Neutral Citation Number: [2019] EWHC 2647 (QB)

Appeal Ref: BM80060A

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE BIRMINGHAM
ON APPEAL FROM THE COUNTY COURT AT BIRMINGHAM
(HER HONOUR JUDGE WALL)

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

Date: 10 October 2019

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- - - - - - - - - - - - - - - - - - - -

Between :

HUMAYUM HUSSAIN

Claimant / Appellant

- and -

EUI LIMITED

Defendant / Respondent

- - - - - - - - - - - - - - - - - - - -

Benjamin Williams QC (instructed by **DGM Solicitors**) for the **Appellant**
Jonathan Hough QC (instructed by **Horwich Farrelly**) for the **Respondent**

Hearing date: 31 July 2019

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Approved judgment

I direct that pursuant to CPR PD39A para. 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

THE HONOURABLE MR JUSTICE PEPPERALL:

1. This appeal concerns the proper approach to the financial losses suffered by a self-employed professional driver while his or her car is off the road pending its repair or replacement following an accident for which another party is at fault. Humayum Hussain is a self-employed taxi driver, but similar issues arise in the case of self-employed chauffeurs, delivery drivers or hauliers.

THE FACTS

2. Mr Hussain drove a BMW 320D car. He was a B-class driver, meaning that he could be allocated airport runs and other longer jobs. The pre-accident value of his car was £7,450.

3. On 28 September 2016, Mr Hussain's car suffered moderate damage in a road traffic accident. The damage was inspected by a licensing officer and the vehicle's private-hire licence was suspended pending repairs. Repairs costing £1,527.74 were completed on 15 October 2016. Meanwhile, Mr Hussain hired a Mercedes E220 car for a period of 18 days from a specialist provider of plated vehicles. The hire was on credit terms at a total cost of £6,596.50.

4. Mr Hussain's claim against the insurer of the driver responsible for his accident was tried by Her Honour Judge Wall sitting in the County Court at Birmingham on 4 April 2018. Judge Wall found for Mr Hussain on liability but held that his claim for hire charges was limited to £423, being the loss of profit that he had avoided by hiring a replacement car. Rejecting his claim for hire charges of over £6,500, Judge Wall found that Mr Hussain had not acted reasonably in incurring hire charges over an 18-day period that almost equated to a full year's profit. If wrong in her primary findings, the judge accepted the insurer's evidence as to basic hire rates thereby limiting the hire claim in any event to £975.

5. Mr Hussain appeals the judge's findings on quantum with the permission of Martin Spencer J. He argues that Judge Wall was wrong to limit damages to the avoided loss of profit. If successful upon this argument, Mr Hussain further argues that Judge Wall was wrong to accept the insurer's evidence as to the basic hire rates.

GROUND 1: LIMITING DAMAGES TO THE AVOIDED LOSS OF PROFIT

6. The core of Judge Wall's reasoning was at [30]-[32]:

> "30. I have concluded that this taxi was a profit-earning chattel in a true sense. It was not the only family car. The claimant lives with his wife and two small children. His wife owns and drives a Toyota Yaris which is sufficient for four people to use. The claimant says in his witness statement that he used his taxi for work, for family trips and longer journeys. He works, he told me, five to six days each week, but there is no evidence before me that any long journeys or family holidays were planned during this relatively short 18-day period for repair and that is

> unlikely, in view of the fact that the claimant did hire this very expensive credit-hire taxi.
>
> 31. So am I not satisfied on the evidence before me that the claimant has discharged the burden of showing that he had a need for a second car for domestic and social use during the hire period. The need was for a taxi for business use and, where the loss is of a profit-earning chattel, then the measure of damages is kept at the loss of profits and it is unreasonable mitigation to expend more in attempting to make a profit than the profit itself. So here the damages claimed grossly exceed the loss of profit which would have followed for 18 days and so I cap the level of damages at the loss of profits level.
>
> 32. The claimant's accounts show that he was self-employed as a taxi driver. I have seen that his net profits in consecutive years were £7,644 for the 2015/2016 year and £6,429 for the 2016/2017 year. I accept the claimant's evidence that he is a very hard worker. He takes little time off work and he often works six days per week. The average net profit for those two years is £7,036.50 and on the claimant's evidence that represents a 50-week year, which would make his loss of profits £141 per week. The 18 days represents three working weeks and so I assess his loss of earnings at £423."

7. Benjamin Williams QC, who appears for Mr Hussain, challenges this finding:

   7.1 First, he argues that the judge's approach to need was too exacting and that the judge should have found that Mr Hussain reasonably needed a second car for social and domestic purposes whatever the business need.

   7.2 Secondly, he argues that the judge was wrong to limit damages to the profit that Mr Hussain would have lost.

THE NEED FOR A REPLACEMENT CAR

8. Mr Hussain explained in his evidence that he was a married man with two young children. He provided the family's sole income. When he was working, his car was of course unavailable to the family. He said that his wife had a small Toyota Yaris, and added:

> "… it is not a family car and is not a suitable substitute vehicle for me for my work or for family trips and longer journeys and normally we would use my BMW for this."

9. While a claimant must prove the need for a replacement vehicle in order to justify hire charges, this is not a significant hurdle in most cases. Indeed, the court will readily infer need from the claimant's actions in acquiring, insuring, taxing and maintaining a private car: Giles v. Thompson [1994] A.C. 142, per Lord Mustill at page 167D.

10. Mr Williams relied upon dicta in Giles v. Thompson and Lagden v. O'Connor [2003] UKHL 64, [2004] 1 A.C. 1067 that need might not be established where the claimant

was in hospital or abroad. These are, however, no more than examples of occasions when a private motorist might not need a replacement car.

11. Need for social and domestic purposes is not self-proving and, in this case, cannot simply be inferred from Mr Hussain's actions in acquiring, insuring, taxing and maintaining his BMW since the car was primarily required for business use. Given that the family ran a second car exclusively for private use and there was no evidence that any holidays, family trips or longer journeys were anticipated during the hire period, the judge was entitled to find that Mr Hussain had failed to prove the need for a second car for private use and that the only evidence of need was for a replacement taxi.

CAPPING DAMAGES AT THE AVOIDED LOST PROFIT

12. Mr Williams accepts that the starting point where a profit-earning vehicle is damaged is that the claimant should recover the loss of profit while the vehicle is repaired or replaced. Further, he accepts that a claimant may be limited to such loss of profit where he fails to mitigate his loss by spending a significantly greater sum on a replacement hire vehicle. Mr Williams argues, however, that the duty to mitigate is undemanding and that the court should recognise that many people on modest incomes have a very small cushion against loss of income. He submits that the court should not expect a claimant to throw himself and his family on to the state and that trial counsel's suggestion that Mr Hussain should have taken a holiday was insensitive.

13. Recognising that there was incomplete evidence as to Mr Hussain's financial position, Mr Williams argues that he should not have been required to prove that he was indigent.

14. Jonathan Hough QC, who like Mr Williams did not appear below, accepted that the need to put food on the table might be a proper basis for allowing a hire claim that exceeded the hypothetical lost profit. Such argument was not, however, advanced at trial. Furthermore, it was an impecuniosity argument and Mr Hussain accepted at trial that he could not argue impecuniosity in view of his failure to comply with case management directions.

15. I accept that there will be cases in which professional drivers will not be able to afford to take time away from work while their vehicles are repaired. Mr Williams is right to make the point that some people on very low incomes simply do not have the financial cushion required to allow them to weather even a couple of weeks without any income coming in. In such a case, the tortfeasor cannot expect the claimant simply to sit at home, unable to pay bills or provide for his or her family without resorting to the state.

16. In my judgment, the following principles apply to claims for financial losses suffered by self-employed drivers when their vehicles are off the road pending repair or replacement:

16.1 The starting point is that the professional driver's vehicle is a profit-earning chattel and that the true loss is the loss of profit suffered while the damaged vehicle is reasonably off the road pending its repair or replacement: Commissioners for Executing the Office of Lord High Admiral of the United Kingdom v. Owners of the Steamship Valeria [1922] 2 A.C. 242; Clerk & Lindsell on Torts (22nd Ed), para. 28-121.

16.2 Of course, a claimant might choose instead to hire a replacement vehicle in order to be able to continue trading. Properly analysed, this is a claim for expenditure incurred in mitigation of the primary loss: Lagden v. O'Connor, at [27]; Umerji v. Khan [2014] EWCA Civ 357, [2014] R.T.R. 23, at [37]. Like any other expense incurred in a reasonable attempt to mitigate a claimant's loss, such hire costs are prima facie recoverable. Where, for example, the claimant successfully mitigates his or her loss by hiring a replacement vehicle at a cost lower than the hypothetical loss of profit, the court will award the lower hire charges.

16.3 A claimant cannot recover any additional loss suffered by reason of a failure to take reasonable steps to mitigate his or her loss: British Westinghouse Electric & Manufacturing Co. Ltd v. Underground Electric Railways Co. of London Ltd [1912] A.C. 673, at 689; Dunkirk Colliery Co. v. Lever (1878) 9 Ch. D. 20, at page 25.

16.4 Claimants cannot, however, be expected to weigh precisely their losses. In Banco de Portugal v. Waterlow & Sons Ltd [1932] A.C. 452, Lord Macmillan observed at page 506:

> "Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures. merely because the party in breach can suggest that other measures less burdensome to him might have been taken."

16.5 Accordingly:

a) where a claimant acts reasonably in hiring a replacement vehicle at about the same cost as the avoided loss of profit, the court will not count the pennies and hold the claimant to the hypothetical loss of profit if it turns out to be a little lower; but

b) where the cost of hire significantly exceeds the avoided loss of profit, the court will ordinarily limit damages to the lost profit.

16.6 Even where the cost of hire significantly exceeds the avoided loss of profit, the claimant may still succeed in establishing that he or she acted reasonably:

a) First, any business must sometimes provide a service at a loss in order to retain important customers or contracts. For example, a chauffeur might not want to let down a regular client for fear of losing her. Equally, a self-employed taxi driver might risk being dropped by the taxi company that provides him with most of his work. Properly analysed, these are not, however, exceptions to the general rule since in such cases the claimant is really saying that, but for his or her actions in hiring a replacement vehicle, the true loss of profit would not have been limited simply to the pro rata loss calculated on the basis of the period of closure but that future trading would itself have been compromised. Again, claimants are not required to weigh these factors precisely, and a claimant who reasonably incurs what at first might appear to be disproportionate hire costs in order to avoid a real risk of greater loss, will usually be entitled to recover such hire costs from the tortfeasor.

b) Secondly, many professional drivers use their vehicles for both business and private purposes. Where such a claimant proves that he or she needed a replacement vehicle for private and family use, a claim for reasonable hire charges, even if in excess of the loss of profit that was avoided by hiring the replacement vehicle, will ordinarily be recoverable in the event that a private motorist would have been entitled to recover such costs.

c) Thirdly, it might be reasonable for a professional driver to hire a replacement vehicle even though the cost of doing so was significantly more than the loss of profit because he simply could not afford not to work. The tortfeasor takes his victim as he finds him and impecunious self-employed claimants cannot be expected to be left without any income and forced to look to the state to provide for their families on the basis that they might eventually recover their loss of profit some months or years later.

17. Cases said to be in the third category identified above raise the same issues of impecuniosity as the courts are used to dealing with in respect of claims by private motorists to recover what would otherwise be disproportionate credit hire charges following the decision in Lagden v. O'Connor. Any claimant wishing to justify hire costs on this basis will therefore have to comply with the directions given by the court in respect of the disclosure of documents as to his or her income, outgoings, assets, liabilities and access to credit. Even where the claimant's income is low, the court will not simply accept an assertion that he or she could not afford not to work without proper evidence of impecuniosity.

18. In this case, District Judge Salmon (as he then was) gave directions requiring Mr Hussain to give notice of his intention to rely on an impecuniosity argument and, if so, to give disclosure in respect of, and address in his witness statement, his financial circumstances.

19. Mr Hussain did not fully comply with the district judge's directions and it was conceded at trial that he could not rely upon an impecuniosity argument. The Appellant's Notice makes plain that there is no appeal from the finding that Mr Hussain could not rely on his plea of impecuniosity. Those concessions are, in my judgment, the end of the matter once it is recognised that Mr Williams' argument on this limb of the appeal is itself an impecuniosity argument. Without evidence of Mr Hussain's financial circumstances, the judge would have been quite unable to assess whether his finances were so tight that he could not have weathered a period of 18 days without working. In any event, as Mr Hough submits, such argument was not even taken at trial and cannot now be taken for the first time on appeal.

20. Upon the evidence before her, the judge was right to conclude that Mr Hussain had not acted reasonably in incurring hire charges over a period of 18 days that equated to almost a full year's profit. She was therefore right to limit damages under this head to the avoided loss of profit.

GROUND 2: BASIC HIRE RATES

21. In view of my conclusions on ground 1, the second ground does not arise and I did not call upon counsel to address it.

CONCLUSIONS

22. For these reasons, I dismiss this appeal.

23. While no point was taken on this appeal as to the proper assessment of Mr Hussain's loss of profit, I do question whether the calculation was right. Where the claim is limited to the lost profit, the true loss is not simply the pro rata loss of profit identified from a claimant's accounts but also the fixed overheads incurred during the period of loss that could not be avoided during the cessation in trade. To give a simple example:

    23.1 A professional driver might receive gross income of £2,000 per month from which he has to pay fixed overheads (including interest payable on the loan taken to purchase his car, insurance and road tax) of £250 and variable costs (principally fuel, servicing and tyres) of £500.

    23.2 His accounts would show a net profit of £1,250 per month, but the claimant's true loss upon his car being off the road for a full month is £1,500 (being his pro rata loss of net profit plus the fixed overheads that he had to pay even though he was not working).

24. Here, it appears that Mr Hussain was simply awarded his pro rata loss of profit. In making that observation, I should make plain that I am not criticising Judge Wall. Counsel at trial simply did not address on these very modest numbers the question of fixed overheads and the judge had no material on which to adjust her calculation of loss.