IN THE COUNTY COURT AT OXFORD 1OX01658.

Oxford Combined Court Centre,
St Aldates,
Oxford,
OX1 1TL.

Thursday, 9th April 2015.

Before:

HIS HONOUR JUDGE CHARLES HARRIS QC

SHAW Claimant

- v -

McCLEANS (CONTRACTS) LTD Defendants

MR HAWES appeared on behalf of the Claimant.

MR ROBERTS appeared on behalf of the Defendants.

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Words: 4,005
Folios: 56 (57 in draft)

JUDGMENT
(Approved)

Thursday, 9th April 2015.

JUDGMENT:

JUDGE HARRIS:

01 This is a credit hire case in which damages are sought arising out of a collision which took place a long time ago on 1st December 2010 when the Claimant's wife Mrs Shaw was driving his Audi A8 Quattro motor car along a minor road in Oxfordshire in wintry conditions. A bus owned by the First Defendant driven by one Quick, their servant or agent, collided with her, on her account when she was stationary in the lane. Eventually liability was admitted. The car was scraped badly down its offside though it was still driveable and the Claimant continued to drive it for his daily 130 mile commute to Birmingham and back for some time while arrangements could be made for its repair. That was not an entirely straightforward matter because the car was made at least partially of aluminium and when Mr Shaw got in touch with the Audi dealer from whom he had bought the car they said to him that they could not mend it, that required somebody more specialised than Audi's own garage and he would have to go elsewhere – a surprising response from a concern such as Audi. Anyway, in due course a specialist repairer acceptable to the insurance and presumably to Audi was located in Birmingham and the car was delivered up there on 23rd March 2011.

02 On the same day the Claimant entered into a Credit Hire Agreement with Accident Exchange for the provision of a substitute car. The car that he got was not an Audi A8 but it was a 7-series BMW which is a similar high performance luxury car. He was content with that. The total daily rate for it was £395.15. As is common in these cases the Claimant himself did not set about carrying out any survey of the rates that were available but simply accepted the vehicle provided by Accident Exchange. The car however was not repaired quickly and delivery was not made until 22nd June 2011 which was about 93 days later. It was for that period of time that the claim was originally made. However, it has been accepted by Mr Hawes for the Claimant that that period is 8 days too long because some of the time the Claimant was absent, I think abroad, and could have taken delivery of the repaired car and handed over the hired car sooner. The total charge made was some £36,748. Liability having been admitted the only issue, there being no personal injury, was the recoverability of the amount claimed for the hire of the car.

03 As is common in these cases points were taken or least positions were taken on three aspects; firstly, the need for the car; secondly, the duration of the period of hire; and thirdly, the appropriate rate. As far as need was concerned, this was a slightly unusual case in that the Claimant, as I have said, who was a man of business who needed to commute pretty substantial mileage each day, liked and wanted to have a comfortable powerful car in which to do this and he also spent a great deal of his time when in the car, talking on business to the Far East as he drove to work in the morning via his built-in car phone. It was suggested, it having been discovered that he owned other cars, that there might have been no need for this at all. The position there was that the stable of cars owned by the Claimant consisted besides the Audi A8 of a 5-series BMW; a 32-year old Range Rover used as a repository for debris which was to be taken to a local tip but otherwise in driveable condition; and three classic cars, namely, an E-type Jaguar, a

Porsche and a Bentley or Rolls Royce. It was suggested that perhaps Mr Shaw could have managed without hiring a car altogether and certainly it would have been perfectly possible to commute with speed and comfort in a 5-series BMW but as Mr Shaw pointed out that was the car which he provided for his wife to use and so it was not available for him. That seems to me to be perfectly legitimate. It was then suggested by Mr Roberts in an attractively conducted piece of cross-examination that it might have been possible to do the journey in the 32-year old Range Rover. Indeed it no doubt might have been possible, but at 32 years old though it might have managed to get to Birmingham and back every day with reasonable reliability, it was not equipped with hands-free telephony and no doubt was not as comfortable and satisfactory not least in terms of economy as the Audi Quattro which had been damaged. While of course these cases are all a matter of degree it does seem to me to be unreasonable to reach a conclusion that it would be reasonable for this substantial daily commute to be conducted in a 32-year old vehicle of this kind. I therefore find without great difficulty that Mr Shaw did have a legitimate need for a replacement car of a comparable kind such as the BMW which he ordered.

04 As to the duration, it is a curious feature – indeed a suspicious feature – of many of these cases, of which I have now tried a very large number over the last decade or more, that repairs seem often to take very much longer in credit hire cases than they do in ordinary cases. Sometimes one wonders why. In this case there was some evidence. The car went in and it appears that the parts which were thought to be necessary had been ordered or at any rate most of them had been, but one part, a quarter panel, had not come and that was delayed by a week or two. There was no other direct evidence from the garage or from somebody who consulted the garage's records about what else happened, but it was Mr Shaw's understanding based upon inquiries that he had made not infrequently about the progress of his vehicle that when the car had been taken to pieces in order to be repaired some other piece not previously anticipated to be needed was discovered to have been damaged and needed to be ordered. He did not have any details of this but thought that it was something to do with the petrol tank or possibly the petrol filler since that would have been on the outside of the flank of the car which had been exposed to the collision with the bus. But the best Mr Shaw could do – and he was a satisfactory witness and clearly a conscientious man and a hardworking person who knew about cars – was to tell the court that he had been given to understand that there was some other piece missing which the garage did not have and needed to get, and that it was the period of time taken to get that together with the comparatively modest delay in the arrival of the quarter panel that seems to have produced the delay. So as far as the duration is concerned it is not a question, as has previously been suggested in cases of this kind, of looking to see what might be regarded objectively as a reasonable period of time in which to repair the damage in question; it is a question of what actually happens to a particular Claimant in a particular case and whether he has acted reasonably.

05 Long ago it was suggested by a high authority that it might be possible to take action against a tardy garage in appropriate cases putatively it seemed by the insurance company or possibly by the credit hire company standing in the shoes of the Claimant. It was never precisely explained – at any rate in my recollection – what the cause of action might have been, but in this case it looks as though somebody did consider and indeed draft proceedings, but these have been dropped. So the position is that the Claimant having put up with a damaged car for quite some time while trying to make

arrangements for repairs delivered his car for repairs and could not get it back before he did (allowing for the eight days to which I have previously referred). In these circumstances he cannot be said to have acted unreasonably and nor can it legitimately be said that there was any other intervening cause of the delay separate from the tort committed by the bus driver which could be blamed for the passage of time. Accordingly, and after some discussion between the Bench and Mr Roberts for the Defendant, it seemed clear and that question of duration too was not one upon which the Claimant's claim was susceptible to successful challenge.

06 That left the question of the rate. As is usual in these cases a number of figures have been assembled. On behalf of the Claimant, a number of figures from local suppliers – local being defined as within 25 miles from Oxford – were provided. There were 17 local providers, all of them quoted for a car of the same luxury category – it is not clear that they were indeed Audis – and their prices ranged from £275 as a basic hire non-VAT rate down to £90 for the same thing as compared to the pre-VAT base figure of the Accident Exchange car of £313. The particular feature of these was that all of them save for the Accident Exchange car which was in fact taken were offered on the basis of excesses and these were said to be non-waivable excesses and some of them were quite substantial. The highest excess demanded was £3000. There were two I think of £2500, several at £2000, and four at £500. The Defendants produced a small chart or summary of what were described as Comparative Hire Charges although these were not, it is to be noted, obtained from premises which were within 25 miles of Oxford, a factor which Mr Roberts contended did not matter because he could allow for that by means of the delivery or collection charge. Those figures compared to the aggregate daily rate of £395 – that is no doubt including VAT and other extras and additions – ranged from £228 for a Mercedes 300 saloon down to £200 for a similar vehicle, and there was in fact an Audi A8 on offer from a concern called Avis Prestige at a price of £136 but with a substantial excess of £3000.

07 The question then arises how is the loss properly to be calculated? It has been established for some time that the basic hire rate, as it is now called, is all that a non-impecunious Claimant such as the present one is entitled to. That means that what one has to do is to strip out all the cost and value of services provided above and beyond the basic provision of a motor car. As has been observed in the past, not least on occasions by myself, this could perhaps most accurately be done by obtaining disclosure from the car hire people as to what their costs actually are, but with perhaps surprising success these companies have avoided making such disclosure and so as another way of arriving at what is a proper figure the Court of Appeal has suggested – and indeed the House of Lords – that what one should be looking at is the basic hire rate being the sum for which comparable cars could in fact be hired without the credit hire embellishments. Fashions have come and gone, suggestions have come and gone as to what might be an appropriate way of looking at the material which you obtain in this way. Some have thought that an average might be a fair way of looking at it, but the higher courts have said that they are not because an average is not in itself by definition any particular figure which might have been available. Sometime it was thought that the highest locally available basic hire rate might be what one looked for, but the Court of Appeal has recently reconsidered this problem in a case called *Stevens v Equity Syndicate Management Ltd* [2015] EWCA Civ 93, the court consisting of Jackson, Kitchin and Floyd LJJ. The court from para. 32 considered the way in which the task should be adopted or approached. They said this:

'So that leaves the third approach which is to look at locally available BHR rates for vehicles in the same Group as that of the innocent party. That is the approach which was followed in this case but it produced a wide variety of figures. That we are told is very commonly the case for such hire rates often vary considerably. How then is a judge in a Fast Track Claim for a small sum to proceed? Should the judge take a figure from the top or middle or bottom of the range? Or should he take an average? Or should he conclude, as Mr Butcher urges us to conclude in this case, that if one of the figures at the top of the range is close to or exceeds the credit hire rate then the Defendant has simply failed to prove that the BHR is less than the claimed credit hire rate and so not apply a discount at all? In answering these questions it seems to me to be important to keep well in mind the nature of the exercise. As Lord Hoffmann explained in Dimond, it is to strip out irrecoverable costs of the additional services which the injured party has received. If Mrs Dimond had borrowed the hire money, paid someone else to conduct the claim on her behalf and insured herself against the cost of losing and any irrecoverable costs her expenses would not have been recoverable. These were therefore additional benefits which had to be brought into account. The difficulty arises because credit hire companies do not routinely value such additional benefits. They quote and charge a single credit hire rate. It follows that any attempt to value the benefits at a later stage in a proportionate way much necessarily involve a degree of imprecision. The best that can be hoped for absent a very expensive exercise of disclosure and analysis is a reasonable approximation. Nevertheless as Lord Hoffmann went on to explain in Dimond, a reasonable estimate could be arrived at by considering what Mrs Dimond would have been willing to pay an ordinary hire company for the use of a car. I do not understand Lord Hoffmann to have been saying that it was necessary to consider what Mrs Dimond would herself have been prepared to pay. The attitude of the driver who is not at fault must be irrelevant to the analysis. For example, it may be that as in the present case that person would never have hired a car at all. The analysis is, as Aikens LJ said in Patney, an objective one and it is to determine what the BHR would have been for a reasonable person in the position of the Claimant to hire a car of the kind actually hired on credit. Here I think one finds the answer to the questions I have posed. The rates quoted by companies for the basic hire of a vehicle of the kind actually hired by the Claimant on credit hire terms may vary. No doubt some are offered on very favourable terms; so also those at the top of the range may reflect particular market conditions which allow some companies to charge more than others. But it seems to me reasonable to suppose that the lowest reasonable rate quoted by a mainstream supplier for the hire of such a vehicle to a person such as the Claimant is a reasonable approximation to the BHR. This is likely to be a fair market rate for the basic hire of a vehicle of that kind without any of the additional services provided to the Claimant under the terms of the credit hire agreement. It follows that the judge faced with a range of hire rates should try to identify the rate or rates for the hire in the Claimant's geographical area of the type of car actually hired by the Claimant on credit hire terms. If that exercise yields a single rate then that rate is likely to be a reasonable approximation for the BHR. If on the other hand it yields a range of rates then a reasonable estimation of the BHR may be obtained by identifying the lowest reasonable rate quoted by a mainstream supplier or if there is no mainstream supplier by a local reputable supplier. I would reject Mr

Butcher's submission that in circumstances such as these it is permissible simply to look at the highest figure in the range and if it is greater than or equal to the claimed credit hire rate conclude that the Defendant has failed to prove that the BHR is less than the rate. That it seems to me would be manifestly unjust particularly since the credit hire company is in the best position to elaborate upon and give disclosure relating to its charging structures. It has not been required to do so in the light of the modest size of the claim. I believe that this approach is not only consistent with the observations of Lord Hoffmann in Dimond but also with those of Lord Hobhouse. It will be recalled he thought that there were other ways of reaching the same answer, one of which was that preferred by Lord Justice Judge in the Court of Appeal. He had taken the view that the excess cost was not reasonably incurred as the costs of hiring a substitute car. The right of recovery was limited to the reasonable costs, viz., the lesser sum.'

08 Then at para. 39 the court emphasised:

'The search must be rather for the lowest reasonable rate quoted by a mainstream supplier for the basic hire of the vehicle of the kind in issue.'

Mr Roberts argued for the Avis Prestige at £136.87 although as pointed out it had a £1000 excess and it had a mileage limit too which would not have been sufficient for the Claimant's use of it as a commuter car to Birmingham. It was suggested that there was a way round that in that the car could have been hired and then given to Mrs Shaw to drive instead of the BMW she usually used and that the Claimant himself could have driven the BMW to Birmingham. That is one possibility. It could also be suggested that there might be savings allowing for the excess liability and that it would be reasonable to have suggested that. The Claimant somewhat reluctantly agreed that he might be prepared to take the course of accepting a car with a more substantial excess than the one that he would be happy with. He would have been happy with a conventional excess of £250 or indeed £500 but he was prepared to say on consideration of the figures – in fact it might have been difficult really for him not to say this – that it would still be much more economical to take a car with a £1000 excess and a very much lower weekly charge than to take a car with no excess but a very much more substantial weekly charge.

09 It was urged by Mr Hawes that the question of excess made all the difference and with reference to *B v Jensen (No 2)* [2007] RTR 32 he said that the Claimant was entitled to have a car with no excess and that there were no comparable cars put forward with no excess and in those circumstances in order to get reasonable compensation for an excess-free car it would be appropriate to award him that sum that in fact he had occurred. It was argued that the *Stevens* principle did not apply where there was no evidence of directly comparable excess-free quotes as there had been in the *Stevens* case. I do not consider that this is the correct way to read the *Stevens* decision. It is, if one can say so respectfully, a laudable attempt – long overdue perhaps – to simplify a common problem. The exercise is, as para. 34 indicates, to determine what the Basic Hire Rate would have been for a reasonable person in the position of the Claimant; and as was said in para. 39 to search for the *'most reasonable rate for the basic hire.'* In my judgment the presence or absence of an excess is one of the factors to be taken into account in deciding what is a reasonable rate and indeed what is the lowest reasonable rate for basic hire. Obviously a rate with a nil excess is likely to be more attractive than

one with a substantial excess. A £500 excess is not a very substantial one and in any event the liability to pay it is probably on balance unlikely. The Court of Appeal's objective in *Stevens* was to enable damages in these cases to be readily calculated by a simple method and not to involve the parties in unnecessary complexities such as the analysis of the different rates of excess which were required and the costs that might or might not be charged in order to diminish them. The figures to which I have already referred, being the 17 locally available cars, appear to show that it is very hard to find cars without any excess and indeed the figures produced by the Defendants reinforce that conclusion.

10 I was invited after the luncheon adjournment by Mr Hawes indeed to take one of the figures from the Claimant's list of 17, namely, the figure for an appropriate category car from Luxury Car Hire in Oxford at £237 a week ex-VAT, though it is to be noticed that precisely the same category of car with precisely the same excess, namely £500, seems to have been available at £170 (for some reason printed as £169.99) or indeed £145 (printed as £144.99) which were also available in Oxford. These latter figures compare pretty closely with the Avis Prestige figure for an Audi A8 which attracted the Defendants for an aggregate daily rate of £136 though with a *prima facie* excess of £3000. There being nothing to indicate why a car at £237 is preferable to one at approximately £100 cheaper given the same excess, a figure which is both objectively in my judgment a reasonable one and subjectively acceptable to the Claimant, I conclude that the *'lowest reasonable rate'* quoted by a local supplier is the Guy Salmon rate of £144.99, plus VAT, and it is that figure (which I propose to call £145) multiplied by 85, which I think is the net period of time for which the hire is now claimed, and plus VAT, which is the amount that I award. I am afraid I have not calculated the sum, but it is £145 multiplied by 85, so £12,325 and then to that needs to be added 20% which is £2465, which makes £14,790. I give judgment in that sum. It is £14790 plus £250, so £15,040; interest is *de minimis* so we will leave it at £15,040.