Neutral Citation Number: [2010] EWCA Civ 647

Case No: B2/2009/1542/CCRTF

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Telford County Court
His Honour Judge Mitchell
7RAO3506

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/06/2010

Before :

SIR MARK POTTER, THE PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE DYSON
and
LORD JUSTICE MAURICE KAY

- -

Between :

BEECHWOOD BIRMINGHAM LTD	**Appellant**
- and -	
HOYER GROUP UK LTD	**Respondent**

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

Mark Turner QC and Stuart Nicol (instructed by Berrymans Lace Mawer) for the Appellant
William Edis QC, Ken Delaney and Miss Summer (instructed by **Anthony Hodari & Co**) for the Respondent

Hearing date : 11 February 2010

- -

Judgment
As Approved by the Court

Sir Mark Potter :

Introduction

1. The appellant in this case, who was the defendant below, appeals from a judgment of His Honour Judge Mitchell in the Telford County Court on 6 April 2009 awarding damages to the claimant/respondent arising out of a road accident between two vehicles driven by their respective employees. The issue in the appeal relates to the proper calculation of damages for the loss of use of the claimant's vehicle while under repair following the accident. More specifically, the issue is whether, in the particular circumstances of this case, the Trial Judge was correct to award to the claimant damages based upon the spot rate for a substitute vehicle hired from a credit hire company, or whether, having held that it was not reasonable for the claimant to hire in a substitute vehicle what (if any) award was appropriate by way of damages for loss of use.

Brief facts

2. The claimant is a substantial company of motor dealers trading from four locations as appointed dealers in new and second hand Audi motor cars. At any given time, it holds a large stock of cars for sale. One of its vehicles, an Audi A6 2.7 tdi Quattro, suffered an accident when being driven by one of the claimant's employees as he went to collect a customer's vehicle. The damaged vehicle was in fact one currently allocated out of the claimant's stock to its then service manager, he being employed under a contract of employment which entitled him to use one of the claimant's cars for his own personal use outside office hours. The damage was such that the vehicle could not be driven until after repair.

3. On the day following the accident the service manager, rather than simply reallocating to himself a similar car from the claimant's stock, hired an equivalent substitute vehicle under a form of credit hire agreement. As the Judge held, this was an unusual step in that hitherto, in similar circumstances, when one of the claimant's cars suffered an accident necessitating a period off the road for repair, it was the claimant's practice not to hire in, but to source a replacement for the temporary loss of use whilst repairs were carried out from it's own available pool of some 64 cars, which was large enough to avoid the necessity to hire in from outside in order to meet its business needs. The pool included a number of courtesy cars available without charge to customers whose vehicles were under repair, as well as used cars passing through the dealership and available for sale or use by the claimant. There were other similar A6 models able to be made available to the service manager for his use out of office hours without any loss of profit or additional expenditure on the part of the claimant. The replacement car in this case was hired, not to fulfil the needs of the claimant's business, but because the service manager wished personally to test the efficacy of a form of credit hire agreement between the claimant and Accident Exchange Limited under which the claimant undertook to refer to Accident Exchange Limited customers who might require a replacement vehicle in the event of an accident.

4. The damaged vehicle was duly placed in the hands of the claimant's body repairers and, owing to delays caused by the insurers of the defendant's vehicle and

complications in the course of repair, the total period of hire paid to Accident Exchange Ltd, and in turn claimed from the defendant, was 120 days.

5. At paragraph 5 of the claimant's re-amended particulars of claim, the claim for damages was framed as follows:

> "By reason of the aforesaid the Claimant has suffered loss, damage, expense and inconvenience.
>
> **PARTICULARS OF SPECIAL DAMAGE**
>
> | | |
> |---|---|
> | (1) Vehicle Repairs | £ 3,071.40 |
> | (2) Vehicle Hire Charges | £30,239.00 |
> | The Claimant hired an Audi A6 3.0 Quattro from Accident Exchange Ltd from 9 February 2006 until 8 June 2006 (120 days) at a rate of £250.95 per day Plus a credit repair fee of £50.00 plus a delivery and Collection fee of £75.00. | |
> | (3) Miscellaneous Expenses associated with the claim. | £ 35.00 |
> | **TOTAL CLAIMED:** | £33,345.40" |

Thus the claim was for special damage, based on the actual costs of hire under the credit hire agreement and no separate or alternative claim for general damages for loss of use was pleaded.

6. By paragraph 6 and 7 of the amended defence, the defendant denied the claimant's paragraph 5 and inter alia alleged failure by the claimant to mitigate its loss by hiring a vehicle on credit when it was unnecessary to do so and/or for failing to make use of alternative vehicles which it had available. By its reply, the claimant asserted that it was "entitled to claim for loss of use of the vehicle referable to the reasonable cost of alternative like for like transport."

7. In the event, the Judge made an award on that basis. He found a period of only 48 days to be justified as the time taken for repairs and awarded general damages for loss of use of the claimant's vehicle of £12,000 at a rate of £250 per day. That was the rate payable under the credit-hire agreement. In the ordinary way the credit hire rate, which allows deferment of the hire charges until eventual recovery from the tortfeasor's insurer, is substantially higher than the spot hire rate and is not recoverable (see *Dimond v Lovell* [2002] 1 AC 384 at 402H-403B) unless the claimant is impecunious (see *Lagden v O'Connor* [2004] 1 AC 1067 per Lord Nicholls at paras 4 – 7); only the spot hire rate, based on the hirer's immediate liability to pay is awarded. However, it is clear from the judgment below, that it was conceded by the defendant that, if (and only if) the claimant could establish a claim based on a *need* for outside hire, then the rate paid under the credit hire agreement should also be taken as the spot hire rate for the purposes of quantifying the claim.

The judgment below

8. The form of the judgment on the issues still relevant to this appeal can be summarised as follows. The Judge first dealt with the state of the evidence in relation to the size of the available pool of the claimant's own cars and the reasons why, for the first and only time, the claimant decided to hire a replacement car under the customer credit hire agreement with Accident Exchange Limited. In relation to the issue of mitigation he referred to a passage in the speech of Lord Hope in *Lagden v O'Connor* [2003] UKHLC 64, [2004] 1 AC 1067 at para. 27 dealing with the duty of a claimant to mitigate, which paragraph reads in full as follows (the words in italics being those quoted by the Judge):

> "Mr Lagden's claim was, in essence, a claim for the loss of use of his car while it was in the garage undergoing the repairs which needed to be done as a result of the accident. There was no evidence that he would have suffered financial loss as a result of being unable to use his car during this period. But inconvenience is another form of loss for which, in principle, damages are recoverable. So it was open to him, as it is to any other motorist, to avoid or mitigate that loss by hiring another vehicle while his own car was unavailable to him. The expense of doing so will then become the measure of the loss which he has sustained under this head of his claim. It will be substituted for his claim for loss of use by way of general damages. But *the principle is that he must take all reasonable steps to mitigate his loss. The injured party cannot claim reimbursement for expenditure by way of mitigation which is unreasonable. So the motorist cannot claim for the cost of hiring another vehicle if he had no reason to use a car while his own car was being repaired – if, for example, he was in hospital during the relevant period or out of the country on a package holiday. If it is reasonable for him to hire a substitute, he must minimise his loss by spending no more on the hire than he needs to do in order to obtain a substitute vehicle*. If the defendant can show that the cost incurred was more than was reasonable – if, for example, a larger or more powerful car was hired or although vehicles equivalent to the damaged car were reasonably available at less cost – the amount expended on the hire care must be reduced to the amount that would have been needed to hire the equivalent. "

9. The Judge then quoted paragraph 34 of Lord Hope's judgment:

> "It has to be shown that the claimant had a choice, and that he would have been able to mitigate his loss at less cost. The wrong doer is not entitled to demand of the injured party that he incur a loss, bear a burden or make unreasonable sacrifices in the mitigation of his damages. He is entitled to demand that, where there are choices to be made, the least expensive route which will achieve mitigation must be selected. So if the evidence shows that the claimant had a choice, and that the

> route to mitigation which he chose is more costly than an alternative that was open to him, then a case will have been made out for a deduction …."

10. Moving to consider the position in the case before him, the Judge stated at paragraph 13 of his judgment:

> "The evidence makes it plain that this claimant neither had a need of outside hire, nor was it reasonable for them to resort to it. They did so for reasons which were remote from the defendant's wrongdoing. Does that then mean, as the defendant submits, that the claimant is entitled to no compensation at all for the loss of use of their motor vehicle?"

11. In relation to that question the Judge found the answer in the speech of Lord Scott in *Lagden* at paragraph 76. That paragraph reads as follows:

> "…
>
> Mr Lagden had been deprived of the use of his car for the 17-day period between the date of the accident and the completion of the repairs. He was entitled to damages as compensation for that deprivation. If he had not hired a substitute vehicle he would still have been entitled to general damages. His entitlement to general damages would not have depended on the degree of use to which he would, if his car had not been damaged, had been likely to put it. *He had been deprived of the benefit of having his car available for whatever use he might from time to time decide upon. The measure of damages for this deprivation would, prima facie, have been the spot rate charged for a comparable vehicle over the repair period*. In *Owners of No 7 Steam Sand Pump Dredger v Owners of SS Greta Holme (The Greta Holme)* [1897] AC 596, 604 Lord Herschell said:
>
> > 'I take it to be clear law that in general a person who has been deprived of the use of a chattel through the wrongful act of another is entitled to recover damages in respect therefore, even though he cannot prove what has been called "tangible pecuniary loss", by which I understand is meant that he is a definite sum of money out of pocket owing to the wrong he has sustained. This was not disputed.'
>
> And in *Owners of the Steamship Mediana v Owners, Master and Crew of the Lightship Comet (The Mediana)* [1900] AC 113, 117, Lord Halsbury LC said:
>
> > 'What right has a wrongdoer to consider what use you are going to make of your vessel? … Here, as I say, the broad principle seems to me to be quite independent of the

> particular use the plaintiffs were going to make of the thing that was taken'…"
>
> In both these cases the issue was as to the damages to be paid to the plaintiff for loss of use for a ship while the damage caused by the defendant's negligence was being repaired. In *Admiralty Comrs v Owners of SS Susquehanna (The Susquehanna)* [1926] AC 655, 661, another ship collision case, Viscount Dunedin made clear that: 'There is no difference in this matter between the position in Admiralty law and that of the Common law …' so, *in car accident cases as in ship accident cases, the negligent driver must compensate the owner of the other car for his loss of use of the car while it is undergoing repair. If there is no more to the loss of use claim than that, the claim will be for general damages and a fair approach to quantum would be to award a sum based upon the spot rate hire charge for a comparable vehicle*." (emphasis added).

12. The Judge continued:

> "14. The A6 was an asset employed by the claimant in their business. I adopt the fair approach adumbrated in the speech of Lord Scott the approach should be to award the claimant general damages based upon the spot hire rate for the comparable vehicle. That is conceded in this case by the defendant, on the particular facts, to be equivalent to the Accident Exchange rate of £250.95 per day."

13. The Judge then made his award accordingly.

The grounds of appeal

14. The grounds of the appeal, as developed in argument by Mr Turner QC for the appellant may be summarised in this way.

15. First, he relies upon the clear and unequivocal finding of the Judge in paragraph 6 of his judgment that, in the circumstances of the case, and on the basis of the claimant's usual practice, there was no need for the claimant to resort to any form of outside hire for the purpose of its business or the fulfilment of any obligation vis-à-vis its manager, the claimants own stock being ample and appropriate for the purpose. That being so, absent authority to the contrary, the matter fell to be analysed on the basis of first principles in relation to proof of loss, including the duty to mitigate.

16. Second, based on the Judge's findings, Mr Turner submits that there should have been no award of damages for loss of use at all, or at best a nominal award, because in the circumstances it had been demonstrated that the claimant had the capacity itself to supply an alternative vehicle of the type damaged out of its pool of cars throughout the entire period whilst the damaged vehicle was off the road, yet the claim for damages for loss of use was pleaded and put solely on the basis of the costs of an unnecessary hiring.

17. Third, Mr Turner submits that if, despite that position, the respondent was entitled to an award of general damages for loss of use, it was illogical and wrong to award a conventional sum based on the reasonable costs of hiring in an alternative vehicle, when the Judge had expressly found that the claimant neither had a need of outside hire, nor was it reasonable for it to resort to it. The proper measure of damage was the cost of maintenance and operation of the alternative vehicle earmarked for the manager's use (see *Birmingham Corporation v Sowsbery* [1970] RTR 84 at 87) in respect of which no claim was made.

18. Fourth, Mr Turner submits that the Judge erred in treating the passages in Lord Scott's speech in *Lagden* (which I have emphasised above) as justifying the award of a spot hire rate in this case.

19. In this respect, he first points out that Lord Scott's identification of the spot hire rate as being the "fair approach" in the general run of loss of use cases needs to be viewed in the context of the case which was before him, namely one where no issue arose as to whether the claimant (who was a private motorist and not a corporation) acted reasonably in hiring a substitute vehicle. The question at issue in *Lagden* was whether the claimant's right to recover was limited to the spot hire rate, *as admitted and averred by the defendants*, or whether he could recover the additional costs of credit hire. Mr Turner submits that proper analysis of the shipping cases relied upon by Lord Scott shows that, albeit they established the principle that damages may be recovered for loss of use of a non-profit earning chattel whether or not a replacement is provided, they positively rejected the principle in respect of the corporate loss claimed that the notional cost of hire of a replacement chattel is a proper basis for the assessment of such damages where no such replacement is hired. Mr Turner submits that other authorities, to which Lord Scott was not referred, affirm this to be the case.

20. Mr Turner emphasises that Lord Scott's dictum does not differentiate between individuals and corporate bodies. In the case of an individual, where no substitute vehicle is hired, the claim for general damages is essentially one for personal inconvenience, over the period of the loss of use. This calls for a jury style assessment dependent upon the degree of personal inconvenience and disruption suffered by the claimant in his daily life. In that respect, depending upon the circumstances, the Judge may or may not take current hire rates to be a useful or conventional guide in assessing the amount of the award: (see *Bee v Jenson* [2007] EWCA CIV 923 at paras 20-22). On the other hand, the claim for damages by a corporate business such as a car dealership which absorbs the loss of use of a single vehicle by supplying a substitute from stock without any consequent loss of profit, is different in character; albeit there is no loss of profit, is a claim for financial loss rather than personal inconvenience and is susceptible to approximation by an appropriate accounting exercise (see *Sowsbery's* case above). The damage suffered, if it is to be claimed at all, falls to be calculated on the basis of the corporate cost of maintaining and operating the substitute vehicle, in relation to which the burden of proof rests upon the claimant.

21. In this connection, Mr Turner submits that an award based on the notional cost of hiring in another vehicle, which includes a substantial element for the profit and additional overheads of the hirer including insurance, can be neither an accurate guide nor a fair approach; it represents a windfall to the claimant and is not something which the tortfeasor ought fairly to be required to pay by way of compensation.

22. Last, it is Mr Turner's submission that, whatever may be the appropriate and/or conventional basis of an award for loss of use to an individual in respect of the inconvenience and disruption experienced in his life when he is deprived of the use of his car and no substitute is provided, in the case of a corporate claimant an award based on costs of hire should only be made if such costs have been incurred; where the gap has been filled at less cost by supply of a vehicle or vehicles out of the claimant's available pool, the award for loss of use should be based upon a suitable accounting exercise apt to approximate the business costs fairly attributable to that process, as in *Birmingham Corporation v Sowsbery* (above).

The respondent's submissions

23. Mr Edis submits that the Judge was correct to make the loss of use award which he did for the reasons which he gave, namely by applying the observations of Lord Scott at face value to the calculation of the loss of use claim and recognising no distinction in principle between claims for loss of use by individuals and by corporate claimants.

24. In addition, by respondent's notice, Mr Edis seeks to uphold the decision on alternative grounds which essentially relate to the burden of proof. His argument runs as follows. He takes the point that the vehicles in the claimant's pool of cars were all owned for the purposes of use in its business, either as cars for sale, courtesy cars or by way of benefit to an employee contractually entitled to use of one of the claimant's cars outside working hours. Thus there was an inevitable cost to the claimant by diversion of the replacement car from its intended use. Mr Edis submits that, in the absence of proof from the defendant that the cost of deploying a car belonging to the claimant would have been cheaper than hiring a car at the spot rate, the Judge should have held either that there was no evidence that the claimant had acted unreasonably and failed to mitigate their damage or that, in the absence of evidence of a lower costs alternative, the Judge was entitled to take that rate as the appropriate figure.

Discussion

Mitigation

25. In my view, Mr Edis fails in his attack upon the Judge's finding that by entering into a hiring agreement rather than by supplying a replacement vehicle from its own ample stock, the claimant failed to mitigate their loss, as to which there was a clear challenge raised in the pleadings and evidence. As stated in *McGregor on Damages* (18th ed. at para. 7-004):

> "The first and most important rule is that the claimant must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction to avoid."

So far as the hiring of a vehicle following an accident is concerned, it is plain that the necessity to do so is not regarded as self-proving. The position in law is that stated by Lord Mustill in *Giles v Thompson* [1994] 1 AC 142 at 167:

> "… It has been questioned whether … there is sufficient proof that the motorist acted reasonably in hiring a replacement vehicle to justify an award in full of the company's hire charges–or, indeed, it would seem any award at all. The question is before the House because the County Court Judge held:
>
> > *'As a matter of principle … if you deprive me of an article of use to me, you have no complaint whatever if I hire another to replace it … If I have a car simply for my own pleasure, I regard it, in principle, [as] wrong that I should be required, before being able to hire a car and charge it to the wrongdoer, to prove that I needed as opposed to merely desire the use of it.'*
>
> Whilst I have sympathy with this point of view I think it too broad. The need for a replacement car is not self-proving. The motorist may have been in hospital through the accident for longer than his vehicle was off the road; or he may have been planning to go abroad for a holiday leaving his car behind; and so on. Thus, although I agree with the judgments in the Court of Appeal that it is not hard to infer that a motorist who incurs the considerable expense of running a private car does so because he has a need for it, and consequently has a need to replace it if, as a result of a wrongful act, it is put out of commission, there remains ample scope for the defendant in an individual case to displace the inference which might other wise arise.
>
> Further than this I am not prepared to go."

26. Again, as stated in the unanimous judgment of the Court of Appeal (per Aldous LJ) in *Burdis v Livsey* [2003] QB 36 at paras. 147-148:

> "147. The fundamental principle is that a person whose car has been damaged is entitled to compensation for the loss caused. In a case where such loss includes loss of use *and he establishes a need for a replacement*, he is entitled to the cost of hiring a replacement car … 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." (emphasis added)

27. The judgment continued:

> "148. We do not anticipate the application of the correct principles will lead to disproportionate costs in small cases. The claim will be based on evidence as to the rate charged by a car hire company in the relevant area. Perhaps the rate will be at the top end of the range of company rates. Thereafter the evidential burden passes to the insurers to show that it would

> not have been reasonable to use that particular car hire company and that the reasonable course would be to use another company which charged a lower rate. *What is reasonable and whether a loss is avoidable are questions of fact, not law, which District and County Court Judges regularly decide*." (emphasis added)

28. That claim of course related to a situation where a replacement car had been hired and the issue arose as to the rate of hire recoverable. However, the principle that a claimant must take reasonable steps to mitigate his loss applies across the piece and is equally applicable where the issue is whether there was a need to hire a replacement car at all: see for instance *Park Lane BMW v Sarah Whipp*, a decision of His Honour Judge Charles Harris QC in the Oxford County Court (Case No. 7B00829), 20 May 2009, in which the principles of mitigation were applied in relation to a large car dealership which had hired a replacement vehicle which was not identical to that damaged, without calling evidence as to what other cars it owned or were available to it. In that case after a careful review of the authorities, the Judge referred to the "long established principle that a claimant must prove … that a replacement car was reasonably necessary" and observed:

> "It will not be difficult for an ordinary motorist who loses the use of his only car to prove his need. It will generally not be too difficult for a commercial organisation which, for example, lost the use of a van which was daily employed for delivery. It might have been possible for Park Lane to have called evidence to establish that it had or would have had the need to use the limousine showing what his diplomatic commitments were or were expected to be and explaining what the substitute car was in fact used for. But it did not bother to do so. Consequential loss, special damage of the type here, does not prove itself."

29. In the instant case an issue was clearly raised and investigated in detail below as to whether there was any need for the hire of a replacement. The Judge concluded that there was not and that the claimant had ample capacity within its own stock of cars to absorb the loss of use of the particular car without any extra expenditure or loss of profit to its business as was its usual practice. In an effort to upset this finding, Mr Edis relies upon the observation of the Court of Appeal in *Copley v Lawn; Maden v Haller*[2009] EWCACIF 580 [2010] Bus LR83 per Longmore LJ at para 23 to the effect that "questions of mitigation are .. questions of evaluation and judgment and there is no reason why this court should not interfere if the judge's conclusions are, in its considered opinion, wrong". However, that observation requires to be read in its context. The issue before the court was whether or not the claimant, who had hired a replacement car through her own insurers, acted reasonably in refusing a subsequent offer of the defendant's insurers of a "free" replacement. There was no issue before the court as to whether or not the claimant was entitled or had need to hire a replacement vehicle at all (which was the issue in this case) and, as Longmore LJ made clear as a preface to his observation, there was "no question of any interference with any finding of primary fact". At paragraph 29 of his judgment he stated:

> "In the present cases there was an undoubted loss to the claimants because their cars had to be repaired *and they needed*

> *replacement cars during the period of repair*. That loss cannot be wiped out by an offer from the defendants to *provide a* "free" replacement …" (emphasis added)

30. In stating his conclusion at paragraph 32 of his judgment, Longmore LJ referred to the general rule that a claimant who hires a substitute vehicle can recover the "spot" or market rate of hire:

> "… unless and to the extent that a defendant can show that on the facts of a particular case, a car could have been provided even more cheaply than the "spot" or market rate."

31. Mr Edis has sought to apply this observation out of context to the situation in this case and to submit that, because the defendant did not demonstrate the costs to the claimant of providing a substitute car from within its own stock would have been less than the cost of hiring at the spot rate, the plea of failure to mitigate cannot be made out and the spot rate should therefore be recoverable. As I have already indicated, the plea of failure to mitigate was raised and held to be established on the basis that the resort to outside hire was a failure to take a reasonable and less costly course open to and customarily followed by the claimant. Once the plea had been raised, and the claim for special damage in respect of outside hire challenged, it was for the claimant to advance any alternative claim for general damages for loss of use and to supply the material to support it. This it failed to do.

32. I do not consider that the conclusion of the judge in this case on the question of failure to mitigate is one with which this Court may properly interfere and, as such, it is a finding upon which Mr Turner legitimately founds his argument for the claimants.

Damages for loss of use

33. Since the decision of the House of Lords in *The Greta Holme* [1897] AC 596, it has been clear that damages may be recovered for loss of use of a non-profit earning chattel, whether or not a replacement is provided for the damaged chattel. This principle appears from the authorities referred to by Lord Scott in the passage quoted at length in paragraph 11 above.

34. It is worthy of note that in *Burrows:Remedies Torts and Breach of Contract (3rd edition) pp 244 – 245,* Professor Andrew Burrows raises a powerful argument that the concept of damages for loss of use of non-profit earning chattels, in addition to the cost of repair and replacement, is misconceived save in respect of claims by private individuals. The effect of his argument is that, in cases of damage to chattels where no substitute vessel or car is hired, the gap being filled because the claimant has sufficient "cover" available within its own stock, no identifiable pecuniary loss is demonstrable and therefore no award of damages is appropriate. In my view, that argument is not open upon the authorities; it does not meet the point that, in any such case, the claimant suffers the loss of a percentage of the capital value of the chattel during the period of deprivation and/or the cost of maintaining and operating the vehicle or vehicles which are used by way of substitution (c.f. *Birmingham Corporation v Sowsbery* and see further below).

35. Mr Turner is correct when he points out that *The Greta Holme* and subsequent authorities do not support the observation that, where one is concerned with the loss of a non-profit earning vessel or vehicle in respect of which the claimant does not incur the costs of hiring in a substitute, the measure of damages is ordinarily to be taken as the spot rate of hire for a comparable vessel/vehicle. Neither T*he Greta Holme* nor *The Mediana* which affirmed the principle that general damages for loss of use are recoverable in such cases, are of real assistance as to how the measure of damages is to be calculated, no argument being directed to that point: see *McGregor on Damages* (18th ed) at paragraph 32-045.

36. The effect of the two cases so far as the measure of damages was concerned was succinctly described in *The Susquehanna* [1926] AC 655 per Viscount Dunedin at 659-660, where he said of *The Greta Holm*e:

> "That case laid down that damages were due for the period in which a ship was rendered useless, even though the ship was not a ship of the kind which could secure commercial employment and earn consequent reward. That, and that alone was the true point of the case. It is true that a sum was then fixed, but it was fixed by Your Lordships much as a jury would fix it. The *Greta Holme* was a dredger. Her services were lost during the period which was occupied in her repair. She could not be, and was not, replaced by any other dredger. There was evidence that if anyone had had a dredger of the same sort he could have let it out at the rate of £100 a day. The dredger was disabled for fifteen weeks. Their Lordships, really acting as a jury, assessed the damages at £500."

Thus, the rate of hire appropriate to a vessel of the type damaged was *rejected* as the mode of calculation or the loss of use claim.

37. In respect of *The Mediana*, the damaged vessel was one of several lightships in a pool sufficient to enable a replacement to be brought in at no extra expense. Viscount Dunedin stated:

> "… there was no discussion in either the Court of Appeal or in this House upon the precise principles upon which the sum afforded was fixed. It was taken as if it had been found by a jury. Nevertheless, Lord Halsbury LC gave a long opinion on the general question of the ascertainment of damages. I analyse his opinion as follows: Small damages are not synonymous with nominal damages; damages which are not nominal may be either small or large; no exact rules for the valuation of damages can be given; special damage must be specially proved; but *general damages only admit of such evidence as is in the circumstances available, and the amount becomes a jury question; depriving a person of the use of his chattel is a ground for real and not for nominal damages*." (emphasis added)

38. Viscount Dunedin went on to say at 662:

> "… The Admiralty were able to supply the gap made by the accident out of their resources. That does not mean that they are not entitled to any damages. If their fleet was sufficient to provide a stand-by then the expenses of keeping that stand-by may fairly be taken into consideration. Such expenses mean no only the daily upkeep but something representing the amount of capital should have been parted with in order to have another ship …"

39. So far as the *Susquehanna* itself was concerned, Lord Sumner put the position thus at 663-4:

> "… no stand-by oiler was substituted for the *Prestol* and therefore calculations based upon the value of a non-existent stand-by … The fact is that the Admiralty by prompt effort and economy in consumption, acting in accordance with their obligation to minimise the damages, managed to get through their work without the *Prestol* and they cannot get damages based upon the use of a stand-by when in fact they did very well without one … All the same, the *Prestol's* services during the time of repair were lost, and accordingly the principle of the *Greta Holme* may be applied, with such rates of interest and depreciation as the evidence may justify. In other words, the loss of user for time of repair, in effect, made the *Prestol's* then capital value infructuous for the time being even though by special effort more benefit was got out of other ships in which other capital was invested than would otherwise have been the case."

40. Thus, although in *The Mediana,* Lord Shand and Lord Brampton made clear that, had the plaintiffs hired in a substitute vessel, the cost of such hire would have been reasonable, it was made clear in the *Susquehanna* that the measure of damage properly to be adopted was one based on the costs of maintaining the standby.

41. Two later decisions are relevant. First, in *The Hebridean Coast* [1961] AC 545, the House of Lords rejected the suggestion that general damages for loss of use of a vessel should be calculated with reference to the costs of chartering an alternative vessel to carry an equivalent cargo. The damaged ship was one of a considerable number in the same fleet of vessels and it had not been demonstrated that the extra cargo could not simply have been redistributed between the other vessels in the fleet.

42. Lord Reid stated at 577-8:

> "The appellants then argued that, in any event, they are entitled to general damages, that the method of assessing such damages is a jury question, and that, taking the whole matter into consideration as a jury would, the fair method is to take into account what, as a matter of regular practice, the authority was paying for chartered tonnage. I must confess that I do not understand that. I do not proceed on any supposed distinction in principle between a profit-earning ship and a non-profit earning

> ship. The task for assessing damages is easier with a profit-earning ship and depends on the probability that she would have earned so much money if her owner could have used her. With a non-profit earning ship there is no direct financial loss and one must ask what harm was done to the owner by his being deprived of the use of his ship. Then comes what may be a very difficult task, to put a value in money on the harm which the owner has suffered. But you must first prove the harm. If no harm is proved beyond the mere fact that the owner is deprived of the services of his ship during the period of repairs, the opinion of Lord Herschell in *Steam Sand Pump Dredger No. 7 (Owners) The Greta Holme (Owners)* appears to have given rise to the practice of awarding damages based on interest on the value of the ship."

43. The second case is *The Marpessa* [1987] AC 241, a similar decision on similar facts to that in *The Greta Holme,* in which it was stated by Lord Loreburn at 244-245 that the plaintiffs were entitled to put their case in this way:

> "The cost to us of maintaining and working on this dredger, while it is working, amounts to so much per day, and its depreciation daily amounts to so much more. We take the total daily sum which it costs to us as a fair measure of the value of its daily service to us. Those services are at least worth what we are habitually paying for them year after year, including what we sacrifice in depreciation."

44. That method had also been approved by the House of Lords in *The Chekiang* [1926] AC 637, a case in which the Admiralty Registrar had made an award of damages for loss of use of an Admiralty light cruiser calculated on the basis of 5% interest upon the capital value of the ship at the time of collision.

45. Thus the net result of the shipping cases can be stated as follows. Where a substitute vessel is hired in to fulfil the role of the damaged vessel, the costs of hiring in are recoverable. Where the claimant's fleet is sufficient to provide a standby, then an award may be made based upon the expenses of keeping that standby, which means not only the expenses of daily upkeep but something representing the amount of capital employed in having another ship available. Where there is no substitute ship hired and no standby ship kept available the damages awarded are generally to be calculated on the basis of interest on the capital value of the damaged ship at the time of the collision.

46. Accordingly, as it seems to me, Lord Scott's dictum in which he referred to *The Susquehanna* as justifying his observation that, for loss of use of a damaged motor vehicle, the fair approach to quantum is to award a sum based upon the spot rate hire charge for a comparable vehicle, requires to be read in and limited to the context in which it was uttered, namely that of a private motorist claiming in respect of a substitute vehicle hired by him during the period of repair.

47. That said, in my view, the common law principles which have been developed and elaborated in cases of collisions at sea are in appropriate cases applicable to corporate claims for loss of use in respect of motor vehicles damaged in collisions on land.

48. In this respect it is important at once to recognise, as submitted by Mr Turner (see para. 20 above), that the claim by a corporation for loss of use of a car as a chattel employed in the course of the claimant's business, constitutes a separate class of case from that in which an individual claims in respect of a private vehicle used for convenience rather than profit. I reject Mr Edis' submission that such cases should simply be treated without distinction in relation to loss of use. In the former class, an award falls to be made to compensate for financial damage in respect of which the Court (which no longer acts with a jury) must do its best to quantify, albeit only by approximation, the loss actually suffered by the business. In the latter class, albeit the Court may be concerned with a degree of compensation for fares etc. by way of special damage in a case where the owner has been obliged to use public transport rather than his damaged vehicle, the primary element of the award is that of compensation for non-pecuniary loss i.e. the lack of advantage and inconvenience caused by not having the use of a car ready at hand and at all hours for personal and/or family use: see *Lagden v O'Connor* per Lord Hope at paragraph 27 and *Alexander v Rolls Royce Motor Cars Limited* [1996] RTR 95 per Beldam LJ at 102.

49. In that respect, perusal of the Current Law Year Books yields references to awards in County Courts up and down the country of conventional weekly sums based not upon car hire rates but on a modest rising scale from £40 or £50 per week in 1995 to £100 per week in 2005 in respect of disruption and inconvenience caused to individual claimants for loss of use of their private motor car during periods of repair in cases where, for reasons of impecuniosity or otherwise, no substitute vehicle has been hired by, or otherwise made available to, the claimant (see for instance *Zubair v Younis* [1995] CLY para. 1625; *Ballard Digital Equipment* ibid para. 626; *Houghton v Mears* ibid para. 1622 and *Mullins v Phillips* [2005] CLY para. 963; *Brown v P E Thorpe and Sons* ibid para. 964). As I have indicated, I do not consider these cases to be relevant to the instant case which concerns recovery for corporate financial loss. In such cases general damages are in principle recoverable for loss of use but should be the subject of an award of such sum as reasonably compensates for the nature and extent of the financial loss suffered as a result of the neutering of the damaged vehicle as an asset employed in the claimant's business and the redeployment of any other such asset. In the instant case, by reason of the Judge's findings and the nature of the claimant's business it was able to "make do" out of stock. The Judge found that is what it should have done and as a result the award should be limited to an appropriate sum by way of general damages. That being so, what is the most appropriate basis for assessment of the loss of use claim?

The measure of damage

50. Whatever the appropriate method of approximating and fairly compensating for the loss in this case, it cannot be that adopted by the Judge. The issue of mitigation argued before him and his findings made in relation to it were predicated on the basis that to hire in a vehicle to replace the manager's car was to incur an excessive and unreasonable expense which could and should have been contained by the less costly course of simply using a substitute from the ample pool of cars available as courtesy cars while awaiting sale. Having so held, the Judge was wrong both in logic and in

law to adopt the "spot" hire rate as the "fair approach" to the measure of damage as adumbrated by Lord Scott in *Lagden*, and I accept Mr Turner's submissions set out at paragraphs 18-23 above.

51. It seems to me that, on the basis of the Judge's earlier findings, the matter fell to be dealt with under the principles identified by Geoffrey Lane J in *Birmingham Corporation v Sowersby*, a case in which the claimant corporation specifically maintained a standby pool of buses available for emergencies out of which it supplied a substitute for one of its buses during a period of repairs following an accident. Geoffrey Lane J stated:

> "Such authority as exists upon the subject is confined to shipping cases. It indicates that there are two possible methods of arriving at the figure which will fairly compensate the plaintiffs for the loss they have sustained. The first method is to take the cost of maintaining and operating the vehicle as the basis of causation, on the assumption that this figure must represent approximately the value [to] the operators where the concern is non-profit making. An example of this method is to be found in *The Marpessa* [1907] AC 241. The second method is based on interest on capital and depreciation. This method is exemplified by *Admiralty Commissioners v Chekiang (Owners)* [1926] AC637 where five percent of the estimated capital value of the ship at the time of the collision was used as the basis, and by *The Hebridean Coast* [1961] AC545 where an award was based on seven percent of the depreciated value of the vessel for the appropriate period."

52. Having discussed the advantages and disadvantages of this approach in the circumstances of a case where a standby fleet was maintained for the specific purpose for which the substitute bus was used, Lane J opted for the first method i.e. an award based on the standby charges as the assumed accurate estimate of the running costs i.e. the costs of maintaining and operating the substitute bus. However, in my view, it is the second method identified in the passage which I have quoted which is the appropriate basis for any award in respect of damages for loss of use in this case i.e. an award based on the interest and capital employed and any depreciation sustained over the period of repairs, allowed in respect of the vehicle of the type damaged in the accident. Given that the course adopted by the claimant could have been, and presumably was, simply to supply a similar vehicle to its manager from its available stock during the period of repairs, it is unnecessary to consider whether the figures fall to be calculated in relation to the vehicle damaged or the vehicle substituted. The position was that over the period reasonably allowed for repairs the claimant was deprived of deployment and use in the course of its business of one of its Audi A6 vehicles with the result that the capital value of such a vehicle was neutered/infructuous over that period, thus meriting not an award of the costs of outside hire but an award of interest at an appropriate rate upon the capital value involved over the period together with a modest, if not minimal, sum in respect of depreciation over the period allowed for repairs.

53. The Judge was unable to make any such award because the relevant figures were not before him; the parties had conducted what appeared to have been an "all or nothing"

contest in relation to the measure of damage for loss of use: see the summary of the pleadings at paragraphs 5 and 6 above. He thus never considered any alternative method of calculating the claim on the lines which I have held appropriate. Nor have there been placed before us figures which enable us to effect an appropriate calculation without further argument.

54. There is much to be said for adopting the approach of His Honour Judge Harris QC in the decision to which I have referred at paragraph 28 above, namely to take the view that the claim for special damage for hiring in having been resolved against the claimant who went "nap" on the credit hire agreement and provided no figures or business details enabling an alternative claim for loss of use to be established, such claim should simply be dismissed. In the ordinary way, I would be reluctant to take such a course in this case because I am not satisfied, nor have the parties suggested, that the Judge was referred to the volume of authority or received the detailed arguments which have been deployed before us. On the other hand, it is clear to me that the figures produced by any further exercise on the lines I have indicated would scarcely justify the time and cost involved in further remission to the Judge for further argument between the parties.

55. I would expect the parties, upon receipt of this judgment in draft, to be able to agree a suitable figure for loss of use which this Court could award in substitution for the sum of £12,000 awarded by the Judge. Failing such agreement, this Court will receive further argument as to the final form order following hand down of the judgment.

Conclusion

56. Subject to that reservation, I would allow the appeal and make an order setting aside the award of general damages made by the Judge in the sum of £12,000.

Lord Justice Dyson:

57. I agree.

Lord Justice Maurice Kay:

58. I also agree.