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Case No: BM90083A

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE BIRMINGHAM

Birmingham Civil Justice Centre,
33 Bull Street, Birmingham. B4 6DS.

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Before:

THE HONOURABLE MR. JUSTICE PEPPERALL

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Between:

ANDREW BUNTING	**Appellant**
- and -	
ZURICH INSURANCE PLC	**Respondent**

- -
- -

MS RUTHERFORD (instructed by **Principa Law Ltd**) for the **Appellant**
MR. TURNER (instructed by **DAC Beachcroft**) for the **Respondent**

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Approved Judgment

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MR. JUSTICE PEPPERALL:

1. On 24th June 2015 the appellant, Andrew Bunting, was involved in a road traffic accident. His Lotus Exige Coupe sports car was damaged and many months later was off the road for some weeks while it was repaired. Meanwhile, he hired a replacement Mercedes C220 Sport from Helphire on credit hire terms. The total cost of hire was £28,551.84. Mr. Bunting brought proceedings to recover the hire costs, together with the cost of repair of his car. The other driver admitted liability for the accident but quantum remained in dispute. The case came before Recorder Le Poidevin QC on 1st November 2018 at Northampton County Court.

2. At trial, the negligent driver's insurer, Zurich Insurance plc, admitted the repair costs but challenged the credit hire charges. The parties agreed that Mr. Bunting had reasonably hired a replacement car for 78 days. The judge rejected the insurer's argument that the hire agreement had not been binding upon Mr. Bunting and that Mr. Bunting should have hired a cheaper car such as a Vauxhall Insignia or similar. The need for a replacement hire car was conceded in closing submissions after the matter was tested in cross-examination and the judge concluded, therefore, that Mr. Bunting had been entitled to hire a Mercedes. Since he did not claim that he was impecunious such that he had no reasonable choice other than to hire a replacement car on credit terms, he was only entitled to recover the basic hire cost of a comparable prestige car rather than the additional cost of hiring a car on credit terms. The judge, therefore, set about considering the evidence as to the lowest rate reasonably available for hire. He accepted the evidence of Philip Rose as to the basic hire rate of a comparable car and, after making adjustments to reflect a number of discrete issues, gave judgment for the claimant on the basis of the Thrifty rate, so adjusted, at £260 per week plus another £98 per week to reflect the cost of the collision damage waiver. Therefore, his judgment sum was a small fraction of the total credit hire costs incurred.

3. Mr. Bunting now seeks to appeal against the Recorder's decision. He does so with the leave of Murray J given orally following permission having been refused on the papers by Jeremy Baker J.

4. Mr. Bunting's appeal involves a sustained challenge to the judge's handling of the credit hire issue and, in particular, his treatment of Mr. Rose's evidence. A Complaint was made, both at trial and on this appeal, that Mr. Rose's evidence was not in full compliance with the directions of Deputy District Judge Downton. Nothing, however, turns on that point. No objection was taken as to the admissibility of the evidence at trial. Indeed, it was the claimant who called Mr. Rose to give evidence. Nevertheless, on this appeal, it is argued on behalf of Mr. Bunting that the judge was wrong to accept Mr. Rose's evidence. Secondly, it is said that the judge was wrong to accept the rates evidence of a comparable car available from Thrifty in view of the 30 day time limit for periods of hire with that company. Thirdly, it is said that the judge was wrong to find that issues with the rates evidence could be addressed by rounding up the cost of hire. Fourthly, it is said that the judge was wrong to find that the lack of evidence of availability was not in breach of the Deputy District Judge's order. Fifthly, the judge was in any event wrong to find that a car would in fact have been available, and, sixthly, the judge was wrong to use the 7 day rate in his calculation for the cost of hire for the final day.

5. At trial, Philip Rose gave evidence that he had considered evidence of rates from a database for the dates of hire and in Mr. Bunting's locality. He did not personally compile the database and could not explain the process of its compilation. He did, however, personally search the database and exhibited to his evidence the screenshots showing the hire prices for comparable cars. From his research he identified a number of possible hire companies for a comparable vehicle. The cheapest was Thrifty that offered a BMW 420, or similar, at a cost of £250.24 per week. The car was also available at a daily rate of £59.27.

6. As to availability, he explained at paragraphs 4.1 to 4.2 of his report: "4.1 Vehicle providers often have cross-hire mechanisms in place to satisfy 'peaks and troughs' for vehicle demand. 4.2 Exhibits generally indicate vehicle availability by showing a hire rate or by stating for example 'sold out' or 'not available at this location'."

7. Asked to elaborate in oral evidence, Mr. Rose explained that he would always take it that a vehicle was available unless the web entry showed otherwise. It was pointed out to him in his evidence that the Thrifty car agreement makes plain that the maximum period of hire is 30 days. He explained that companies use a hire cycle. Asked what would happen at the end of the 30 day period, he said that the hirer would simply have to be in touch with the company and seek a further period of hire. He added later in cross-examination that it was his experience as a basic hire rate surveyor that hirers would be able to enter into a further period of hire. Alternatively, they would be able to obtain a comparable car from another company at the same or a very similar rate. He added that there is not much fluctuation over such timeframes as to hire rates. Here the hire period was 78 days. It was therefore 11 weeks and a day. He said that he valued the final day at one-seventh of the weekly rate. Asked on what basis he asserted that the car could have been obtained at one-seventh of the weekly rate rather than at the daily rate he again cited his experience.

8. Mr. Stephen Turner, who appears for the insurer, argues that the judgment was an impeccable application of the structured approach advocated by Aikens LJ in *Pattni v First Leicester Buses Ltd* [2011] EWCA Civ 1384 at paragraph 73, which reads as follows: "Sub-issue (1): The Calculation of the BHR. The first question that arises is: what exercise is a judge conducting when he has to find the 'spot rate' or, as I prefer to call it, the BHR. I have already attempted to summarise, at [30] to [42] above, the principles that I think a judge has to apply, in accordance with the leading cases of *Dimond v Lovell*, *Lagden v O'Connor* and *Burdis v Livsey*. To summarise, the questions are: (i) did the claimant need to hire a replacement car at all; if so (ii) was it reasonable, in all the circumstances, to hire the particular type of car actually hired at the rate agreed; if it was, (iii) was the claimant 'impecunious'; if not (iv) has the defendant proved a difference between the credit hire rate actually paid for the car hired and what, in the same broad geographical area, would have been the BHR for the model of car actually hired and if so what is it; if so, (v) what is the difference between the credit hire rate and the BHR?"

9. Mr. Turner argues, therefore, that there was no error of law, rather, this was a judge doing his best to assess the true market rate and his findings of fact were properly rooted in evidence open to the judge. Accordingly Mr. Bunting, he argued, cannot hope to establish that the findings of fact were perverse.

Discussion

10. This appeal raises no new issues of law in this heavily litigated field. It is common ground that, having found that Mr. Bunting had proved his need for a replacement vehicle for the agreed period of 78 days, and upon the judge's finding that he acted reasonably in hiring a comparable car to his damaged Lotus rather than a cheaper run-around vehicle, that Mr. Bunting was entitled to recover damages for the reasonable cost of hire. Further, since Mr. Bunting did not claim to be impecunious, such that he had no choice other than to hire a car on credit terms, damages fell to be assessed by considering the lowest available rate at which Mr. Bunting could reasonably have hired the Mercedes or a similar prestige vehicle on normal trading terms.

11. The parties also accept that the burden was upon the insurer to demonstrate by evidence that the credit hire rate exceeded the basic hire rate of a suitable vehicle. All of this is trite law and in accordance with the decisions of the House of Lords in *Dimond v Lovell* [2000] RTR 243 and *Lagden v O'Connor* [2004] RTR 24 and the decision of the Court of Appeal in *Pattni*.

12. I accept Mr. Turner's submission that the Recorder's decision was properly structured in accordance with the guidance given in *Pattni*. First, the Recorder considered 'need' at paragraph 12 of his judgment. Secondly, he considered the reasonableness of the type of vehicle actually hired at paragraphs 13 to 15. Briefly, he considered the non-issue in this case of impecuniosity at paragraph 16, and then at paragraphs 17 to 25 he considered whether the insurer had proved that there was a difference between the credit hire rate actually paid and the market rate; and then at paragraphs 26 to 28 the Recorder considered the questions of adjustments to the base hire rate.

13. The real issue in this appeal is how the judge should have approached imperfect evidence as to the basic hire rate. This is not a new problem. It has long been the tradition of the Court of Appeal that County Court judges should be encouraged to do their best with imperfect evidence. In the case of *Crewe Services v Silk*, unreported, CA 2nd December 1997, Robert Walker LJ, as he then was, said: "County Court judges constantly have to deal with cases that are inadequately prepared and presented, either as to the facts or as to the law, or both, and they must not be discouraged from doing their best to reach a fair and sensible result on inadequate materials. Moreover, there is a strong public interest in encouraging litigants not to incur the expense and proliferation of expert witnesses … unless the additional expense, time and money can be justified".

14. In similar vein, Arden LJ, as she then was, said in *Latimer v Carney* [2006] EWCA Civ 1417 at paragraph 27: "However, in cases where the amount in dispute is not large, courts regularly have to do their best on less than ideal material. That endeavour is consistent with the approach of the Civil Procedure Rules 1998 which provides that their overriding objective is 'enabling the court to deal with cases justly' CPR 1.1(1). The overriding objective states the fundamental value of any properly run system for the administration of justice."

15. Turning more directly to credit hire cases in the case of *Bent v Highways & Utilities Construction Ltd* [2010] EWCA Civ 292 Jacobs LJ concluded that a County Court judge was wrong to require evidence from the insurer as to the hire cost of a reasonable alternative vehicle at precisely the time of the accident. At paragraphs 8 and 9 of his judgment he said: "Very often, when one is assessing valuation evidence in all sorts of fields one has evidence of prices of the same or similar things at

different dates and has to make appropriate adjustments. Working with comparables and making adjustments is the daily diet of judges concerned with valuation in all sorts of fields. Clearly, evidence of a spot rate a year or so later than the relevant date is likely to throw considerable light on what the spot rate would have been at the time." Paragraph 9: "I would add, further, that one must not be hypnotised by any supposed need to find an exact spot rate for an almost exactly comparable car. Normally the replacement need be no more than in the same broad range of quality and nature as the damaged car. There must be a bracket of spot rates for cars rather better and rather worse. A judge who considered that bracket and aimed for some sort of reasonable average would not be going wrong".

16. In my judgment, the Recorder was absolutely entitled to rely upon Mr. Rose's evidence. It was the only evidence before the Recorder of basic hire rates and was admitted into evidence without any objection as to its shortcomings or any breach of the Deputy District Judge's order. The judge carefully took into account the various points made by Ms Rutherford at trial and rehearsed by her on behalf of the appellant on this appeal. On the evidence of Mr. Rose, the judge was entitled to find that the basic hire rate was indicative of the likely hire costs throughout the 78 day period, even though Thrifty's terms themselves specified a 30 day maximum period of hire. Further, the judge was entitled also to find, based on Mr. Rose's evidence, that a car, not necessarily the BMW 420 but a comparable car, would have been available at the time at broadly similar cost. Indeed, the judgment of Jacobs LJ in the *Bent* case makes plain that the court does not necessarily require evidence as to the availability of a particular car at a particular date. Equally, in my judgment, the Recorder was entitled to accept Mr. Rose's evidence that the 78th day would have been charged at the weekly rate. Even without express evidence on the point the judge, it seems to me, would have been entitled to come to such a common sense conclusion upon proof of the weekly rate.

17. Further, the judge was fully entitled to use his experience to make a rough and ready adjustment to the hire cost. Indeed, I accept Mr. Turner's submission that arguably he was generous to the claimant to do so, given that it is not obvious that the weekly rate of hire would have been increased by any of the three factors identified by the judge at paragraph 27 of his judgment.

18. As to the deposit, whether there was a deposit required by Thrifty or not made no difference to the overall cost of hire and, I accept Mr. Turner's submission, would be irrelevant in a case where there is no evidence of impecuniosity. As to the mileage limit of 500 miles per week, such limit was more than double Mr. Bunting's usual mileage; and as to the 30 day limit, I consider that the charge per week for 11 weeks was unlikely to be at a higher rate than the charge per week for the first four weeks. For those reasons, as I say, the adjustment was to some extent generous to Mr. Bunting.

19. In any event, the judge's rough and ready additional allowance is precisely the sort of matter that is open to a first instance judge and with whose judgment the Appeal Court should be very slow to interfere. This is a judgment which, in my view, displays no error of law. The appeal is, I regret to say, a nit-picking challenge to the judge's findings of fact, best exemplified by the fact that one of the grounds seeking to attack the use of weekly rates for the final day's hire is worth a mere £24. These findings of fact were all open to the judge, and the appellant, in my view, comes

nowhere near to establishing that the findings of fact were perverse. For those reasons I dismiss this appeal.

(Following a short discussion concerning costs)

20. Upon dismissing this appeal, the respondent defendant insurer seeks its costs. There is no challenge, and indeed could not sensibly be any such challenge to that application for costs, and the appellant will pay the respondent's costs which I am now going to summarily assess on the standard basis. There is a schedule of costs which comes to a grand total of £6,598.60 plus VAT. The challenge to that is relatively modest. Ms Rutherford rightly recognises that the bulk of the costs are not sensibly capable of challenge. She does gently challenge the amount of time spent on reviewing counsel's advice on appeal, also upon the preparation of the statement of costs and generally in respect of the review of the appeal papers.

21. Having considered the amounts of the costs, both individually and globally, it does not seem to me that any of those items are either disproportionate or unreasonably incurred and I, therefore, allow them as sought.

22. There is a gentle challenge again to counsel's fees. Ms Rutherford rightly accepts the advisory work charged at £1,750 and the hearing fee of £3,000 to include the skeleton argument are not of themselves either unreasonable or disproportionate to an appeal conducted in the High Court and I therefore assess the costs as claimed.

This Judgment has been approved by the Judge.