Davies*</u> *(Court of Appeal, 20th February 1985, Unreported)* where Lord Justice Browne-Wilkinson gave the leading judgment. In that case, the hirer incurred hire charges of £605 which included a sum of £78 in respect of a zero excess waiver. The argument raised by the defendant on appeal was that in obtaining a zero excess waiver, the hirer was in fact better off because when driving his own car, he only had the benefit of third party insurance. It was submitted that he should have hired a vehicle on the basis that he would have to bear the excess of £150. That argument was rejected by the Court of Appeal on the basis that *"it was entirely reasonable that he should pay the waiver fee to cover himself against contractual liability which he would otherwise never have been under."* But, in coming to that conclusion, Browne-Wilkinson LJ noted that *"it was accepted that it was reasonable for him to hire the car from the car hire company"*: such is to be contrasted with the instant case.

9. Moreover, and although on the facts of that case, the Court of Appeal concluded that the judge below was right be include the waiver fee as an item of recoverable damage, it does not seem to me that the case is authority for the proposition that, as a matter of law, a hirer will always be entitled to hire a vehicle on terms that there is no excess. I think that Mr Turner is correct when he says that the decision in *Marcic* goes no further than to establish that it was reasonable on the facts of that case for that claimant to purchase collision damage waiver at a cost of £78. (with inflation, on today's figures, just over £232). It also seems clear to me that the test which the Court of

Appeal was applying was what was *reasonable* in the circumstances of that particular case.

10. The second case replied upon is:*Bee v Jenson [2006] EWHC 2534 (Comm)*. The matter in dispute in that case was related to the arrangements between a Legal Expenses Insurance Company (DAS) and a hire company, Helphire, specifically that DAS should give credit for any commission payments received from Helphire. But, and of some importance, it was not argued that the hire charge for a replacement vehicle was higher than the basic hire rate which the hirer would have been charged had he himself arranged for the hire of a replacement vehicle as opposed to his insurers. Further, and in addressing the question of quantum, Morrison J observed; *"...It is now clear on the evidence that the rate charged by Helphire with a nil excess was very good value for money, by comparison with other spot rates."*

11. The judge then went on to consider the question of waiver of the excess and it is the following passage upon which Ms Scally places heavy reliance:

> *"Had the point been live, I would have held that it was reasonable for the replacement vehicle to have been provided with a nil excess regardless of the excess which applied to Mr Bee's own car."*

12. The judge then went on to quote from counsel's skeleton argument with which he fully agreed. The relevant passages, relied upon by Ms Scally are as follows:

> *"He* [the defendant's expert] *treats Mr Bee as if, on receiving a hire car, was in the same position after the accident as he was before it. Obviously, he was not. He was not in his own car; he was in somebody else's. He was obliged to return the car in the same state he had received it. Were his own*

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car damaged, he could defer repairs, perform amateur or temporary repairs or not bother with repairs. These would not be options with Helphire. Moreover, were [Mr Bee] *to be blamed for damage to that vehicle he would be subject not only to a claim for the cost of the repair, but also for Helphire's loss of profit whilst it was out of commission. In other words, by forcing Mr Bee into a hire vehicle,* [the defendant] *was exposing him to risks which he did not previously face, such that his insurance needs were different. As such, it is impossible to portray the nil excess as a betterment. It was a reasonable arrangement, consequential on the tort."*

13. As Mr Turner points out, the comments made by Morrison J are pure *obiter dicta* and, in any event, the matter under discussion was whether a nil excess constituted a betterment. It seems to me that the judge was saying no more than on the facts of that case, where there was no disparity between the credit hire rate and the basic hire rate, it was *a reasonable arrangement* for the claimant to hire a vehicle with nil excess.

14. Ms Scally also relies upon another first instance decision:*Dhami v Amlin Corporate Member Limited (Birmingham County Court, 23rd July 2013, Unreported* In his *ex tempore* judgment HHJ Oliver Jones QC found that the hiring of a BMW, which could only be hired with an insurance excess of £3,000 without any possibility of collision damage waiver, could not be compared with the vehicle which had in fact been hired and in respect of which there was no excess. He stressed that, in his view, collision damage waiver formed part of the daily hire rate. The latter is perhaps not contentious but at paragraph 26 of his judgment, he said this: *"The hirer is not required to pay an excess."* Insofar as the judge was advancing that proposition as a proposition of law, based upon the decision in *Marcic*, with respect, I am unable to agree with him. The

judge did not ask the question, in that case, as to whether the hire charges incurred by the claimant were, in all the circumstances, reasonable.

15. Ms Scally also makes passing reference to the recent case of *Stevens v Equity Syndicate Management Limited [2015] EWCA Civ 93*. However, its only relevance to the issue which arises on this appeal is that the Court of Appeal agreed with the Recorder when he focused on four mainstream suppliers for basic hire with a nil excess. But, again, that was fact-specific; the evidence was that there was a considerable body of basic hire rates for similar vehicles in the claimant's locality at somewhere between £60 to £66 with a nil excess as compared to other rates where there was an excess and a much higher daily charge. At all events, the decision in that case is essentially authority for the proposition that in adopting a basic hire rate, it is not appropriate to take an average but rather to take the lowest reasonable rate from within the range quoted by mainstream suppliers.

16. On behalf of the respondent, Mr Turner concedes that in many cases it may well be reasonable for a claimant to obtain a hire with a nil excess but he maintains that the overarching test is whether the charges actually incurred by the claimant are reasonable having regard to basic hire rates available elsewhere. He accepts that the burden is on the respondent to demonstrate that the credit hire rates are excessive or unreasonable and to show that, in such circumstances, the hirer has failed to mitigate his loss.

17. In support of the contention that the issue is one of reasonableness, Mr Turner reminds me of what was said by Lord Justice Aikens in the well-known case of *Bent v Highways and Utilities Construction [2011] EWCA Civ 1384* at paragraph 73:

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> *"... 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 kind 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 as if so what is it; if so, (v) what is the difference between the credit hire rate and the BHR?"*

18. Mr Turner places considerable emphasis on the second question in order to make good his submission that the overriding test is one of reasonableness, having regard to what basic hire rates would be available in the market. He argues that it is a question of fact and degree. In other words, if the credit hire rate is only marginally or, at least, not very substantially higher than the basic hire rate available and the former includes nil excess whereas the latter does not then a court might conclude that it would be reasonable for the hirer to incur the somewhat higher rate.

19. However, on the facts of this case he submits that the District Judge was entirely right in concluding that it was unreasonable for the appellant to incur hire charges of nearly £7,400 where a basic hire rate over the same period for an equivalent car, albeit with a £500 excess, was approximately £3,115. To put the matter in sharp focus, the appellant sought to recover credit hire charges at a daily rate of £264.79, whereas a comparable vehicle could have been hired locally from Enterprise for a similar period at a rate of £111.28, a difference of more than £153 per day.

20. To put it another way, is it reasonable for the insurer to be required to pay an additional £4,300 in order to avoid the appellant facing the potential risk of having to

pay a £500 excess in the event of the hire car being damaged? Mr Turner relies upon the well-known case of *Darbishire v Warren [1963] 1 WLR 1067* which is authority for the proposition that the claimant must act with commercial common sense and have at least some regard for the economic interests of the tortfeasor. Similar observations are made at paragraph 9-076 of *McGregor on Damages*. He also makes the point that a reasonable person spending his own money would not have incurred an additional daily charge of some £153 in order to avoid the risk of paying an excess of £500.

21. As it seems to me, Ms Scally's submission could be tested in this way: if, as she says, a claimant has an automatic right, as a matter of legal principle, to hire a car with a zero excess, and if there is no basic hire rate for a similar vehicle with similar excess then (as a matter of logic) whatever amount is charged by the credit hire company is properly recoverable from the defendant's insurer. But Ms Scally responds to this by saying that it is not an unqualified legal right, insofar as it is subject to the credit hire charges being extortionate. If they were deemed to be extortionate, then she concedes that it would not be proper to require the insurer to meet those costs. It is surely correct that the defendant's insurer should not be required to meet extortionate charges but in concluding that a particular charge is extortionate, I query whether that is saying any more than the charges are unreasonable or, perhaps, grossly unreasonable. Whichever way the matter is looked at, it seems to me that the concept of reasonableness is imported.

22. At all events, in my judgment, a claimant, as a matter of legal principle does not have an inalienable right to hire a vehicle with a full waiver excess. In many situations it may be reasonable for a claimant to obtain a replacement vehicle with a nil excess, but

where, as here, there is a gross disparity between what the credit hire company charged and the basic hire rate, with the only additional advantage being the waiver of a £500 excess, it may well be unreasonable for the claimant to incur that additional cost. It seems to me that Mr Turner is entirely right in submitting that the ultimate test is one of reasonableness and that if the defendant can show that the claimant has failed reasonably to mitigate his loss, then the hire charges claimed ought not to be recoverable.

Respondent's Evidence as to BHR

23. According to his statement, Mr Stone identified 61 organisations through the internet in his search for a suitable alternative vehicle. Only three such organisations were able to provide a comparable hire vehicle rate. Two of those organisations were based in Edinburgh. The District Judge found (at least by implication) that only the rates offered by Enterprise, being approximate 17 miles from the appellant's home, were therefore appropriate in carrying out the comparison. As it happens, the other two comparators, Avis and AMT offered much more competitive rates with an excess of, in one instance, £500 and, in the other, £625. Mr Stone, in his statement, said that in seeking to obtain comparative quotations, he acted as a "mystery shopper" and added this: *"The period of hire would not be known, so based upon a period of 28 days."* The enterprise screen grab has a heading "28-day quote", with a pick up on 12th February 2015 and return on 12th March 2015. But within the quote, a weekly figure is given and then multiplied by four.

24. The evidence is therefore somewhat equivocal as to whether in fact Mr Stone asked for a quote for a 28-day fixed period of hire or whether he asked for a daily rate, but on the basis that the vehicle would be hired over a period of 28 days. However, I accept

Ms Scally's submission that it would seem that the District Judge concluded that the quotation was for a fixed 28-day period.

25. Mr Stone selected a 28-day period for good reason, because that was in fact the period of hire, the rental having started on 23rd July 2014 and concluded on 19th August 2014. However, it was not known in advance that the vehicle would need to be hired for 28 days. The appellant's vehicle went in for repair five days after the accident, on 23rd July, and on 29th July, the assessors indicated that the repairs would take six to seven days to complete. In the event, the repairs were not completed until 14th August and it was a further five days before the appellant was able to pick up his vehicle. Although not known in advance that the hire period would need to be in the order of four weeks, it does seem to me that on the basis of what is set out in the credit hire rental agreement, the arrangement was for a rental period of 28 days. It is specifically stated that the rental start date was 23rd July and end date was 19th August, *unless ended by the customer prior to that date.* The agreement sets out the daily charge. There is no indication, one way or the other as to whether by entering into a 28-day agreement, the rates were cheaper. Equally, as it seems to me, there is no evidence to support the proposition that because, as the District Judge found, Mr Stone asked for hire for a 28-day period, the quote was lower than it otherwise would have been. Ms Scally argues that judicial notice should be taken of the fact that a pre-planned 28-day rate would be subject to a market discount. I agree with Mr Turner that that is pure speculation.

26. In my judgment, there was nothing inherently unreliable about the evidence adduced by Mr Stone. He had succeeded in finding a rental company in the appellant's locality which had a vehicle similar to the damaged vehicle; and he had obtained a quotation for the weekly hire rate of that vehicle as well as the cost of reducing the excess to

£500 and the cost of having a second named driver. This was evidence, as it seemed to me, that the District Judge was perfectly entitled to rely upon in determining local basic hire rates.

DECISION

27. I am satisfied that the District Judge applied the correct test, namely that of reasonableness, in determining what sums the appellant should recover for the cost of hire of an alternative vehicle. I am equally satisfied that he was entitled to rely upon Mr Stone's evidence in determining what was the local basic hire rate. In my judgment, there was no error of law in applying a basic hire rate where there was an excess of £500. Further, to apply basic hire rates provided by Enterprise was well within the District Judge's wide ambit of discretion.

28. In conclusion, and whilst I am willing to grant permission to appeal in relation to the first ground of appeal, but not the second ground of appeal, ultimately, this appeal fails.