Case Nos: (1) B2/2010/2882
(2) B2/2011/0498

Neutral Citation Number: [2011] EWCA Civ 1384

(1) IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MRS JUSTICE SWIFT
NG10-021A

(2) ON APPEAL FROM THE CAMBRIDGE COUNTY COURT
HER HONOUR JUDGE PLUMSTEAD
8CB01193

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/11/2011

Before:

LORD JUSTICE PILL
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE AIKENS

- -

Between:

(1)	**VASANT PATTNI**	**Appellant**
	- and -	
	FIRST LEICESTER BUSES LIMITED	**Respondent**
(2)	**DARREN BENT**	**Appellant**
	- and -	
	HIGHWAYS AND UTILITIES CONSTRUCTION	**First Respondent**
	- and -	
	ALLIANZ INSURANCE	**Second Respondent**

(1) Mr Christopher Butcher QC and Mr Robert Marven (instructed by **TLT LLP**) for the **Appellant.**
Mr Mark Turner QC and Mr Richard Whitehall (instructed by **Berrymans Lace Mawer LLP**) for the **Respondent.**
(2) Mr Christopher Butcher QC, Mr Guy Vickers and Mr Benjamin Williams (instructed by **PCJ Solicitors Limited**) for the **Appellant.**
Mr Mark Turner QC (instructed by **Berrymans Lace Mawer**) for the **Respondent.**

Hearing dates: 4 & 5 October 2011

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(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Judgment
As Approved by the Court

Lord Justice Aikens:

I. The two appeals in outline

1. These appeals are fought on two new fronts in the saecular war that has now been conducted for over 20 years between the motor insurance market and credit car hire companies who provide an innocent victim of a motor accident ("an RTA") with a replacement vehicle whilst his is being repaired. Both appeals concern points of principle which might arise in similar types of case, with which the County Courts of England and Wales deal every working day of the week. In all these cases involving the hire of replacement cars on credit terms, although the nominal claimant is the innocent victim of the negligent driving of the nominal defendant, the real parties behind the actions are always, on the claimant's side, a credit hire company which is seeking to recover the car hire costs involved; and, on the defendant's side, a motor insurance company which is at risk of having to pay out on behalf of its insured, the negligent driver.

2. In the first appeal, ***Pattni v First Leicester Buses Ltd,*** Mr Pattni hired a replacement car on credit terms (although he could have afforded to hire a car without credit terms) under which, at least nominally, he was contractually obliged to pay interest on the credit hire charges for the period between the end of the hire of the replacement car and the date when the claim against the defendant driver was finalised. In that case HHJ O'Rorke held that the claimant is entitled to recover hire charges but calculated by reference to the so-called "spot rate" applicable. HHJ O'Rorke also held that no sum representing interest on that figure (whether claimed as damages or as interest pursuant to statute) could be recovered. On appeal on the question of interest, Swift J reached the same conclusion. Mr Pattni appeals to this court with permission granted by me. I will refer to the nominal claimant in this action as Mr Pattni and the nominal defendant as "FLB".

3. In the second appeal, ***Darren Bent v Highways and Utilities Construction Limited and Allianz Insurance,*** Mr Bent, who is a well-known Premier League and England footballer, hired an Aston Martin DB 9 on credit hire terms as a replacement for his Mercedes Benz CLS 63 AMG Coupé which was damaged in an accident where he was not at fault. Mr Bent could have hired a suitable replacement car without taking up credit hire facilities. The issue in that case concerns the proper method of calculating the so-called "spot rate" for a replacement vehicle. Mr Bent appeals to this court from the order of HHJ Plumstead with permission granted by me. I will refer to the nominal claimant in this action as Mr Bent and to the defendants as "Highways" and "Allianz" respectively. Allianz is, obviously, the insurer of Highways.

4. We heard these two appeals consecutively on 4 and 5 October 2011. Mr Butcher QC led the appellant's legal team in both appeals. Mr Turner QC led the respondent's legal teams on both appeals. We reserved judgment in both cases.

5. Given the common factors in these appeals it seems sensible to give one judgment covering both cases, even though the two appeals raise distinct points of principle. The common features are: (1) the nominal claimant is the innocent victim of an RTA

caused solely by the negligence of the nominal defendant; (2) the nominal claimant has hired a replacement car on credit terms even though he could have afforded to hire one without entering into a credit hire agreement; (3) it is now accepted in each case, at least for the purposes of these appeals only, that it was reasonable for the nominal claimant to have hired the particular make and model of car that he did for the period of hire in question.

II. *Pattni v First Leicester Buses Ltd*: the Facts and the judgments below

6. The accident between Mr Pattni's Porsche 911 Coupé and the FLB vehicle occurred on 9 April 2008. The driver of the FLB vehicle was solely at fault. Mr Pattni's Porsche was damaged and needed repair. He required a replacement car. On 12 April 2008 Mr Pattni, using the services of Swift Rent-A-Car Limited ("Swift"), hired a substitute car, which was an Audi R8. It has always been accepted that this was a reasonable substitute car to hire. It was hired on credit terms.

7. Mr Pattni used the Audi R8 for 40 days whilst his car was being repaired. The total hire cost, including VAT, was over £25,000. That is very nearly one third the value of the Porsche 911 Coupé itself.

8. Mr Pattni brought a claim against FLB. The claim was for the cost of the repairs to the Porsche 911 and the hire charges paid for the replacement Audi R8. Effectively, the entities behind Mr Pattni's action were Mr Pattni's motor insurers, who had paid for the repairs, and Swift, who had borne the cost of the hire of the replacement Audi R8. The action was allocated to the fast-track. The trial was heard by Judge O'Rorke. Having considered the evidence, Judge O'Rorke accepted that Mr Pattni needed to hire a replacement car. He also accepted Mr Pattni's need for an expensive model of substitute car. However, the judge reduced the number of days hire to which Mr Pattni was entitled to be compensated from 40 days to 29 days.

9. The daily credit hire rate for the Audi R8 was about £500. Judge O'Rorke held that Mr Pattni was sufficiently well off to have been able to hire the replacement car in the conventional way by paying hire in advance. The judge accepted evidence that if Mr Pattni had made reasonable searches locally to hire a substitute car (on non-credit terms) he could have done so for a basic hire rate ("BHR") of £370.50 per day. Therefore, in accordance with established authority, Judge O'Rorke held that the daily hire rate recoverable from the defendant was £370.50. The judge accordingly awarded total hire charges of £10,744.50, i.e. 29 x £370.50 per day.

10. Mr Pattni (effectively Swift) claimed interest on this sum for the period between the end of the hire of the car and the date the judge gave judgment, pursuant to the terms of the credit hire contract. The judge rejected that claim.

11. The claimant appealed with the permission of Hamblen J. Swift J heard extensive argument on whether interest on the hire charges should be awarded. In a reserved judgment Swift J considered the three ways in which counsel for the claimant had argued that Mr Pattni was entitled to recover interest on the hire rate awarded by Judge O'Rorke. The first argument was that Mr Pattni was entitled to interest in accordance with the contractual obligations imposed upon him by his credit hire agreement with Swift. It was, however, conceded that Mr Pattni would only be entitled to interest on the hire charges actually awarded by Judge O'Rorke, not the

full credit hire charge agreed under the credit hire agreement. The second argument was that the judge should have increased the damages represented by the daily basic hire rate to reflect the fact that if Mr Pattni had actually paid out the hire charge in advance, he would have been kept out of his money for some period. Therefore (it was argued) Mr Pattni must be entitled to a sum of interest as damages for the loss of use of his money. Lastly it was argued that the judge should have awarded statutory interest on the principal sum of car hire found recoverable, pursuant to ***section 69*** of the ***County Courts Act 1984***.[1]

12. Swift J rejected all three arguments and so dismissed the appeal. The core of her judgment is at [34] – [45]. On the first argument, Swift J held that the claimant had suffered no loss in relation to interest for which he required to be compensated. The judge emphasised (at [40]) that there was no evidence that the claimant would have to pay interest under the Agreement or that his insurers would have to do so. On the second argument, Swift J held (at [43]) that the claimant had failed to prove any loss of interest which would sound in damages. On the third argument, Swift J held (at [45]) that as there was no evidence that the claimant or his insurers had suffered any loss, the judge was entitled to exercise his discretion under ***section 69*** of the ***County Courts Act 1984*** as he did.

III. The Terms of the Car Hire Agreement concluded between Mr Pattni and Swift.

13. The terms of the agreement ("the Agreement") are fundamental to the first argument raised in the Pattni appeal. I have set out all the relevant detailed terms in an Appendix to this judgment. However, I will describe here the key provisions. The Agreement is on a standard form and contains terms on both sides of a single sheet of paper. The front page of the terms consists of a number of boxes, some of which have to be completed, eg. with personal details of the hirer or with one of a number of choices that have to be made. Other boxes contain some of the terms of the Agreement. Mr Pattni is called "The Hirer". The car hire company, Swift, is referred to as the "The Owner". Box 13 is important. In summary it provides that "the owner" will make the hired vehicle available in consideration of the hirer's agreement to pay the rental charges set out in the Agreement "*together with any amounts payable in respect of insurance, CDW, and other ancillary charges (the "Hire Charges") and upon the terms and conditions set out on the reverse of this document"*. The box continues with terms in capital letters to the effect that the agreement is legally binding when signed by the hirer and that it contains the entire agreement between the owner and the hirer.

14. The "Conditions of Hire" are set out on the reverse page. Condition 1 is headed "Definitions". Condition 1.2 includes definitions of "Claim" (which is the claim by the person who has hired the car to recover his loss and damage suffered as a result of the RTA) and "Interest Rate". These terms are set out fully in the Appendix. Condition 9 is headed "Payment". Condition 9.1 imposes an obligation to pay the hire charges at the end of the hire period. Condition 9.2 imposes an obligation to pay interest on those charges. Condition 10 is headed "Credit on the Hire Charges". Conditions 10.1, 10.2, 10.3.1 and 10.3.3, together with clauses 10.5 and 10.6 are

[1] This provides: *"…in proceedings…before a county court for the recovery of a debt or damages, there may be included in any sum for which judgment is given simple interests at such rate as the court feels fit or as may be prescribed on all or any part of the debt or damages on which judgment is given…".*

relevant. Condition 10.1 permits the car hire company to defer payment of the car hire due from the hirer. Condition 10.2 stipulates that the hirer will pay interest, at a defined rate, on any outstanding hire charges. Outstanding hire charges plus interest will be paid either upon the final settlement of the "Claim" or 51 weeks after the start of the hire of the vehicle, whichever is earlier. Condition 10.5 directs the hirer to appoint solicitors to pursue the hirer's "Claim". By Condition 10.6 the hirer agrees to give irrevocable instructions to the solicitors appointed to pay to Swift all sums received as a result of the Claim.

IV. *Bent v. Highways and Utilities Construction Limited and Allianz Insurance*: the Facts and the judgments to date.

15. In February 2007 Mr Bent, then aged 23, was playing for Tottenham Hotspur. On 26 February 2007 he was driving his Mercedes AMG CLS 63R in Greenwich, South London. A van owned by Highways and Utilities Construction Limited and driven by one of its employees came out of a side road and hit the Mercedes. It did damage to the car which cost about £20,000 to repair. Mr Bent hired an Aston Martin DB9 on credit hire terms from Accident Exchange Limited ("AEL"). In the event the hire period was for 94 days. The daily rate of hire was £573.28 plus VAT.

16. After some equivocation, Highways and Utilities Construction Limited and its insurers, Allianz, admitted liability. The only quantum issue in dispute was the amount of the credit hire charge incurred by Mr Bent. The total cost of hiring the Aston Martin DB9 was £63,406.90. The respondents to this appeal made an interim payment of £38,618.76 in respect of the car hire cost claim. So, by the time that the case came on for trial before HHJ Yelton on 10 July 2009, the only sum in dispute was the balance of the car hire claim, viz. £24,788.14.

17. Judge Yelton concluded that it was reasonable for Mr Bent to hire a car in place of the one he was driving when the accident occurred. He held that the Aston Martin DB9 was a reasonable replacement for the damaged Mercedes. Judge Yelton also concluded that the hire period of 94 days was reasonable in all the circumstances of this case.

18. However, Judge Yelton found one issue to be difficult. He described this, at [10] of his judgment, as "*… whether or not in the circumstances the claimant can recover only the spot hire rate for such a vehicle, rather than the rate provided by the credit hirer*". The judge recorded that he had had extensive submissions on that issue and that he had been referred to a number of leading authorities. Having referred to those and the evidence before him on the "spot" hire rates, Judge Yelton came to the conclusion that none of the evidence dealt with what he described as "*the real issue*". He identified that issue as being "*… the cost of hiring a Mercedes of Mr Bent's type or an Aston Martin of the type he hired on a daily rate*". The judge concluded that, in the absence of that evidence he could not speculate, so that the claimant succeeded in recovering the full amount of credit hire paid, viz. £63,406.90.

19. The respondents appealed that decision. This court (Jacob and Leveson LJJ and Briggs J) allowed the appeal on 24 March 2010. Jacob LJ gave the single reasoned judgment.[2] Jacob LJ concluded: (1) the judge did have evidence of "spot rates" for

[2] ***[2010] EWCA Civ 292***

cars equivalent to the Aston Martin DB9 for the year 2008, and (2) he was mistaken to conclude that he could not use those figures in order to assess the "spot rate" for an Aston Martin DB9 (or equivalent) in early 2007.[3]

20. At paragraph 9 of his judgment Jacob LJ said:

> "*I would add further that one must not be hypnotised by any supposed need to find an exact spot rate for an almost exactly comparable car. Normally, the replacement need be no more than in the same broad range of quality and nature as the damaged car. There may be a bracket of spot rates for cars rather "better" and rather "worse". A judge who considered that bracket and aimed for some sort of reasonable average would not be going wrong.*"

That paragraph has given rise to argument on the present appeal, to which I will refer below.

21. It was agreed by the parties before the Court of Appeal on that occasion that if the court concluded that the judge had erred about the "spot rates" then the case would have to be remitted for a re-trial on that issue.[4] It was agreed that both sides could adduce further evidence "*about spot rates and equivalent rates*" at the re-trial.[5]

22. The order made by the Court of Appeal stated, at paragraph 2:

> "*There shall be a re-trial limited to the determination of the spot hire rate of a reasonably equivalent replacement vehicle at the time of hire. For the avoidance of doubt, the issue of a "reasonably equivalent replacement car" does not imply that any new or different legal test of "like for like" is to be applied.*"

In the course of the hearing before us it was agreed by the parties that the second sentence of that paragraph did not enlarge the ambit of the issues at the re-trial or the appeal before us.

23. The re-trial was heard before HHJ Plumstead over one and a half days on 4 and 9 February 2011. The judge received written and oral evidence from two witnesses on the issue of the proper "spot rate". Mr Stephen Anthony Evans, the chief executive of AEL, gave evidence on behalf of the claimant, nominally Mr Bent. The defendant produced rates for various types of car (including those for an Aston Martin DB9) at various different times and also the rates agreed under the Association of British Insurers' General Terms of Agreement (known as the "GTA"). Ms Stephanie Goeting, of SG Consultancy Solutions Limited and a consultant in the insurance industry with 25 years experience, particularly in claims, gave evidence on behalf of Highway and Allianz. She gave evidence about internet and telephone research she had done to get rates from five particular car hire companies. Both Mr Evans and Ms Goeting were cross-examined.

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[3] [8]
[4] [10]
[5] [11]

24. Judge Plumstead gave an *ex tempore* judgment at the close of submissions. There were three issues for decision. First, the appropriate "spot rate" for a reasonably equivalent replacement vehicle at the time of Mr Bent's need for a hire car. Secondly, whether the "spot rate" should be based on a hire rate for 7 days or one for 28 days. Thirdly, if the appropriate "spot rate" was that for a 28 days hire, then what discount (on the seven day rate) would that longer hire period attract? The judge said that the effect of the judgment of the Court of Appeal was that "…*Mr Bent had not in fact set about the task of mitigating [his] loss at all*".[6] The judge stated that the principles for determining the amount that Mr Bent was entitled to recover in respect of hiring the replacement car (when the claimant did not have to hire on credit) were clear:

> "*If you do not have to use a credit hire company then you are entitled to recover that which either is your actual loss if you go around and make a reasonable effort at shopping around and hire a vehicle for yourself, or in the case of somebody who uses a credit hire company when they do not have to, the limits of their recovery is the same as the person who made reasonable efforts on his own behalf, and so I have to assume that Mr Bent would have made reasonable efforts on his own behalf to hire a reasonably comparable vehicle for a reasonable time and at a reasonable rate*".[7]

25. HHJ Plumstead considered the second issue first. She held that it would have been clear that the repairs to the Mercedes SL 63 AMG would take some time and so it would have been reasonable for Mr Bent to have made enquiries about different periods of hire. The judge accepted (at [10]) the defendants' submission that it was reasonable to have expected Mr Bent to have hired a car initially for 28 days, with the possibility of extending, and so getting the advantage of a discounted hire rate.

26. The judge then reviewed the evidence regarding "spot rates". She regarded the most useful evidence on rates produced by Mr Evans to be a table exhibited to his second statement which set out "spot rates" for vehicles in the insurance group SP[8] 12 for Spring 2009, as set out by GTA. The range (for different types of car within group SP 12) for 2009 was £700 to £300, with Mercedes SL55 AMGs (which was not the same type as Mr Bent's car) being available for seven day hire at rates between £395 - £595.[9] The judge concluded that there were only limited figures for 2007 and a broad range of figures for 2009.[10] Judge Plumstead noted that, in contrast to Recorder Susman in ***Ford v Trans Alliance,***[11] who had evidence of the published hire price ranges for the specific car which had been hired (a Mini Cooper), in this case there was only evidence of a broad range of hire prices for a group of comparable vehicles. The judge accepted the submission of Mr Turner that the 2009 range should be taken as the basis for her calculations. She took a "midway range" between £395 and £450

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[6] [9] of the judgment.
[7] [9] of the judgment.
[8] "SP" stands for "Sports vehicle".
[9] [12] of the judgment.
[10] [13]-[14] of the judgment. There was a further statement from Mr Evans about 2007 figures, but the judge regarded those as being from "*very small scale specialist hirers, not main stream hirers such as, for example, Avis Prestige, Guy Salmon and the like…*".
[11] Judgment in the Central London County Court dated 7 May 2010.

per day on a seven day rate.[12] The judge rejected the evidence of Mr Evans that there had been a 40% drop in rates between 2007 and 2009.[13]

27. Judge Plumstead concluded[14] as follows: (i) in setting the "spot rate", it was correct to "*err on the highest side of that which [is] reasonable"*, following the approach of Recorder Susman in ***Ford v Trans Alliance***; (ii) that would be done by "*…pick[ing] the top of that centre bracket of £450 as my starting point as a daily rate";* (iii) however, as the replacement car should have been hired on a 28 day period basis, that rate should be discounted to reflect a lower rate for a longer hire period; (iv) that discount was 12%. Therefore the appropriate "spot rate" for a reasonably equivalent replacement vehicle at the time of Mr Bent's need for a hire vehicle was £396 per day. When VAT was added to that figure and it was multiplied by 94 days of hire, the total was £43,738.20. As the respondents (Highways and Allianz) had already made an interim payment of £38,618.76, this meant that the respondents were liable to pay an additional judgment sum of £5,119.44.

28. Mr Bent, effectively on behalf of AEL, appeals to this court with permission granted by me. I concluded that it was reasonably arguable that the judge had erred in her approach to fixing the so-called "spot rate" and that this was an appropriate case where this court might review the basis upon which courts determined the so-called "spot rates" recoverable in this type of case.

V The Legal Background

29. Three House of Lords and one Court of Appeal decision have established certain principles concerning (a) the basis on which a claimant can recover damages for car hire costs when he is the innocent victim of an RTA and he has hired a replacement car on credit hire terms and (b) what sums can be recovered as damages or otherwise. The authorities have all been concerned with cases where the claimant car driver was entirely without fault, had entered into a credit hire agreement with a credit hire company for a replacement car and that agreement provided that the hirer will not have to pay the hire charges until the successful prosecution of a claim for damages against the negligent driver. The cases are ***Giles v Thompson,***[15] ***Dimond v Lovell,***[16] ***Burdis v Livsey***[17] and ***Lagden v O'Connor.***[18]

30. For present purposes I think that the relevant principles established by these decisions are as follows: (1) the loss of use of a car as a result of the car being damaged by the negligence of another driver is a loss for which, in appropriate circumstances, the innocent claimant can recover damages, even where the car is "non-profit earning".[19]

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[12] [16] of the judgment.
[13] [17] of the judgment.
[14] [19] of the judgment.
[15] [1994] 1 AC 142
[16] [2002] 1 AC 384
[17] [2003] QB 36. The Court of Appeal actually considered five case: ***Burdis v Livsey; Clark v Ardington Electrical Services, Dennard v Plant; Sen v Steelform Engineering Co Ltd*** and ***Lagden v O'Connor.*** Only the last went to the House of Lords.
[18] [2004] 1 AC 1067
[19] ***Dimond v Lovell (supra) at 406 B-F*** in the speech of Lord Hobhouse of Woodborough. Technically, this statement is *obiter* as none of the other four law lords specifically agreed with Lord Hobhouse. But the general principles were authoritatively established in a series of ship collision cases in the House of Lords in the early years of the twentieth century and cannot be in doubt, at least in the case where the claimant has incurred the

It is the duty of the innocent claimant to mitigate his loss. If the loss of use of a car can be mitigated or avoided by the hire of a replacement car, the cost of that replacement car will be the measure of damages recoverable for the loss of use of the car.[20]

31. (2) A claimant who hires a car on credit terms as a replacement vehicle suffers a loss which is recoverable as damages, even though, by the terms of the credit hire agreement, the hirer is not liable to pay the hire until there has been a judgment in the hirer's favour against the negligent driver. In that circumstance there is, generally, a "*real liability, the incurring of which constitutes a real loss to the motorist. Whatever the publicity material may have conveyed, the provision of the substitute car was not free*".[21] If a claimant has had the use of a replacement car and he has had to pay for it, then the claim may more aptly be characterised as one for special damages; however, if he does not have to pay for it Longmore LJ has stated that: "*..it may be difficult to say that he can recover special damages at all. It may be that he can only recover general damages*". [22]

32. (3) The injured party cannot claim reimbursement for expenditure that is unreasonable. If the defendant can show that the cost that was incurred was more than was reasonable, either by proving that the claimant had no use for a replacement car in part or at all, or because the car hired was bigger or better than was reasonable in the circumstances, the amount expended on the hire must be reduced to the amount that would have been needed to hire the equivalent to the damaged car.[23] As Lord Mustill put it in ***Giles v Thompson,*** "…*The need for a replacement car is not self-proving*".[24]

33. (4) Even if it was reasonable for the innocent claimant to hire a replacement car on credit hire terms, the measure of damages recoverable will not necessarily be the amount of the credit hire that the claimant agrees to pay the credit hire company. It will depend on the financial circumstances of the claimant. If the claimant could afford to hire a replacement car in the normal way, ie. without credit terms and by paying in advance, then the damages recoverable for loss of use of the damaged car will be that sum which is attributable to the basic hire rate of the replacement car.[25]

34. This basic hire rate has often been referred to as the "spot rate", but that is, with respect, a misnomer. The term "spot rate" is more appropriately applied to rates of

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cost of hiring a substitute: see ***Beechwood Birmingham Ltd v Hoyer Group Ltd [2011] QB 364*** at [35]-[47] per Sir Mark Potter P, with whom Dyson and Maurice Kay LJJ agreed.

[20] ***Ibid at 406G*** in the speech of Lord Hobhouse. See also Lord Hoffmann's speech at ***401E,*** where he stated that the claimant's action in hiring a car on credit terms constituted "*..reasonable steps to mitigate her damage*". Lords Browne-Wilkinson and Nicholls agreed with Lord Hoffmann on this specific point. See also the speech of Lord Hope of Craighead in ***Lagden v O'Connor [2004] 1 AC1067*** at [27].

[21] ***Giles v Thompson (supa) at 116D-G*** in the speech of Lord Mustill. The other four law lords agreed with his speech.

[22] ***Bee v Jensen (No 2) [2007] EWCA Civ 923; [2007] 4 All ER 791*** at [22] per Longmore LJ. The measure of such damages in that type of case, at least where a corporate claimant asserts such loss, was discussed by this court in ***Beechwood Birmingham Ltd v Hoyer Group UK Ltd [2011] QB 357.***

[23] ***Lagden v O'Connor [2004] 1 AC 1067*** at [27] per Lord Hope of Craighead.

[24] ***Giles v Thompson (supra) at 167B-G***.

[25] ***Dimond v Lovell (supra) at 402 G-H and*** in the speech of Lord Hoffmann, with whom Lord Browne-Wilkinson agreed; and ***406H and 407A-G*** in the speech of Lord Hobhouse of Woodborough, who also agreed with Lord Hoffmann.

freight or charter hire, or the price of a commodity in open, often international markets, where the service or commodity is bought for delivery today, as opposed to some time in the future. I think it would be better if, in the context of credit hire cases, the term "spot rate" were not used in future and the term "basic hire rate" or "BHR" were used instead. That term more accurately describes what is the basic measure of damages recoverable in cases where the claimant could afford to have hired a car by paying in advance, ie. not hiring the car on credit.

35. (5) The difference between the BHR and the credit hire rate (assuming there is one) takes account of the additional services that a credit hire company provides to the hirer, viz. credit, handling the claim and effecting the recovery from the negligent driver, taking the risk of not recovering from the latter and an element of profit. Those elements are not part of the recoverable loss of a claimant who has hired a replacement car on credit hire terms but who could have afforded to do so by paying in advance.[26] However, it is for a defendant to demonstrate, by evidence, that there is a difference between the credit hire charge agreed between the claimant and the credit hire company and the BHR.[27]

36. (6) If it was reasonable for the claimant to hire a replacement car but he could not afford to hire a replacement car by paying in advance, (in the word used in the cases, that he is "impecunious") then, *prima facie*, he is entitled to recover the whole of the credit hire rate he has paid, provided that it was otherwise a reasonable rate to pay in the circumstances. If the claimant is "impecunious" then, on the assumption it is reasonable for him to hire a replacement car and it was a reasonable type of car that he hired, he is said to have had "*no choice*" but to hire on credit terms.[28] In ***Lagden v O'Connor*** Lord Hope of Craighead suggested that a rule of thumb test on whether a claimant hirer is "impecunious" might be whether he has the use of a recognised credit or debit card.[29] In practice whether someone is "impecunious" will depend on the facts of a particular case and Lord Hope's rule of thumb test is not necessarily determinative of the issue of whether a claimant can afford to pay hire charges day by day, which is the key question.

37. (7) If the credit hire agreement provides that the hire will not be due and payable until judgment has been obtained against the negligent driver and there are no express terms in the hire agreement about the payment of interest on the hire charges then interest should not be awarded, at least under the terms of ***section 35A*** of the ***Senior Courts Act 1981*** or ***section 69*** of the ***County Courts Act 1984.*** This is because, in such circumstances the hirer has not been "kept out of his money"; he was not contractually obliged to pay the hire charges to the credit hire company whilst the

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[26] ***Dimond v Lovell (supra) at 403H-404A*** in the speech of Lord Hobhouse.

[27] ***Lagden v O'Connor (supra) at [34]*** in the speech of Lord Hope of Craighead. The other law lords did not specifically endorse this proposition but it is well established on earlier authority that it is for a defendant to prove that a claimant has benefitted from "betterment" in mitigating his loss by an action, albeit a reasonable one, so that the damages recovered must be reduced to take account of the "betterment": ***British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673.***

[28] ***Lagden v O'Connor (supra) at [35]*** in the speech of Lord Hope. See also ***[5]-[7]*** in the speech of Lord Nicholls of Birkenhead with whom Lord Slynn of Hadley agreed.

[29] ***Lagden v O'Connor (supra) at [42]***.

claim against the negligent driver was being assessed and (if necessary) litigated. No hire charges were then owed to the credit hire company.[30]

38. (8) In the judgment of the Court of Appeal in ***Burdis v Livsey,***[31] the court considered the method by which judges could calculate the BHR and so the measure of damages for loss of use in circumstances where the claimant was not "impecunious". The court canvassed three possible methods. The first was to break down the charge made by credit hire companies so as to enable the additional elements (for credit, claim handling etc) to be stripped out. That method was rejected because it was said it would entail detailed disclosure and analysis which would be cumbersome in small cases and the costs would be disproportionate to the sums claimed in most of this type of case. I agree that may well be so in most cases. But I do not understand this court to be saying, at [137] of ***Burdis v Livsey,*** that it is wrong as a matter of law to consider direct evidence on this issue from the actual credit hire company that hired the replacement car to the claimant, eg. in the form of the company's published credit hire rates and BHRs. If there is such direct evidence it might be the best evidence of any difference between the credit hire rate charged and the BHR for that type of car in that area at the time the replacement car was hired. But if there is not such direct evidence, then it is unlikely that indirect evidence from the car hire company (such as its assertion of what its BHR would have been had they had one) will be useful. It would also probably entail disproportionately costly disclosure.

39. The second possible method canvassed was to apply a "reasonable discount" to the credit hire rate charged. That was rejected as being too arbitrary. I agree that this is not a satisfactory approach for the reasons given in ***Burdis*** at [138].

40. The third possible method and the one preferred by this court in ***Burdis*** at [139] is to look at "*…actual locally available figures*". However, the court also emphasised, at [146], that "*…a person who needs to hire a car because of the negligence of another must, subject to mitigating his loss, be entitled to recover the actual cost of hire, not an average [cost of hire]"*. I would, with respect, endorse that statement. Once the court has concluded that it was reasonable for the claimant to hire the type of car that he did, then the task of the court is to find what constitutes the BHR for the particular type of car actually hired. As this court put it at [147] in ***Burdis:***

> *"[The claimant] can go round to the nearest hire company and is prima facie entitled to recover the amount charged whether or not the charge is at the top of the range of car hire rates. However, the basic principle is qualified by the duty to take reasonable steps to mitigate the loss. What is reasonable will depend on the particular circumstances"*.

41. In practice, therefore, on the issue of what BHR is recoverable in a case where the claimant who has hired on credit is not "impecunious", a judge may have two sorts of evidence. First, he may have direct evidence, in the form of published rates, from the actual credit hire company that hired the replacement car which demonstrates

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[30] ***Giles v Thompson (supra) at 167H-169A*** in the speech of Lord Mustill, who emphasised that he was dealing only with the circumstances of the particular case in which that issue arose, viz. ***Devlin v Baslington,*** in which the judge and the Court of Appeal had awarded statutory interest. That award was disallowed by the House of Lords.

[31] ***At [134]-[150].***

either that the credit hire rate and the BHR for that type of car is the same or it is different and what the difference is. Secondly, the judge may have evidence of the BHR charged by other car hire companies in the area for the type of car actually hired. From that he will be able to ascertain, on a balance of probabilities, what the BHR for the actual type of car hired was and so arrive at the measure of damages recoverable, subject to the issue of the reasonable time for hiring the car.

VI. The arguments of the parties in the two appeals

42. **Pattni:** Mr Butcher advanced three arguments in favour of his general submission that the claimant was entitled to recover a sum equal to interest on the principal BHR sum that was found to be recoverable by Judge O'Rorke. As a preliminary point, Mr Butcher emphasised that, in contrast to earlier cases,[32] the credit hire Agreement in this case specifically provided, in Condition 10.2, that the hirer would pay interest on the hire charges for the period between the end of the hire and the time when the principal hire charge became due, normally on settlement of the claim against the tortious driver: see Condition 10.5. Mr Butcher's first argument is that the claimant reasonably entered into the Agreement with Swift as a direct result of the tort of the defendant. The claimant's contractual liability to pay interest to Swift at the agreed rate[33] was reasonably foreseeable and so is a loss which is recoverable from the defendant. Mr Butcher submitted that it is well established by authority that a contractual *liability* to pay money which is incurred as a direct result of a tort constitutes a recoverable loss from the tortfeasor. He relied on statements to that effect by Lord Mustill in ***Giles v Thompson*** and of Mr Gross QC sitting as a Deputy Judge in ***Total Liban SA v Vitol Energy SA,***[34] where the deputy judge had also referred to the early but authoritative case of ***Randall v Raper.***[35]

43. Mr Butcher's second, alternative, argument was that when the judge was assessing the damage suffered as a consequence of the defendant's tort the judge should have taken into account the fact that if the claimant had hired a car in the usual way, by paying in advance, he would have lost the use of his money thereby paid away. Therefore the judge should have awarded both the BHR and interest on that sum as two heads of the damages recoverable for the loss of use of the claimant's car. In support of this argument, Mr Butcher relied on the statement of principle of Lord Nicholls in ***Sempra Metals Ltd v IRC.***[36]

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[32] Such as ***Giles v Thompson [1994] 1 AC 142*** and ***Clark v Ardington [2003] QB 36,*** part of the ***Burdis v Livsey*** group of cases in the CA.

[33] By Condition 1 this was 3% above Nat West's base rate in operation on the date 28 days before the date on which the Agreement was made.

[34] ***[2001] QB 643 particularly at 664E-H.***

[35] ***(1858) EB & B 84.*** This was a decision of the Queen's Bench: Campbell CJ, Wightman, Erle and Crompton JJ in a contract action where the buyer claimed from the seller of barley the reduced value of his crop as a result of the seller providing barley inferior to that warranted by him. Mr Butcher relied particularly on what Erle J said (at 90) "*…the true rule is that a liability to loss is sufficient to give the party liable a title to recover*". Crompton J gave the example (at 90) that "*…in actions for bodily injuries, the liability to pay the surgeon's bill is always allowed as an item of the damages*"; implicitly, even when the surgeon does not demand payment.

[36] ***[2008] 1 AC 561 particularly at [94]-[95],*** where he said "*…the House should now hold that, in principle, it is always open to a claimant to plead and prove his actual interest losses caused by late payment of a debt….in the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case*".

44. Mr Butcher's third argument was that the claimant is entitled to statutory interest pursuant to ***section 69*** of the ***County Courts Act 1984*** to reflect the loss of use of funds that the claimant would have incurred if he had hired a replacement car on a standard basis (ie. by paying in advance). In support of that argument he relied on a statement of Lord Hobhouse in ***Dimond v Lovell,***[37] to the effect that a calculation of the sum recoverable for the cost of a replacement car included an element of interest. If it did not, then, Mr Butcher argued, there is every reason to award statutory interest as a matter of discretion.

45. Mr Turner's response to the first argument was that ***Dimond v Lovell*** required that all elements, including interest, other than the BHR must be stripped out of the credit hire rate payable under the Agreement in order to arrive at the measure of damages recoverable for the loss of use of a car in cases where the claimant was not "impecunious". That must include any element of interest, even if there is a contractual liability to pay it under the Agreement. On the second argument he submitted that interest is only recoverable as a head of damages upon proof that money has been paid so that the claimant can demonstrate that he has lost the use of his money for a period of time. He said that could not be demonstrated here because there was no evidence of any payment by the claimant in this case. Mr Turner submitted that the same principle applied to the third argument of Mr Butcher. No sums had been paid by the claimant so that the judge was entitled to exercise his discretion under ***section 69*** of the ***County Courts Act 1984*** against awarding interest.

46. **Bent:** Mr Butcher attacked all three major conclusions of HHJ Plumstead, viz. on her conclusion that the "spot rate", or BHR, should be fixed at £396 per day, that Mr Bent should have hired the replacement car on a 28 day hire basis and that there would have been a 12% discount on the seven day hire rate if he had done so. Mr Butcher submitted that the judge erred[38] in regarding her task as being to determine what rate Mr Bent could have obtained if *he* had used reasonable efforts to hire a suitable replacement car on non-credit terms. Instead the judge should, objectively, have determined what, if any, was the difference between AEL's credit hire rate and what would have been its BHR for the actual car hired and then "stripped out" that difference between the two rates. Mr Butcher also submitted that if there is evidence of a range of basic hire rates, then the highest reasonable rate should be taken, because the obligation of the claimant is only to do what is reasonable.

47. Mr Butcher criticised the judge's use of the evidence on hire rates on the following grounds: (i) the judge should have used 2007 rates, on which there was direct evidence; (ii) the judge wrongly concentrated on 2009 rates; (iii) the judge artificially narrowed the range of BHRs from which she derived the BHR applicable in this case; and (iv) the judge should not have used figures for a different type of Mercedes (SL 55 AMG) which was neither the same as Mr Bent's car nor the one he hired – an Aston Martin DB 9.

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[37] ***[2002] 1 AC 384 at 407F-G:*** *"…I prefer the approach of making a commercial apportionment between the cost of hiring a car and the cost of the other benefits included in the scheme. The necessity to make some apportionment or other reduction in the claim is demonstrated by the need to avoid double counting. Prima facie the court should award statutory interest on the claim; but here the claim already included some element of interest…."*.

[38] In [9] of her judgment.

48. Mr Butcher further submitted that there was no evidence on which the judge was entitled to conclude that Mr Bent should have hired on a 28 day basis as opposed to the seven day basis on which he did hire the Aston Martin DB 9. Furthermore, the evidence demonstrated that the discount should have been only 6.1% rather than the 12% figure chosen by the judge.

49. Mr Turner submitted that Judge Plumstead did not err in her approach in principle and that the judge's conclusions on the BHR of £395, hiring on a 28 day hire basis and a discount of 12% for the longer hire period basis of hire were all conclusions of fact that the judge was entitled to make on the evidence adduced. Therefore none of the judge's conclusions could be challenged in this court.

VII. The Pattni appeal: Discussion and conclusions on the three analyses.

50. **The First analysis: liability to pay interest charges under the Agreement.** The first of Mr Butcher' analyses raises the most formidable argument of the three he put forward. On this argument the only foundation on which Mr Pattni or the credit hire company Swift could recover any sum by way of interest on the BHR is under the terms of the Agreement. It is therefore imperative to examine the precise effect of the Agreement's terms on interest.

51. The terms in Box 13 on the first page of the Agreement Swift ("the Owner") make the car available to the "Hirer" for the "Hire Period" on condition that the Hirer agrees to pay the rental charge plus ancillary charges which are called collectively "the Hire Charges", which term includes "other ancillary charges" and so must include interest charges. Under Condition 10.2 the "Hirer", viz. the claimant here, agrees to pay to Swift interest (at the "Interest Rate" as defined) for the period from the "due date of payment" of the Hire Charges "in accordance with Condition 9.1" until the "actual payment" of the Hire Charges. By Condition 9.1 the "due date of payment" is the end of the hire period, that is when the hire car is returned to Swift, save where Swift has agreed to provide credit hire pursuant to Condition 10. Under Condition 10.1, where a "Claim"[39] exists Swift may permit the Hire Charges to remain outstanding for up to 51 weeks, but, more usually, until final settlement of the "Claim": see Condition 10.3.3. Condition 10.3 sets out the various possible events upon which the hire charges and interest on them will become "immediately due and payable", including the final settlement of the "Claim" as defined.

52. The effect of these closely interlocking conditions must be that in the case of a credit hire where there is a "Claim" by the credit hirer against the other driver involved in the RTA to recover losses including the cost of hire, the credit hirer is contractually bound to pay a sum of interest on the credit hire charge from the date when the car hire ends until the final settlement of the claim, or upon the event of one of the other events identified in Condition 10.3. In other words, the interest charged is for the further period of credit from the end of the Hire Period until the date when the total hire charges (including interest) are immediately due and payable, which, usually, will be when the "Claim" has been finally settled. It is to be noted that the terms of the Agreement do not provide that the credit hire company can claim interest as each day of hire accrues.

[39] As defined in Condition 1.2: see the Appendix to this judgment.

53. That leads to the question: what is the credit hire company aiming to recoup by this contractual obligation to pay interest on the outstanding total credit hire charge for the period between the end of the actual hire until the "claim" is finally settled? There can only be three possibilities. First, the interest charge could be intended to recoup the cost to the credit hire company of agreeing to delay the date when it will demand repayment of the credit hire charge, ie. until final settlement of the claim or one of the other contractually agreed events. Secondly, its purpose could be to provide an additional element of profit for providing a hire car on credit, but in the guise of interest. Thirdly, its aim could be a combination of the first two. I am not sure it matters which it is, although I suspect that it is the first of these three.

54. Are such interest charges recoverable as damages by Mr Pattni (effectively Swift) in the circumstances of this case? Mr Butcher relied on the statement of Lord Mustill in ***Giles v Thompson***[40] that:

> "*If the motorist had simply persuaded a garage to hire a substitute [car] on credit, without any of the superstructure of the present transaction, it would be no answer to a claim for damages equivalent to the sums due to the garage that these sums would not in practice be paid until a judgment in the motorist's favour had provided the necessary funds; for the amount of the outstanding liability represents the loss suffered by the motorist and the question whether the motorist intends to apply the damages recovered in satisfaction of the debt [to the credit hire company] or in some wholly different way cannot affect his right of recovery*".

He submits that this statement encapsulates a broad principle that in a claim in tort where the victim incurs contractual liability as a result of the tortious act, it is the fact of the contractual liability rather than the actual payment of that liability that constitutes the loss suffered and the tortfeasor is obliged to pay damages equal to that loss.[41] Mr Butcher therefore submitted that it was incorrect of Judge O'Rorke to hold that because Mr Pattni had not had to pay any interest under the contractual terms, he had suffered "no loss".[42] He further submitted that it was therefore beside the point for Swift J to conclude[43] that there was no evidence that Mr Pattni "*has or will have to pay any interest under the Agreement*".

55. In my view there is no need to investigate the scope of the principle for which Mr Butcher contends or whether it is applicable on the facts of this case, because there is a prior question that has to be answered. That is, assuming the existence of this particular contractual liability, viz. to pay interest for the delayed payment of credit hire charges, does that constitute a recoverable loss at all in the circumstances in which the liability has been incurred? This requires a close study of the analyses of Lords Hoffmann and Hobhouse in ***Dimond v Lovell*** concerning what damages are recoverable for loss of use of a car when the victim hires a replacement car on credit terms.

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[40] At 166D-E. All the other law lords agreed with Lord Mustill.
[41] As already noted Mr Butcher referred us also to ***Total Liban SA v Vitol Energy SA [2001] QB 643*** at ***662D-663D*** and ***Randall v Raper (1858) EB & B 84.***
[42] [27] of HHJ O'Rorke's judgment.
[43] At [40] of her judgment.

56. I preface that analysis by recalling two points. First, the fact that in this case, unlike ***Dimond v Lovell,*** there are express provisions for the payment of interest. Secondly, Mr Butcher accepted Judge O'Rorke's finding of fact in this case that there is a difference between the credit hire rate for the replacement Audi R8 (£500 a day) and the BHR for such a car (£370.50 a day). In ***Dimond v Lovell*** there was also a finding of fact by the trial judge that the credit hire company's rates were considerably higher than the so-called "spot rate" for which a car could have been obtained for cash from an ordinary hire company.[44] Given those facts, Lord Hoffmann then analysed what services, or benefits, the claimant in that case had obtained "*by virtue of her contract*" to hire the replacement car on credit terms. Lord Hoffmann said:

> "*[The claimant] was relieved of the necessity of laying out the money to pay for the car. She was relieved of the trouble and anxiety of pursuing a claim against Mr Lovell or [his insurer]. She was relieved of the risk of having to bear the irrecoverable costs of successful litigation and the risk, small though it might be, of having to bear the expense of unsuccessful litigation…*".[45]

57. Lord Hoffmann characterised these items as "*additional benefits obtained as a result of taking reasonable steps to mitigate loss*" and he said that they had to be "*brought into account in the calculation of damages*".[46] He then noted that the credit hire contract did not distinguish between what element of the cost was attributable to the hire of the car and what was attributable to the other benefits given by the contract. Lord Hoffmann summarised these other benefits as being (at least): (a) the credit hire company bearing the irrecoverable cost of conducting the claim; (b) providing credit to the hirer; (c) paying commission to brokers; (d) checking the accident was not the hirer's fault. Lord Hoffmann stated that the court could not ignore the fact that these had to be paid for and that a charge for them "*is built into the hire*".[47] He then stated that the value of all those "*additional benefits*" must be taken as being the difference between the credit hire rate and what he called the "spot rate" and I prefer to call the BHR. He stated that all those elements were not recoverable as damages for loss of the use of the claimant's car.

58. Lord Hobhouse made effectively the same analysis in explaining the £17 a day difference between the daily hire rate of the credit hire company and the daily hire rate from an "*ordinary car hire company*". He said:

> "*The [credit hire] company is doing more than just hiring a car. It is financing the transaction until the expected recovery is made from the other party; it is bearing a commercial (though not normally the legal) risk that there may be a failure to make that recovery; it is bearing the cost of handling the claim and making the recovery. The £17 a day covers this and a margin of profit*".[48]

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[44] ***Dimond v Lovell (supra) at 401A***
[45] At ***401F-G.***
[46] At ***402A.***
[47] AT ***402F-G.***
[48] At ***403G to 404A.***

59. Lord Hobhouse went on to accept that it was reasonable for the claimant to hire a car on credit and it was reasonable for her to pay the additional sum (over the BHR) to obtain the additional benefits identified. But, he said, the claimant could not "*claim the whole cost as the cost of mitigating the loss of use of her car*". Lord Hobhouse stated that his preferred way of distinguishing between the cost of mitigating the loss of use of the claimant's car and the costs of the other benefits of hiring a car on credit was to make a "*…commercial apportionment between the cost of hiring a car and the cost of the other benefits included in the scheme [of hiring on credit]*". He continued:

> "*The necessity to make some apportionment or other reduction in the claim is demonstrated by the need to avoid double counting. Prima facie, the court should award statutory interest; but here the claim already included some element of interest. Similarly the claim included something in respect of costs; to award costs as well would involve some duplication. The elements to which the uplift in the charges of the [credit hire] company was attributable were (and inevitably must be) elements which were not properly included in the claim for damages for loss of use. As appears from what I have said, some might be recovered from the wrongdoer in another form but it is unlikely that any scheme could be devised which would enable the insurance element to be recovered*".[49]

60. I have quoted these passages from the speeches of Lords Hoffmann and Hobhouse at length because, in my view, they make it clear that if it is proved that there is any element in the credit hire charge that represents the cost of providing credit facilities to the hirer then that is not recoverable as part of a claimant's damages for loss of use of his car. It is to be regarded as an additional benefit.

61. In my view it is clear that the interest charge for which Mr Pattni is under a liability to Swift by the terms of the Agreement constitutes the cost of an "additional benefit" given to the credit hirer , viz. the benefit of delayed payment of the credit hire charges until the "Claim" against the other driver has been finalised. On the analysis of both Lord Hoffmann and Lord Hobhouse in ***Dimond v Lovell,*** this is not a recoverable loss in the case of a hirer who is not "impecunious", in the sense described by Lord Hope in ***Lagden v O'Connor.***

62. Mr Butcher relied heavily on the passage in Lord Hobhouse's speech which I have quoted at [59] above, arguing that Lord Hobhouse was accepting that an element for interest was a legitimate recoverable loss. I do not accept that is the correct interpretation of that part of his speech. What Lord Hobhouse was saying was that it was important to make a "commercial apportionment" and for two reasons. First, to distinguish between the cost of hiring the car and the cost of other benefits. Secondly, to avoid "double counting" which otherwise might arise, of which he gave examples. He was not saying that if there was an element of interest (whether expressly agreed or not) as the cost of permitting a hirer to do so on credit, that was a recoverable part of the loss.

63. Therefore, I would reject Mr Butcher's first argument.

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[49] See ***407F-G.***

64. **The second analysis: interest as damages.** This can be dealt with more briefly. Mr Butcher's argument under this head starts from the premise that, in accordance with the analysis in ***Dimond v Lovell,*** it has to be assumed that the hirer (who is not "impecunious") would have hired a replacement car without credit terms, so that he would have had to pay only the BHR. In that case the hirer *would have* been out of pocket and so he should be awarded an amount which reflects the loss of use that he would have suffered.

65. I appreciate that the House of Lords has now stated, in ***Sempra Metals Ltd v IRC***[50] that it is open to a claimant to plead and prove his actual interest losses caused by the late payment of a debt. I am prepared to assume that, by analogy, a claimant can recover damages if he has proved that he has suffered loss of money by reason of the defendant's tort, subject to the same principles governing all claims for damages in tort claims such as remoteness, failure to mitigate and so forth. I accept also that there was evidence before the court in the form of the rate agreed for the interest charges under the Agreement and what the actual cost of borrowing would have been for this claimant, Mr Pattni.

66. However, Judge O'Rorke found as a fact that Mr Pattni had not incurred any financial cost at all up to the date of the trial before him and that he had not had to pay out any interest.[51] Swift J held that there was no evidence at all that either Mr Pattni or his insurers had suffered any loss in relation to interest or that Mr Pattni or his insurers had suffered any actual loss as a result of a shortfall between the hire charges payable under the Agreement and the damages awarded by Judge O'Rorke.

67. In my view the relevant question is whether Mr Pattni, the claimant, could prove that he had suffered a loss because, as a result of the defendant's tort, he had actually had to pay out money which he could have used for other purposes. There are concurrent findings of fact that he did not make any such payments or suffer any such actual loss. It is immaterial that he might have done so, because the principle enunciated in ***Sempra*** requires proof of actual loss.

68. Nor, to my mind, is it relevant that Swift might have had to borrow to fund the provision of a replacement car on credit terms for Mr Pattni in circumstances where he cannot prove that he had to do so. Subrogated insurers cannot be in a better position to recover damages than the nominal claimant.

69. I therefore reject Mr Butcher's second analysis.

70. **The third analysis: an award of statutory interest.** I can deal with this even more shortly. Swift J was correct in saying that statutory interest under ***section 69*** of the ***County Courts Act 1984*** is awarded at the discretion of the court in cases where it can be shown that the claimant would suffer loss if an award of interest under the statute were not made. As Swift J observed, the reality of the situation in this case is that there is no evidence that Mr Pattni had to pay out any sums at all. I would therefore reject this analysis too.

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[50] ***[2008] 1 AC 561:*** the relevant passage in the speech of Lord Nicholls of Birkenhead at [94]-[95] is quoted at fn 36 above.

[51] [27] of his judgment.

VIII. Disposal of the Pattni appeal.

71. As I have rejected all three of Mr Butcher's analyses, I would dismiss the appeal in this case.

IX. The Bent appeal: Discussion and conclusion

72. As already noted, there are three aspects of HHJ Plumstead's judgment under appeal. First, her calculation of the BHR; secondly, whether the car should have been hired on a 7 day basis or a 28 day basis; and thirdly, if it should have been the latter, what discount to the 7 day rate should be applied.

73. **Sub-issue (i): The Calculation of the BHR.** The first question that arises is: what exercise is a judge conducting when he has to find the "spot rate" or, as I prefer to call it, the BHR. I have already attempted to summarise, at [30] to [42] above the principles that I think a judge has to apply, in accordance with the leading cases of ***Dimond v Lovell, Lagden v O'Connor*** and ***Burdis v Livsey.*** 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?

74. For present purposes the important point to note is that (assuming the answer to questions (i), (ii) and (iv) above is "yes" and that to (iii) is "no") the aim of the judge's fact finding exercise is to ascertain the BHR for the model of car that the claimant actually hired and to do so on an objective basis. I think that this approach is borne out first of all by the way that Lord Hoffmann analysed the matter in ***Dimond v Lovell*** at 401 to 403. Thus, he accepted the judge's conclusion that Mrs Dimond acted reasonably in going to the credit hire company and accepting its services: see 401D-E. That covers questions (i) and (ii) above. Then Lord Hoffmann states, at 403H, that the way to calculate the "additional benefits" is by finding the difference between what Mrs Dimond was willing to pay the credit hire company and "*…what she would have been willing to pay an ordinary car hire company for the use of a car"*. I appreciate that Lord Hoffmann refers to "*a car",* not "*the car",* but the car hired must be a reasonable substitute; Lord Hoffmann cannot have meant it could be any type of car. It is also clear from the way that Lord Hobhouse addressed the question at 407B-D that he regarded the correct exercise to be to calculate the difference (if any) between the actual credit hire rate for the replacement car hired and what, on the evidence, the judge concluded was the BHR for that model of car.

75. Secondly, this approach was, I think, adopted by the Court of Appeal in ***Burdis v Livsey***.[52] In giving the judgment of the court, Aldous LJ said that the claimant is entitled to recover the actual cost of hire, not an average cost, because he is entitled to recover compensation for the loss caused. Aldous LJ continued:

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[52] ***[2003] QB 36*** at [146]-[147].

> *"[The claimant] can go round to the nearest hire company and is prima facie entitled to recover the amount charged whether or not the charge is at the top end of car hire rates. However the basic principle is qualified by the duty to take reasonable steps to mitigate the loss. What is reasonable will depend on the circumstances"*.

76. Given that the claimant will actually have hired the replacement car on credit hire terms, I take that passage to mean that even if the credit hire rate for the car hired is at the top of the range of credit hire rates, so long as it was reasonable to hire that car and the credit hire rate is reasonable, then the court has to calculate the BHR on the basis that the claimant notionally went round to an equivalent non-credit car hire company. If there is a difference between the two rates, the claimant will recover the BHR that the non-credit car hire company would have charged, even if the BHR that the car hire company charged was at the top end of the range, provided that the claimant acted reasonably.

77. Mr Butcher submitted that Judge Plumstead had erred because she based her conclusion on the BHR at which Mr Bent could have obtained a substitute car had he himself made enquiries as to non-credit car hire, rather than ascertaining what the "objective" BHR was for the Aston Martin DB9. It might be said that the passage of Aldous LJ's judgment that I have quoted above supports a more "subjective" approach, but in my view that is not what Aldous LJ intended. The claimant in this situation has not gone out to hire a car on non-credit terms. But the object of the exercise is to find out what the BHR would have been had he done so. That figure can only be arrived at on an "objective" basis.

78. I acknowledge the point made by Jacob LJ at [9] of his judgment[53] in the present case when it was before this court for the first time. I understand him to be recognising that it may be difficult to produce evidence of an exact BHR for the car that was actually hired on credit terms. The judge has to deal with the evidence available. It is in that sense that Jacob LJ said that a judge *"would not be going wrong"* if he considered a bracket of BHRs for cars rather "better" or rather "worse" than the one actually hired. But, whether the judge has evidence of BHRs for the type of car actually hired on credit, or has evidence of BHRs for other types of car which are within a bracket that is comparable, the aim of the exercise remains the same. It is to make a calculation of what the BHR was for the car actually hired and so compare it with the credit hire rate actually paid.

79. I do not believe that Jacob LJ intended to suggest that "*some sort of reasonable average"* of a bracket of "spot rates" for cars rather "better" or "worse" than that actually hired on credit terms would produce the BHR to which a claimant was entitled. Such an approach would be inconsistent with this Court's statement in ***Burdis v Livsey*** at [146], where it expressly rejected the suggestion that a claimant should recover the average cost of car hire, whether the actual cost to him was more or less than the average. I think all that Jacob LJ was doing was to give an indication of one way by which a judge might identify the BHR of the actual car hired on credit hire terms by means of what, in [38] above, I have called "indirect" evidence.

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[53] Quoted at [20] above.

80. So the exercise that HHJ Plumstead should have conducted was to find, as best she could on the evidence, what was the BHR for the Aston Martin DB9 that was actually hired on credit hire terms. Did the judge err in law in her approach and conclusion? With great respect to the judge, I think that she did. First of all, the judge was wrong to state[54] that this court had found that Mr Bent had not set about the task of mitigating his loss. There is nothing in the judgment of Jacob LJ to warrant that statement. The appeal was allowed and the case remitted to the county court only because Judge Yelton had wrongly decided that he had no evidence on which to assess the BHR for a broadly similar car in January 2007. This court concluded that he should have determined the BHR with the evidence he had.[55]

81. Secondly, although HHJ Plumstead recognised that it was necessary to reach a figure for the BHR of a broadly comparable car during the period of actual hire, in 2007, she held that those types of figure were not available.[56] I respectfully disagree. The judge had figures for BHRs of Aston Martin DB9s in 2007 in the third witness statement of Mr Evans and its exhibits. Those figures were taken from archived copies of the home pages, tariff pages and terms and conditions of three car hire companies. They showed a range for the BHR of an Aston Martin DB9 in February 2007 of between £500 to £695 plus VAT.[57] The judge also had evidence from Mr Evans' fourth witness statement that a "*main stream*" car hire company, Guy Salmon, was advertising an Aston Martin DB9 V12 coupé in 2007 at a "seven day" rate of £470 a day. Therefore the total range of BHRs for Aston Martin DB9s for February 2007 that the judge had in evidence was from £470 to £695. The judge did not suggest that any of those figures were unreliable.

82. Thirdly, the judge referred to evidence from Mr Evans about BHRs in April 2009 and concluded that they were within a range from £700 to £300. Those figures do not appear to relate specifically to the hire of an Aston Martin DB9. The judge regarded the range of figures for the BHR of a Mercedes SL 55 AMG in April 2009 as being significant. That range was from £395 to £595 a day. Although I accept that a Mercedes SL 55 AMG is in the same group for insurance and hire classification purposes as an Aston Martin DB9 and Mr Bent's car that had been damaged, (a Mercedes AMG CLS 63), in my view the judge erred in concentrating on the range of figures for a Mercedes SL 55 AMG when BHR figures for an Aston Martin DB9 were available.

83. Fourthly, the judge rejected Mr Evans' evidence about the BHR for an Aston Martin DB9 in 2007 because they were figures from "*very small scale specialist hirers*".[58] However, Judge Yelton had found it was reasonable for Mr Bent to hire a high performance replacement car such as an Aston Martin DB9 and he had also concluded that was a very specialised market.[59] In my view it must follow that it would have been reasonable for Mr Bent to go to a very small scale prestige specialist hirer to hire an Aston Martin DB9. As Judge Yelton commented, the market for the hire of such cars or equivalent is a "*very specialised market*", because the cars involved were "*top*

[54] [9] of HHJ Plumstead's judgment.
[55] See [7] –[9] of Jacob LJ's judgment. There are two paragraphs [8].
[56] See [16] of HHJ Plumstead's judgment.
[57] At para 5 of Mr Evans' third statement he had quoted one rate as being £795 but he accepted in evidence that this was wrong and it should have been £500.
[58] [13] of HHJ Plumstead's judgment.
[59] [14] of HHJ Yelton's judgment.

of the range powerful sports cars of which there are very few no doubt in the country and very few available at any one time".[60] The rates of "*main stream"* hirers would not necessarily have been the appropriate rates by which to calculate the BHR of the Aston Martin DB9 actually hired, although if a "*main stream"* hirer had had available figures for the BHR of an Aston Martin DB9 at the appropriate time, that would be relevant evidence. The Guy Salmon figure of £470 was such a figure.

84. Fifthly, the judge concluded that the 2009 rates were the more relevant and determined that, for those rates, there was a relevant "*midway range"* between £395 and £450 for a seven day hire. The judge then rejected Mr Evans' evidence that there had been a 40% drop in car hire rates between 2007 and 2009. Finally the judge fixed the appropriate BHR at the highest end of the range of what was reasonable, ie. £450.[61]

85. In my view the judge erred in concentrating on the 2009 figures when 2007 figures were available. The preference for figures from a later period is unexplained. I also think that the judge erred in holding that the appropriate BHR was the highest that was reasonable, following the approach of Mr Recorder Susman. That approach is inconsistent with what was laid down by this court in ***Burdis v Livsey.*** The proper exercise is, as I have said, to find the BHR for the actual car that was actually hired on credit by Mr Bent. However, the judge's rejection of Mr Evans' evidence that rates had reduced from 2007 to 2009 cannot be criticised.

86. If the judge erred, then this court has to decide, on the evidence that was available to the judge, whether Highway and Allianz have proved that the notional BHR of the Aston Martin DB9 that Mr Bent hired in February 2007 would have been less than the credit hire charge of £573.28 plus VAT per day?[62] The best evidence on which to make a finding relates to the contemporaneous 2007 rates for an Aston Martin DB9. These are: for Guy Salmon (£470 on a seven day basis), for Blue Chip (£500[63] on a seven day basis), for Supercar (£691 on a seven day basis); and for Signature (£695 on a seven day basis).

87. The judge also had also useful evidence, from Miss Goeting, about BHRs for an Aston Martin DB9 in 2009. Miss Goeting did a web based search; for an Aston Martin DB9 she found 14 BHR quotations within the London area. The prices varied from £650 a day down to £375 a day. However, all the quotations stipulated a minimum age for the driver, the lowest of which was 25. The minimum age for the £375 a day quotation was 30. Mr Bent was, of course, 23 at the time. It was Miss Goeting's evidence that if the hire company was approached by telephone it would be prepared to hire a car to someone in Mr Bent's position and of his age, provided that he organised his own insurance for the hire. The judge did not state whether Mr Bent's insurance would have covered him to hire an Aston Martin DB9 on non-credit

[60] [14] of the judgment of HHJ Yelton.
[61] [17]-[19] of HHJ Plumstead's judgment.
[62] I leave aside the 7day/28 day rate issue for the moment.
[63] Mr Evans had given a figure of £795 in his witness statement but he corrected that to £500 in evidence and that is the figure used by HHJ Plumstead at [13] of her judgment.

hire terms. Miss Goeting also stated that there would be a more advantageous rate if the hire was for 28 days or more.[64]

88. Mr Butcher emphasised that the evidential burden was on Highway and Allianz to establish that the BHR for the Aston Martin DB9 hired was lower than the credit hire rate of £573.28 per day plus VAT actually charged by AEL. He drew to our attention the evidence given by Mr Evans in cross-examination about the overheads and organisation of AEL compared with other car-hire organisations suggesting that AEL had no need to have had a lower BHR for this particular car.

89. So, have Highways and Allianz proved that the BHR for the Aston Martin DB9 that Mr Bent hired on credit was less than the credit hire rate of £573.28 per day plus VAT? On the evidence available I am not satisfied that they have. There is a large variation in the rates. There is no firm evidence that Mr Bent's insurers would have been prepared to insure him to hire an Aston Martin DB9 so that it cannot be demonstrated that the lower rates discovered by Miss Goeting would have been applicable. Therefore, subject to the seven day/28 day rate point, I would hold that Mr Bent is entitled to recover the cost of hiring the Aston Martin DB9 at the rate actually charged, viz. £573.28 plus VAT.

90. **Sub-issues (ii) and (iii): Should it have been the seven day rate or the 28 day rate and if the latter, at what rate of discount?** Judge Plumstead held that the Aston Martin DB9 should have been hired on a 28 day basis.[65] Mr Butcher argued that this conclusion was in error. I reject that submission. It is clear that it was going to take a considerable time to effect the repairs on this specialist car which needed specialist parts that had to come from Germany. The judge's conclusion cannot be classified as either unreasonable or clearly wrong.

91. Judge Plumstead concluded that there was clear evidence that there was a discount of the daily rate if a car was booked for a 28 days instead of seven days.[66] That conclusion was not really challenged before us. The question was, rather, whether the discount should have been 12%, as the judge found, or a lower figure, for which Mr Butcher contended. Before Judge Plumstead counsel who appeared for Mr Bent submitted that the judge should take the actual credit hire rate charged as the BHR. On that basis he was prepared to accept a discount of 10-12%.[67] In my view that was realistic. If I had concluded that the BHR had to be at a lower figure, I would have been more inclined to Mr Butcher's submission that the discount would have been lower for a 28 day hire. But, overall, I think that a figure of 12% is correct.

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92. The result of the conclusions above is that the figure for calculating the loss of use claim will be £504.48 plus VAT. As there is no challenge to the period of hire of 94 days, the total sum recoverable will be £47,421.12 plus VAT at 17.5%, which produces a figure of £55,719.81. As an interim payment of £38,618.76 has already been made, this means that Mr Bent is entitled to recover a balance of £17,103.05.

[64] See [8] of HHJ Plumstead's judgment. The judge does not set out the rates that Miss Goeting said would have been offered.
[65] [10] of the judgment.
[66] [19] of the judgment.
[67] See transcript page 106 lines 30-31.

Whether any sum for statutory interest is recoverable on that figure was not debated at the hearing of the appeal. If necessary, the parties will have to submit further written submissions on the point.

Lord Justice Moore Bick:

93. I agree.

Lord Justice Pill:

94. I also agree.

Appendix

Relevant provisions in the "Conditions of Hire" of the Credit Hire Agreement between Mr Pattni and Swift Rent-A-Car Limited.

Condition 1. Definitions.

1.2 "…Claim" means a claim by the Hirer to recover loss, including the loss of hiring the Vehicle hereunder, resulting from damage sustained to the Hirer's own vehicle in a road traffic accident, which claim is against a party other than the Owner or the Hirer's own insurer)".

"Interest Rate" means a rate equal to 3% above the base rate published by National Westminster Bank PLC (as being the latest interest in operation on the date 28 days before the date on which this agreement is made)".

Condition 9. Payment

9.1 "Save where the Owner has agreed to provide credit pursuant to Condition 10, the Hirer shall pay to the Owner the Hire Charges at the end of the Hire Period".

9.2 "If the Hirer fails to pay the Owner the Hire Charges in full within 14 days after the end of the Hire Period, interest on the outstanding amount at the Interest Rate shall accrue on a daily basis both before and after and judgment from the due date for payment under Condition 9.1 until the date of actual payment".

Condition 10. Credit on the Hire Charges

10.1 "Where a Claim exists the Owner may at its complete discretion, and subject to the provisions of this Condition 10, allow the Hire Charges to remain outstanding until the date identified under the terms of Condition 10.3, being on or before the expiry of 51 weeks after the date of this Agreement (the "Credit Period").

10.2 The Hirer agrees to pay to the Owner interest on any outstanding Hire Charges at the Interest Rate from the due date for payment of the Hire Charges provided for in Condition 9.1 until the date of actual payment. Such interest will be paid on payment (or final payment) of the Hire Charges.

10.3 The Hire Charges, together with interest on them, shall become immediately due and payable by the Hirer in a single payment upon the occurrence of the earliest of the following events:

10.3.1 the day which is 51 weeks beginning with the date of this Agreement;

…….

10.3.3 upon final settlement of the Claim;

……

10.5 The Hirer agrees to take all reasonable steps to pursue the recovery of the Claim and without limitation agrees:

10.5.1 To instruct solicitors to pursue the Claim and if so advised, to issue court proceedings;

…

10.6 The Hirer agrees to give irrevocable instructions to the solicitors referred to in 10.5 to pay the Hire Charges and interest thereon directly to the Owner out of any monies recovered in respect of the Claim. Nothing in this Clause shall entitle the Hirer to make any more than two payments to the Owner being the payment under sub-clause 10.3.2 and the payment under Condition 10.3"

Condition 13 stipulates that the Agreement is governed by English law.