Neutral Citation Number: [2015] EWCA Civ 93

Case No: B2/2014/1166

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BRISTOL DISTRICT REGISTRY
The Hon Mr Justice Burnett
[2014] EWHC 689 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 26th February 2015

Before:

LORD JUSTICE JACKSON
LORD JUSTICE KITCHIN
and
LORD JUSTICE FLOYD

- -

Between:

Karl Stevens	**Claimant/ Appellant**
- and -	
Equity Syndicate Management Limited	**Defendant/ Respondent**

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Official Shorthand Writers to the Court)

Christopher Butcher QC and Guy Vickers (instructed by True Solicitors LLP)
for the Claimant/Appellant
Steven Turner (instructed by Lyons Davidson) for the Defendant/Respondent

Hearing date: 28 January 2015

Judgment

As Approved by the Court

Lord Justice Kitchin:

Introduction

1. This is an appeal by the claimant, Mr Stevens, against an order of Burnett J (as he then was) made on 12 March 2014 allowing in part and dismissing in part his appeal against an order of Mr Recorder Tolson QC made on 24 May 2013. The appeal is brought with the permission of Patten LJ granted on 3 July 2014. It raises an important question as to how the basic hire element of the total charge incurred under a motor vehicle credit hire agreement is to be ascertained.

2. On 10 February 2011 Mr Stevens was driving his Audi A4 S Line Tdi 140 when an insured of the defendant, Equity Syndicate Management Ltd ("ESM"), reversed into him. As Burnett J explained, Mr Stevens had comprehensive insurance but did not wish to jeopardise his own no claims discount by claiming for repairs on his own policy. Accordingly his insurers put him in touch with a credit hire company called Accident Exchange Limited ("AEL") which provided him with two services. First, it hired him a replacement Audi A4 whilst his own vehicle was being repaired. Second, it made arrangements for those repairs and funded the costs of carrying them out pending the recovery of those costs from ESM as the insurer of the driver at fault.

3. The total hire period was 28 days, running from 24 February 2011 to 23 March 2011. The hire rate was £140 per day (exclusive of VAT). But hire at this rate was subject to a £1500 excess. So Mr Stevens agreed to pay an additional charge of £22.50 per day (excluding VAT) to reduce the excess to nil, and a further £3.00 per day (excluding VAT) to reduce his liability for accidental damage to the windscreen, tyres and underbody to nil. The total daily hire rate agreed by Mr Stevens was therefore £165.50 (excluding VAT).

4. Liability was not in issue and the amount due in respect of the repairs was eventually agreed. These proceedings have therefore been concerned with the extent to which the credit hire charge incurred by Mr Stevens is recoverable from ESM.

5. The Recorder had to decide three issues: first, was Mr Stevens impecunious such that he would have been unable to hire a replacement vehicle had he not used a credit hire company? Second, if Mr Stevens was not impecunious and could have afforded to hire a replacement vehicle in the normal way, then what sum was attributable to the basic hire rate of the replacement vehicle that Mr Stevens did in fact hire? Third, was the period of hire reasonable?

6. The Recorder found that Mr Stevens was not impecunious, essentially on the basis of the oral evidence which he gave and his bank statements which showed that at all relevant times his account had a significant positive balance. In deciding the second issue, the Recorder took an average of the rates quoted by four mainstream vehicle hire companies for vehicles in the relevant group and in this way arrived at a basic hire rate of £63.02 (excluding VAT). Finally, he found that the reasonable period of hire was 19 days, having disallowed nine days because the damaged vehicle was taken to the garage for repair on 24 February, but the repair work did not in fact begin until 4 March.

7. Mr Stevens appealed against the Recorder's findings on each of these three issues. Burnett J upheld the Recorder's finding on impecuniosity and there is no further appeal against that decision. However, he reversed the Recorder's finding as to the reasonable period of hire, finding that the car had been stripped almost immediately after its delivery to the garage so that the spare parts necessary for its repair could be identified, and that although these parts were ordered straight away, they did not arrive until nine days later. It would not have been reasonable to reassemble the car so as to allow Mr Stevens to drive it until the parts arrived and so the basic hire rate for the whole 28 day period was properly recoverable. There has been no appeal by ESM on this issue.

8. As for the basic hire rate, Burnett J upheld the decision of the Recorder, but he did so on a basis which Mr Stevens contends is clearly flawed and which would, if uncorrected, have a significant impact on credit hire litigation in the county courts. It is this aspect of the decision of Burnett J which has given rise to this appeal.

General principles

9. The principles to be applied in determining the basis upon which a claimant can recover damages in respect of his vehicle hire costs when he is the innocent victim of a road traffic accident and has hired a replacement vehicle on credit hire terms have been considered in a number of decisions including, most notably, *Giles v Thompson* [1994] 1 AC 142, *Dimond v Lovell* [2002] 1 AC 384, *Burdis v Livsey* [2002] EWCA Civ 510, [2003] QB 36, *Lagden v O'Connor* [2001] UKHL 64, [2004] 1 AC 1067 and *Pattni v First Leicester Buses Ltd*; *Bent v Highways and Utilities Construction Ltd and anor* [2011] EWCA Civ 1384, [2012] Lloyd's Rep IR 577.

10. In *Pattni*, Aikens LJ (with whom Moore-Bick and Pill LJJ agreed) reviewed the earlier authorities and helpfully summarised in a series of propositions the approach to be adopted in such cases. As he explained and so far as relevant to this appeal, the loss of the use of a vehicle as result of the negligence of another driver is a loss for which, in appropriate circumstances, the innocent party can recover damages. It is the duty of the innocent party to mitigate his loss, and if the loss of the use of the vehicle can be mitigated by the hire of a replacement vehicle, the cost of that replacement vehicle will be the measure of damages recoverable for the loss he has sustained.

11. Further, such an innocent party who hires a replacement vehicle on credit hire terms suffers a loss which is also recoverable as damages provided always that he has acted reasonably. Nevertheless, and even if he has acted reasonably, the innocent party may not be able to recover the full amount of the credit hire rate that he has agreed to pay to the credit hire company. It all depends upon his financial circumstances. If he could have afforded to hire a replacement vehicle in the normal way, that is to say without credit hire terms and by paying in advance, then the damages recoverable will be that sum which is attributable to the basic hire rate (or BHR) of the replacement vehicle. If, on the other hand, he is impecunious and could not have afforded to hire a replacement vehicle by paying in advance then, prima facie, he is entitled to recover the whole of the credit hire rate he has paid, provided it was a reasonable rate to pay in all the circumstances.

12. The reason why an innocent party who can afford to hire a replacement vehicle in the normal way is not able to recover the full credit hire rate from the negligent driver

was explored by the House of Lords (albeit obiter) in *Dimond*. In that case Mrs Dimond's vehicle was damaged as a result of the negligence of another driver. Thereafter she acted reasonably in accepting the services offered by a credit hire company called 1st Automotive even though the local BHR (referred to as the "spot rate") for hiring a vehicle similar to her own was a good deal less than the credit hire rate she agreed.

13. Lord Hoffmann (with whom Lord Browne-Wilkinson agreed) explained (at 401D – 402F) that in these circumstances it could not be said that Mrs Dimond had failed to take reasonable steps to mitigate her damage. But that did not necessarily mean that she could recover the full amount charged by 1st Automotive. Under her credit hire contract she had obtained not just the use of the vehicle but additional benefits as well. For example she had been relieved both of the need to lay out the money to pay for the vehicle and of the trouble and anxiety of pursing the claim herself. These were additional benefits the costs of which were not recoverable and had to be brought into account in the calculation of damages. It had been established by the decision of the House of Lords in *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 that where a person whose contract has been broken has taken a reasonable and prudent course naturally arising out of the circumstances in which he has been placed by the breach it is necessary, in assessing his loss, to look at any additional benefits he has obtained and so to "balance the loss and gain". In this regard there could be no difference between contract and tort.

14. That left the question, crucial to the present appeal, as to how the additional benefits were to be ascertained and their value determined. Lord Hoffmann expressed the view that, prima facie, the value was represented by the difference between what Mrs Dimond was willing to pay 1st Automotive and what she would have been willing to pay an ordinary hire company for the use of a vehicle. As he said at 402F – 403H:

> "How does one calculate the additional benefits that Mrs Dimond received by choosing the 1st Automotive package to mitigate the loss caused by the accident to her car? The hiring contract does not distinguish between what is attributable simply to the hire of the car and what is attributable to the other benefits. But I do not think that a court can ignore the fact that, one way or another, the other benefits have to be paid for. 1st Automotive have to bear the irrecoverable costs of conducting the claim, providing credit to the hirers, paying commission to brokers, checking that the accident was not the hirer's fault and so on. A charge for all of this is built into the hire.
>
> How does one estimate the value of these additional benefits that Mrs Dimond obtains? It seems to me that prima facie their value is represented by the difference between what she was willing to pay 1st Automotive and what she would have been willing to pay an ordinary car hire company for the use of a car. As the judge said, 1st Automotive charged more because they offered more. The difference represents the value of the additional services which they provided. I quite accept that a determination of the value of the benefits which must be

> brought into account will depend upon the facts of each case. But the principle to be applied is that in the *British Westinghouse* case [1912] AC 673 and this seems to me to lead to the conclusion that in the case of a hiring from an accident hire company, the equivalent spot rate will ordinarily be the net loss after allowance has been made for the additional benefits which the accident hire company has provided."

15. Lord Hobhouse took a similar view. He explained (at 407A-C) that Mrs Dimond was paying for more than the cost of hiring a replacement vehicle. Although she had acted reasonably she had paid not just for the vehicle but also for other matters which ought not to be included in the cost of mitigation. This was, he thought, the preferred way of looking at the issue but, he continued (at 407C-D), there were other ways which led to the same conclusion:

> "One is that preferred by Judge LJ in the Court of Appeal. The excess cost was not reasonably incurred as the cost of hiring the substitute car. Mrs Dimond's right of recovery is limited to the reasonable cost, that is to say the lesser sum. Another way of looking at the matter is to say, as does my noble and learned friend, that, if the whole cost is to be brought into account, then the benefits must be brought into account as well. This raises the question discussed in *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 and the distinction between what is and is not collateral."

16. Reverting to *Pattni*, Aikens LJ emphasised (at [35]) that it is for the 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.

17. Aikens LJ then proceeded (at [38]-[41]) to consider the ways in which the BHR may be calculated and in so doing reviewed the earlier decision of this court on that issue in *Burdis*. Three possible methods of calculation were canvassed in that case. The first was to break down the charge made by credit hire companies so as to enable the additional unrecoverable elements to be stripped out. The court in *Burdis* rejected that approach on the basis that it would entail detailed disclosure and analysis which would be cumbersome and costly. However, as Aikens LJ observed, that did not mean that the approach was wrong in law and if such evidence was available, for example in the form of the company's published credit hire rates and BHRs, then it might be very persuasive.

18. The second was to apply what was described as a reasonable discount to the credit hire rate charges. But this was rejected as being too arbitrary, a conclusion with which Aikens LJ agreed.

19. The third, and preferred, course was to look at locally available BHR figures. Aikens LJ endorsed the rejection by this court in *Burdis* of an average on the basis that the innocent party was entitled to recover the actual rather than the average cost of hire, subject to mitigation. He summarised the position in these terms at [40]-[41]:

> "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 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."

20. Later in his judgment, Aikens LJ returned to the calculation of the BHR. He began by summarising the questions to be asked (at [73]):

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

21. This is a helpful passage for it explains a structured approach which may usefully be adopted in deciding cases of this kind. It also makes clear once again that the burden lies upon the defendant to establish that there is a difference between the credit hire

rate actually paid and the BHR for the model of car actually hired. The aim of the exercise is, Aikens LJ continued (at [74]), to ascertain the BHR for the vehicle that the claimant actually hired. After again referring to the decision of this court in *Burdis*, Aikens LJ emphasised (at [76]-[77]) that, so long as it was reasonable to hire a particular vehicle and the credit hire rate was reasonable, the court has to calculate the BHR on the basis that the claimant notionally went round to an equivalent non-credit vehicle hire company. As he put it, the claimant has not gone out to hire a vehicle 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.

The appeal

22. Upon this appeal Mr Stephens has been represented by Mr Christopher Butcher QC and Mr Guy Vickers. ESM has been represented by Mr Steven Turner.

23. Mr Butcher explained to us that the judgments at first instance and on appeal in this case demonstrate that judges are still experiencing real practical difficulties in carrying out the exercise of stripping out the additional benefits and calculating the BHR in cases of the kind before us. Indeed, he continues, these difficulties raise serious questions about the practicability and coherence of the exercise itself. Before addressing his criticisms, I must say a little more about the decisions themselves.

24. The only evidence before the Recorder as to BHRs was a report produced by AEL on behalf of Mr Stevens. It shows a wide range of BHRs for vehicles of the relevant group (P4) extending from £33.83 with a non-waivable £1,000 excess to £136.76 with a non-waivable £500 excess. There is, however, a considerable body of BHRs from reputable suppliers for vehicles available close to Mr Stevens' home at around £60 to £66 (exclusive of VAT) and with a nil excess.

25. As I have said, at first instance, the Recorder assessed the BHR by taking an average of a group of BHRs towards the bottom of the range. On appeal, the parties were agreed that this approach, involving, as it did, averages, was contrary to the decisions of this court in *Burdis* and *Pattni*. Nevertheless Burnett J upheld the decision. He considered that the search must be for the figure that the claimant would have been willing to pay had he gone into the ordinary car hire market. As he said at [29]:

> "… the search must be for the figure which the claimant was willing to pay [to use Lord Hoffmann's formulation] on the basis that he had in fact gone into the ordinary car hire market to find a temporary replacement for his vehicle. In doing that the evidence of a claimant that he would be disinclined to spend more than necessary on a car would be relevant. There might be evidence of how the claimant has sourced hire cars in different contexts. Some might be fortunate to have access to discounted rates through membership of motoring or professional bodies. As was recognised in *Burdis* a claimant hiring a vehicle to replace one damaged by a tortfeasor would be under a duty to take reasonable steps to mitigate his loss. That does not mean that a claimant would be expected to telephone every last car hire provider in the locality to seek

> details of various deals that might be available. But the reality today is that almost anybody seeking to hire a vehicle in any particular locality would be likely to investigate the market by doing a simple comparative search on the internet. The full panoply of different hire rates available to the credit hire industry through specialist websites (and regularly produced in credit hire litigation) would not be available to an ordinary driver, but one way or another it is not difficult for anyone wishing to hire a car to discover the rates offered by the major hire companies. Cheapest is not necessarily best and for all sorts of reasons anyone may reasonably choose to hire from a company that is not the cheapest available."

26. One of the curiosities of this case is that Mr Stevens explained in evidence that he would never have taken that course and he is, I suspect, by no means unusual in that respect. Nevertheless, Burnett J thought a claimant in a case of this kind should be questioned on the hypothesis that he would have gone into the market to hire a vehicle:

> "30. Questioning of the claimant on this issue, should be directed to exploring what he would have been willing to pay on the hypothesis that he would have gone into the market to hire a vehicle. "

27. Burnett J then turned to the AEL report and explained that the Recorder had focused on companies which provided vehicles in the appropriate group in the locality in which Mr Stevens lived and with a nil excess. He noted too that before the Recorder the parties had agreed that it was appropriate in this case to look at vehicles in that group. Moreover, the judge continued, in looking at the nil excess the Recorder was endeavouring to find the closest like for like comparator. Further, he had properly concentrated on four major suppliers, National, Europcar, Thrifty and Alamo. In all these circumstances, and despite the Recorder's error in taking an average, he had not arrived at a figure which was to Mr Stevens' disadvantage because the correct approach would have led him to arrive at a slightly lower figure. The judge put it this way (at [32]):

> "… Had the judge been reminded that the averaging exercise in which he had engaged was disapproved by authority, he would have had a range of Basic Hire Rates to choose from which covered a spectrum from £10.00 per day less than the figure on which he alighted to £7.00 per day more. The correct approach to reflect the factors that the evidence disclosed in this case would have been likely to lead the judge to pick a figure somewhere in the middle, in fact a little less than the average upon which he eventually chose. Whilst able to hire a vehicle in the market, the claimant was not especially affluent and had demonstrated by his evidence his disinclination to spend more than was necessary. Had he hired, he would have done so with a nil excess from a major reputable company with a local presence. The error in approach has not resulted in any detriment to the claimant."

28. Mr Butcher contends that the approach adopted by Burnett J was wrong for at least the following reasons. The whole exercise of seeking to find the BHR is directed to finding out the amount, if any, included in the credit hire rate which is attributable to additional benefits over and above the hire of the vehicle. This exercise is necessarily an objective one. The BHR cannot depend upon what a particular claimant would have been willing to pay. The notion of a BHR depends on there being a unitary figure which can be assessed as the amount payable for the hire of a relevant type of vehicle, not including any additional benefits, and so cannot be something which is dependent upon the position, wishes or circumstances of any individual claimant. Further, the judge's approach cannot be justified by reference to Lord Hoffmann's speech in *Dimond.* Although Lord Hoffmann spoke of the additional benefits being represented by the difference between what Mrs Dimond had been willing to pay the credit hire company and what she would have been willing to pay an ordinary hire company for the use of a car, this was an early formulation and the correct approach has since been clarified by the decisions of this court in *Burdis* and *Pattni*.

29. Accordingly, Mr Butcher continues, Burnett J ought to have assessed what part of the credit hire rate was attributable to additional benefits on an objective basis. Further and importantly, it was for ESM to establish that there was a difference between the credit hire rate actually paid and the BHR for the model of vehicle actually hired. Had the judge approached the matter correctly he would or ought to have found that the higher rates in the table could not properly be ignored for they showed that non-credit hire companies would have hired out vehicles in the same group for substantially more than the BHR at which the judge arrived. By way of illustration, Mr Butcher focuses on the rate of £122.69 per day with a £500 excess quoted by Europcar, a major non-credit hire company. That excess would, he says, have been capable of being separately insured and thus the basic hire rate would have been higher (albeit by how much was not established) than the figure quoted. Given this, he continues, it is simply not possible to say that AEL's rate, with a nil excess, included any amount in respect of irrecoverable benefits.

30. I accept that judges are still experiencing practical difficulties in calculating the BHR component of any particular credit hire rate. The reasons are not hard to find. The claims are generally for relatively small sums and often proceed in the fast track. Lawyers preparing them and judges trying them endeavour to do so at proportionate cost. As recognised in *Burdis*, breaking down the actual credit hire charge made by a credit hire company in any particular case so as to enable the unrecoverable element to be stripped out would require disclosure and analysis, the cost of which would far exceed the value of the claim. We canvassed with Mr Butcher in the course of argument whether credit hire companies could, as a matter of course, disclose their estimate of the BHR alongside every quoted credit hire rate but I understood him to say this would not be straightforward for it would depend upon the particular circumstances of each individual case. Certainly it was not a suggestion which AEL embraced.

31. The second approach discussed in *Burdis*, that of applying a reasonable but standard discount, found little favour in that case because of its unduly arbitrary nature. As I have indicated, that was a conclusion with which Aikens LJ agreed in *Pattni*, and it was not suggested to us that it should be revived.

32. 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 range 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 the middle or the 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?

33. 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.

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

35. Here I think one finds the answer to the questions I have posed. The rates quoted by companies for the basic hire of a vehicle of the kind actually hired by the claimant on credit hire terms may vary. No doubt some are offered on very favourable terms. So also those at the top of the range may reflect particular market conditions which allow some companies to charge more than others. But it seems to me reasonable to suppose that the lowest reasonable rate quoted by a mainstream supplier for the hire of such a vehicle to a person such as the claimant is a reasonable approximation to the BHR. This is likely to be a fair market rate for the basic hire of a vehicle of that kind without any of the additional services provided to the claimant under the terms of the credit hire agreement.

36. It follows that a judge faced with a range of hire rates should try to identify the rate or rates for the hire, in the claimant's geographical area, of the type of car actually hired by the claimant on credit hire terms. If that exercise yields a single rate then that rate is likely to be a reasonable approximation for the BHR. If, on the other hand, it yields a range of rates then a reasonable estimate of the BHR may be obtained by identifying

the lowest reasonable rate quoted by a mainstream supplier or, if there is no mainstream supplier, by a local reputable supplier. I would reject Mr Butcher's submission that in circumstances such as these it is permissible simply to look at the highest figure in the range and, if it is greater than or equal to the claimed credit hire rate, conclude that the defendant has failed to prove that the BHR is less than that rate. That, it seems to me, would be manifestly unjust particularly since the credit hire company is in the best position to elaborate upon and give disclosure relating to its charging structures but has not been required to do so in light of the modest size of the claim.

37. 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 there were other ways of reaching the same answer, one of which was that preferred by Judge LJ in the Court of Appeal. He had taken the view that the excess cost was not reasonably incurred as the cost of hiring the substitute car. The right of recovery was limited to the reasonable cost, that is to say the lesser sum.

38. With these principles in mind I turn to the decision of Burnett J in this case. As I have said, he considered that the search must be for the figure that the claimant would have been willing to pay on the basis that he had gone into the ordinary hire market to find a temporary replacement for his vehicle, and that questioning of the claimant should be directed to exploring that issue. He then went on to find that had Mr Stevens done so he would have picked a figure a little less than the average at which the Recorder had arrived. In these circumstances, the error made by the Recorder in taking an average had not worked to the disadvantage of AEL or Mr Stevens.

39. In my judgment Burnett J has fallen into error in the way he approached the exercise but not in the answer to which he came. As I have sought to explain, the analysis must be directed to stripping out the irrecoverable costs from the hire rate the claimant has agreed to pay or, conversely, ascertaining the part of the charge which is attributable to the basic hire of the particular vehicle the claimant has chosen. This is an objective exercise and the evidence of the claimant about what he would have done had he gone into the market to hire a vehicle on standard hire terms is likely to be of little assistance to the judge seeking to carry it out. The search must rather be for the lowest reasonable rate quoted by a mainstream supplier for the basic hire of a vehicle of the kind in issue to a reasonable person in the position of the claimant. This, it seems to me, is a proportionate way to arrive at a reasonable approximation to the BHR.

40. Nevertheless, application of the correct approach in the context of this case seems to me to yield a figure for the BHR which is very close to but a little less than that at which the Recorder arrived. The Recorder properly focused on four mainstream suppliers offering for basic hire with a nil excess in Mr Stevens' locality a vehicle of the kind actually hired by him on credit hire terms. However, and as the parties agreed before the judge, the Recorder then fell into error in taking an average. In my judgment he ought rather to have taken what he considered to be the lowest reasonable rate from within the range he had identified. I entirely agree with Burnett J that had he done so he would have arrived at a figure a little less than that which he actually chose.

41. For all of these reasons I would dismiss this appeal.

Lord Justice Floyd:

42. I agree.

Lord Justice Jackson:

43. I also agree.